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PUNISHMENT WITHOUT CULPABILITY

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ABSTRACT

For more than half a century, academic commentators have criticized the Supreme Court for failing to articulate a substantive constitutional conception of criminal law. Although the Court enforces various procedural protections that the Constitution provides for criminal defendants, it has left the question of what a crime is *purely to the discretion of the legislature. This failure has permitted legislatures to evade the Constitution's procedural protections by reclassifying crimes as civil causes of action, eliminating key elements (such as mens rea) or reclassifying them as defenses or sentencing factors, and authorizing severe punishments for crimes traditionally considered relatively minor.*

The Supreme Court's inability to place meaningful constitutional limits on this aspect of legislative power is often described as a failure of courage or will. This Article will demonstrate that it is actually a failure of memory. Prior to the turn of the twentieth century, the Supreme Court's jurisprudence was animated by two traditional common law ideas: (1) that there are real moral limits to what the government can do, and (2) that the most reliable way to tell whether the government has transgressed those limits is to analyze the challenged action in light of longstanding practice. In the first half of the twentieth century, the Supreme Court rejected these ideas in favor of instrumentalism, an approach to jurisprudence that sees law as a mere instrument through which government experts can solve social problems in light of new scientific insights. As a result, for several decades the Court seemed to approve a limitless legislative power to define and punish crime, which the Court treated as just another form of regulation.

This approach did not last. Criminal law does not merely regulate: it imposes moral condemnation on the offender in the name of the community.

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In recent decades, the Supreme Court's constitutional criminal jurisprudence has moved toward reassertion of the old common law constraints, imposing either moral or precedential limits on the power of the legislature to define and punish crime. But because the Court no longer understands the relationship between morality and tradition, these efforts have mostly failed. This Article will suggest that the only way to develop a constitutional criminal jurisprudence that is coherent, just, and duly respectful of the legislature's primacy in defining and punishing crime is to return to the common law synthesis of morality and tradition that underlies the constitutional law of crime.

I. INTRODUCTION[1]

You are a UPS delivery truck driver in Tampa, Florida. Your job involves picking up packages at a central warehouse, loading them onto your truck, and delivering them to various offices and homes on your delivery route. Every Friday, you deliver a package weighing a couple of pounds to a particular residence on your route. The residence is located in a "bad" neighborhood where there is a lot of crime, particularly drug crime. The person who signs for the package every week is a tough-looking character, and there are usually several other tough-looking characters in the background. While on your way to make the delivery one Friday, you are stopped by the Tampa police. They seize the package from the back of your truck, open it, and discover one kilogram of cocaine. You are charged with possession of cocaine with intent to deliver, a crime punishable by fifteen years in prison.[2] To convict you of this crime, prosecutors are not required to prove that you knew the package contained cocaine or any other illicit substance. All they have to prove is that you possessed it and intended to deliver it.[3] You do have the right to raise lack of knowledge as an affirmative defense—but the burden rests on you.[4]

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[1] This Article is part of a series intended to specify the proper interpretation of the Cruel and Unusual Punishments Clause and explore its relation to criminal law doctrine. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011) [hereinafter Stinneford, *Rethinking Proportionality*]; John F. Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) [hereinafter Stinneford, *Original Meaning of Unusual*].

[2] FLA. STAT. ANN. § 893.13 (West 2000).

[3] FLA. STAT. ANN. § 893.101(2) (West Supp. 2011) ("The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter.").

[4] *Id.* ("Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.").

A reader of this hypothetical scenario—at least a reader who has a passing familiarity with criminal law—is likely to think that this statute violates the Constitution in three ways. First, it permits the state to impose criminal punishment on someone who acts reasonably, in good faith, and with no knowledge of the facts that make his conduct wrongful, a result that seems to violate the Due Process Clause's requirement of fundamental fairness.[5] Second, it requires the defendant to disprove a key element of the offense,[6] thus inverting the requirement that the state must prove all elements beyond a reasonable doubt—again in violation of the Due Process Clause.[7] Third, it authorizes a very harsh punishment—up to fifteen years in prison—for a crime that can be committed with complete moral innocence, thus violating the proportionality requirements of the Cruel and Unusual Punishments Clause.[8]

In reality, the answer is not as clear as it seems.[9] The Supreme Court has said that criminal statutes that authorize punishment without culpability, shift the burden of proof to the defendant, or authorize disproportionate punishments might violate the Constitution.[10] But the Court has also upheld criminal statutes that do precisely these things.[11] To the extent there is any pattern to the Court's treatment of these matters, it has been a pattern of advance and retreat: the Court announces a constitutional rule to protect criminal defendants, but then pulls back when faced with the implications

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[5] *Cf.* Felton v. United States, 96 U.S. 699, 703 (1877) ("All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.").

[6] *See* State v. Adkins, 96 So. 3d 412, 423 (Fla. 2012) (holding that it was not "improper[]" under Florida Statutes § 893.101(2) to give defendant the burden of disproving knowledge of the illicit nature of the controlled substance because such knowledge was legislatively defined as an affirmative defense rather than an element).

[7] *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970) (holding that the Due Process Clause requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt).

[8] *See, e.g.*, Weems v. United States, 217 U.S. 349, 367 (1910).

[9] *See* Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1354 (11th Cir. 2012) (rejecting a habeas challenge to Florida Statutes § 893.101(2) on the ground that the constitutional law governing this issue was not sufficiently clear: "One very general principle can be distilled from the [Supreme] Court's cases in this area: legislatures have 'wide latitude . . . to declare an offense and to exclude elements of knowledge and diligence from its definition,' but they still must 'act within any applicable constitutional constraints' when defining the elements of a criminal offenses [sic]. The Court has not drawn lines around this principle sufficient to dictate a particular result of the Florida court here . . . ." (footnotes omitted) (quoting Lambert v. California, 355 U.S. 225, 228 (1957) and Liparota v. United States, 471 U.S. 419, 424 n.6 (1985))); *Adkins*, 96 So. 3d at 423 (upholding the constitutionality of Florida Statutes § 893.101(2)).

[10] *See infra* Parts IV.B.4, IV.D, V–VI.

[11] *See infra* Parts II.C, V–VI.

of the rule it has announced. Scholars have observed (and complained about) this fact for more than half a century,[12] but like the Court itself they have been unable to diagnose the source of the problem or propose an effective solution.

This Article will argue that the Supreme Court's inability to resolve questions of constitutional criminal law is the result of the instrumentalist revolution, a movement in legal thought that sought to delegitimize morality and tradition as sources of legal standards and replace them with values of power and efficiency.

Prior to the instrumentalist revolution, American legal thought was animated by two core common law ideas: first, that there are real moral limits to what the government can do, and second, that the most reliable way to tell whether the government has transgressed those limits is to analyze the challenged action in light of longstanding practice or tradition.[13] In other words, tradition was a guide to the application of moral principles in practice. It helped show which moral principles were relevant to a given case, how they were to be balanced against competing principles, and how they were to be applied to a given set of facts. This common law synthesis of morality and tradition was built into the various parts of the United States Constitution that related to crime, most explicitly the Cruel and Unusual Punishments Clause.[14]

Instrumentalism rejected the common law synthesis of morality and tradition.[15] It denied that the law contains any predetermined constraints on

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[12] *See* Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime. . . . So vacant a concept is a betrayal of intellectual bankruptcy."); *see also, e.g.*, John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1374–75 (1979); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996) ("Legislatures decide what is and is not a crime, just as they decide what (mostly civil) rules apply to sales contracts or securities offerings. . . . But courts alone decide what the law of criminal procedure looks like, since courts are the system's constitutional lawmakers and criminal procedure is the province of constitutional law."); Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U. L. REV. 775, 791 & n.112 (1975). *But see* Louis Bilionis, *Process, The Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1278–79 (1998) (criticizing Henry Hart's claim that the move toward strict liability crimes subverts the core purposes of the criminal law and stating that "[c]riminal law is not nearly the stickler for individualized moral blameworthiness that Hart mythicized").

[13] *See infra* Part II.A.

[14] *See* Stinneford, *Original Meaning of Unusual*, *supra* note 1.

[15] *See infra* Part II.B.

the ends the legislature may pursue or the means through which it may choose to achieve them. With respect to the criminal law, this meant that punishment could be used purely as a form of regulation and that traditional culpability-based constraints on criminal punishment should no longer apply.

The instrumentalist claim that "crime" is whatever the legislature says it is conflicts with the United States Constitution. The Constitution imposes a wide variety of limits on government power that only apply in criminal cases, including rights to indictment and trial by jury, prohibitions of ex post facto laws and double jeopardy, and protection against cruel and unusual punishments. These limits presuppose a substantive constitutional definition of crime; otherwise they would be meaningless. A legislature could always evade them simply by reclassifying a criminal statute as civil.

The Supreme Court became aware of this problem by the middle of the twentieth century. Since that time, it has made repeated efforts to draw a constitutional line between criminal and civil causes of action,[16] to impose culpability-based limits on the legislature's power to define crimes,[17] and to require proportionality in punishment.[18] These efforts failed, however, primarily because of the continuing impact of instrumentalism. Although instrumentalism did not succeed in eliminating either morality or tradition from the legal system, it did largely succeed in breaking the connection between the two.

As the Supreme Court sought to rebuild the constitutional law of crime in the wake of the instrumentalist revolution, it returned to common law ideas about morality and tradition—but it now kept the two largely separate from each other. In cases involving the criminal–civil distinction, the Court used tradition in isolation from morality, looking at the outcomes in prior cases but failing to examine why those outcomes were reached. The emptiness of this approach has led the Court to accept the civil or criminal label the legislature put on the statute in virtually every case.[19] In cases involving legislative redefinition of crime, on the other hand, the Court tried to apply moral principle unmediated by tradition. This effort threatened to sweep aside vast areas of traditional criminal law doctrine, and the Court retreated as soon as the implications of its effort became clear.[20] Finally, the Court's efforts at requiring proportionality in punishment have been defined by a struggle between originalists who rely upon an artificially

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[16] *See infra* Part III.

[17] *See infra* Parts IV–V.

[18] *See infra* Part VI.

[19] *See infra* Part III.

[20] *See infra* Parts IV.B, IV.C, V.

narrow view of tradition and nonoriginalists who employ a subjective and unconstrained vision of morality.[21] As a result, the Court's proportionality jurisprudence has largely been a dead letter outside the death penalty context.[22]

In the wake of this failure, the Supreme Court has recently started to recreate the common law synthesis of morality and tradition, albeit in a radically incomplete fashion. The Supreme Court's recent cases involving the criminal–civil distinction have increasingly recognized that the key difference between criminal and civil laws is that criminal laws employ sanctions as an expression of blame.[23] The Court's cases involving legislative redefinition of crime have increasingly drawn upon tradition to shed light on the scope and limitations of the moral culpability requirement.[24] The Court's proportionality cases, on the other hand, remain largely unprincipled.[25]

Although the Supreme Court appears to have restarted a process of common law adjudication that could lead to the recovery of a coherent constitutional doctrine of substantive criminal law, many of its decisions are predicated on statutory construction or on constitutional doctrines only loosely related to culpability. In several areas, the Court still maintains an almost impenetrable wall of deference to the legislature that prevents the development of any doctrine that might provide meaningful protection to criminal defendants. In short, until the Court returns fully to the common law synthesis of morality and tradition, embodied most specifically in the Cruel and Unusual Punishments Clause, the constitutional law of crime will remain radically incomplete.

Part II of this Article will describe the rise of instrumentalism and show how it shattered the bond between morality and tradition that made constitutional criminal law possible. Part III will show the Court's efforts

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[21] This conflict replayed itself once again in a case decided this past Term. *Compare* Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012) ("We view [the proportionality requirement of the Cruel and Unusual Punishments Clause] less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.") (citations and internal quotation marks omitted), *with id.* at 2483 (Thomas, J., dissenting) ("As I have previously explained, the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous methods of punishment—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted. The clause does not contain a 'proportionality principle.'") (emphasis, citations, and internal quotation marks omitted). Justice Thomas's claim that the Cruel and Unusual Punishments Clause was not originally understood to forbid disproportionate punishments is incorrect. *See* Stinneford, *Rethinking Proportionality*, *supra* note 1, at 926–60.

[22] *See infra* Part VI.

[23] *See infra* Part III.

[24] *See infra* Parts IV.D and V.

[25] *See infra* Part VI.

in the aftermath of the instrumentalist revolution to use tradition without morality as a basis for distinguishing civil and criminal statutes, as well as the Court's currently emerging recognition that the true difference lies in a statute's retributive purpose. Part IV will describe the Court's effort to invalidate statutes that authorize punishment without culpability, its retreat from this effort, and its eventual decision to use statutory interpretation to protect the values underlying the culpability principle in most federal cases. Part V will show how the same pattern played out in the Court's elemental manipulation cases. In this context, the Court tried to prevent legislatures from redefining elements of crimes as affirmative defenses or sentencing factors in order to evade the requirement of proof beyond a reasonable doubt. Recently, the Court has engaged in a more limited effort to prevent elemental manipulation in a series of cases focusing on sentencing factors and the right to a jury trial. Part VI will show how a similar pattern played out in the context of proportionality in punishment. The Court struck down several statutes on the ground that the punishments they authorized were excessive in relation to the offender's culpability, but it retreated amid concerns about usurping the proper role of the legislature. Over the last decade, the Court has revived proportionality review in a narrow class of cases involving the death penalty and life sentences for juvenile nonhomicide offenders. But the Court lacks a principled basis for its decisions, and its enforcement of the proportionality requirement is incomplete and disingenuous. Part VII will provide a brief conclusion.

II. CULPABILITY AND THE SHIFT FROM COMMON LAW MORAL REALISM TO LEGAL INSTRUMENTALISM

A decade prior to the American Revolution, William Blackstone asserted that it was unjust to impose punishment without culpability. He wrote that "punishments are . . . only inflicted for [the] abuse of . . . free will,"[26] and that "an unwarrantable act without a vitious will is no crime at all."[27] This view of the criminal law was universally held for more than five hundred years, dating back at least as far as medieval jurist Henry de Bracton.[28] As late as 1877, the United States Supreme Court implied that it was beyond the authority of government to punish even knowing violations of a criminal statute where such violations were committed in good faith

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[26] 4 WILLIAM BLACKSTONE, COMMENTARIES *27.

[27] *Id.* at *21.

[28] *See* 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1300) ("[C]rimen non contrahitur nisi voluntas nocendi intercedat. Et voluntas et propositum distinguunt maleficia . . . ." (translated as "[A] crime is not committed unless the intention to injure exists[.] It is will and purpose which mark *maleficia* . . . .")).

and with no "evil intent": "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."[29]

By 1922, however, the Supreme Court had virtually abandoned the culpability requirement, treating it as the antiquated relic of a quaint, bygone era. In *United States v. Balint*, the Court held that it would no longer read all criminal statutes to require proof of a guilty mind, particularly where the "emphasis of the statute is . . . upon achievement of some social betterment."[30] By 1943, the Supreme Court claimed that the culpability requirement was an obstacle to making the criminal law "a working instrument of government,"[31] at least where the criminal law concerned public health.

This change in the Supreme Court's attitude had many causes. It has often been described as a response to the industrial revolution and the rise of the regulatory state.[32] But as will be shown immediately below, the Court's rejection of the culpability principle in the first half of the twentieth century flowed most directly from the instrumentalist revolution, which rejected the common law emphasis on moral realism and tradition in favor

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[29] Felton v. United States, 96 U.S. 699, 703 (1877). In *Felton*, the defendants knowingly violated a statute regulating liquor production, but did so to avoid the complete loss of the liquor being produced. *Id.* at 702. The purpose of the statute, which was to ensure the collection of federal taxes, see *id.* at 701–02, was not frustrated by the defendants' conduct (in fact, it was furthered by their decision to prevent the destruction of the liquor). Thus their conduct was justified under the doctrine of necessity or choice of evils. Given this fact, the Court held that their conduct could not be characterized as "willful" within the meaning of the statute. *Id.* at 702. But the Court used language that went beyond mere statutory interpretation, implying that punishment for objectively justified conduct would be fundamentally unjust.

[30] 258 U.S. 250, 252 (1922).

[31] United States v. Dotterweich, 320 U.S. 277, 280 (1943).

[32] *See, e.g.*, Morissette v. United States, 342 U.S. 246, 253–54 (1952) (describing the rise of strict liability crimes as resulting from the following causes: "The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."); Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933) ("[T]he growing complexities of twentieth century life have demanded an increasing social regulation; and for this purpose the existing machinery of the criminal law has been seized upon and utilized.").

of a belief in scientism and expertise as the best solution to all forms of social problem. Although instrumentalism's grip on the Supreme Court's constitutional criminal jurisprudence loosened by the middle of the twentieth century, the common law bond between morality and tradition had already been shattered. This shattering made it virtually impossible for the Court to provide coherent answers to questions of constitutional criminal law.

A. THE COMMON LAW, MORAL REALISM, AND TRADITION

Today we are used to seeing the common law as Oliver Wendell Holmes Jr. described it: a body of rules made by judges exercising a "legislative function" and acting with a view to "what is expedient for the community concerned."[33] This is not how the common law was seen for most of its history. Rather, it was seen as a kind of customary law, a law of "custom" and "long usage."[34] Judges in common law cases were to look to precedents to discern the customs relevant to a given case and then apply those customs to the facts before them.

Common law thinkers argued that the customary nature of the common law gave it two primary advantages over both legislation and royal or executive decree. First, because custom arose from long usage rather than the command of the sovereign, common law rules were thought to enjoy the consent of the people. If the people rejected a given custom, it would fall out of usage over time and would cease to have any legal authority.[35]

Second, the customary nature of the common law was thought to ensure that it comported with principles of reason. Common law thinkers were moral realists. They believed that real moral principles inhered in nature and that such principles could be discerned by reason. Laws that failed to comport with moral reality were not truly "law" but were mere acts of power or violence.[36] Common law thinkers did not claim, however, that

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[33] OLIVER WENDELL HOLMES, THE COMMON LAW 35–36 (Dover, 1991) (1881).

[34] *See* Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1766–1814.

[35] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *74 (asserting that customary laws supported by long usage possessed "internal evidence of freedom," for they arose through "the voluntary consent of the people"); EDWARD COKE, THE COMPLEAT COPYHOLDER (1630), *as reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 701 (Steve Sheppard ed., 2003) [hereinafter COKE, SELECTED WRITINGS] ("Customes are defined to be a Law . . . which being established by long use, and the consent of our Ancestors, hath been, and is daily practised.").

[36] *See, e.g.*, 1 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND (1608) [hereinafter COKE, INSTITUTES], *as reprinted in* 2 COKE, SELECTED WRITINGS, *supra* note 35, § 69, at 684 ("[N]othing that is contrarie to reason, is consonant to Law."); *id.* § 138, at 701 ("[R]eason is the life of the Law, nay the common Law it selfe is nothing else but reason."); 1

moral principles could easily be identified in the abstract and applied to given cases. At any given time, an individual judge engaging in abstract moral reasoning might get the moral principle wrong, might fail to weigh it properly against competing principles, or might fail to apply it properly to the facts of a given case. The common law was thought to minimize these risks because it presented to judges an intergenerational consensus about the application of moral principles in practice. Prior cases revealed which moral principles were relevant to a given issue, how they were to be balanced against each other, and how they were to be applied in specific factual situations. Though any one person might make a mistake, the consensus of multiple generations was likely to reach a just conclusion.

The great common law jurist Edward Coke compared the development of the common law to the refinement of gold in a fire: "[I]f all the reason that is dispersed into so many severall heads were united into one, yet could not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme . . . ."[37] As this description implies, the common law was not seen as a static system of unchanging rules. Rather, it represented a process of legal development. Through case-by-case adjudication over a long period of time, customs that were truly just and reasonable would survive and develop, while those that were not would fall away.

Coke's analogy between the common law and the refinement of gold also provided the basis for a theory of fundamental law. Over time, as the common law "refined" the law, it revealed certain principles and practices that could not be changed by the government without profound injustice. Such principles and practices constituted the fundamental law upon which the English Constitution was based. Sometimes fundamental law imposed affirmative obligations on the government. For example, in 1673 Chief Justice John Vaughan of the Court of Common Pleas opined that the government is required to punish certain serious crimes, such as "murther

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BLACKSTONE, *supra* note 35, at *70 ("[O]ur lawyers are with justice so copious in their encomiums on the reason of the common law; . . . the law is the perfection of reason, . . . it always intends to conform thereto, and . . . what is not reason is not law."); 7 EDWARD COKE, *Calvin's Case, or the Case of the Postnati*, *in* REPORTS (1608), *as reprinted in* 1 COKE, SELECTED WRITINGS, *supra* note 35, at 166 (asserting that "the Law of Nature is part of the Law of England").

[37] 1 COKE, INSTITUTES, *supra* note 36, § 138, at 701. According to Edward Corwin, the claim that "immemorial usage" is "superior to human rulemaking" goes back at least to the classical period in Greece and is found in English common law thinking as early as the fourteenth century. EDWARD S. CORWIN, THE 'HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 6, 26 (1955).

[sic], stealing, perjury, trespass," and that any statute legalizing such conduct would itself be void.[38] More commonly, fundamental law restricted the government's power to use coercive force against individuals, particularly in criminal cases. Many of these restrictions provided procedural rights to criminal defendants, including the right to due process of law,[39] indictment by grand jury,[40] trial by jury in the vicinage of the offense,[41] habeas corpus,[42] and the right not to be subjected to double jeopardy.[43] Some of these rights, however, were clearly substantive in nature. For example, the right to be free from cruel and unusual punishments implied a substantive limit to the state's power to punish.[44]

With respect to the criminal law, the most basic limit on the government's power was the prohibition of punishment without culpability. This prohibition was reflected in a whole variety of substantive criminal law doctrines. The mens rea doctrine required the prosecution to prove that the defendant had a blameworthy state of mind before convicting him of a crime.[45] The actus reus doctrine required proof of a voluntary act, since a person cannot be blamed for involuntary actions such as reflexes.[46] Those who were too young[47] or too mentally ill[48] to exercise the power of free choice could not be criminally punished; nor could a person who violated the law due to a reasonable, good faith mistake of fact[49] or in order to avoid

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[38] Thomas v. Sorrell, (1673) 124 Eng. Rep. 1098, 1102 (C.P.).

[39] 2 COKE, INSTITUTES (1642), *supra* note 36, ch. 29, at 858–59.

[40] *Id.* at 858.

[41] 3 WILLIAM BLACKSTONE, COMMENTARIES, at *349–50.

[42] *Id.* at *129; 2 COKE, INSTITUTES, *supra* note 36, at 862–64; 3 BLACKSTONE, *supra* note 41, at *129.

[43] *See* 4 BLACKSTONE, *supra* note 26, at *335; EDWARD COKE, *Dr. Bonham's Case*, 8 REPORTS [hereinafter COKE, *Dr. Bonham's Case*], *reprinted in* 1 COKE, SELECTED WRITINGS, *supra* note 35, at 277 (articulating the right not to be subjected to double jeopardy: "Nemo debit bis puniri pro uno delicto . . . . Deus non agit bis in idipsum.").

[44] 4 BLACKSTONE, *supra* note 26, at *379.

[45] *See* 3 COKE, INSTITUTES (1644), *supra* note 36, ch. 1, at 961 ("[A]ctus non facit reum nisi mens sit rea": The act does not make one guilty unless the mind is also guilty.).

[46] *See* 4 BLACKSTONE, *supra* note 26, at *20–21 (noting that involuntary actions cannot "induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable").

[47] *See* 4 BLACKSTONE, *supra* note 26, at *22 ("Infants under the age of discretion, ought not to be punished by any criminal prosecution whatever.").

[48] *See id.* at *24 ("[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities . . . .").

[49] *Id.* at *27 ("[W]hen a man, intending to do a lawful act, does that which is unlawful[,] . . . there is not that conjunction between [the deed and the will] which is necessary to form a criminal act.").

a greater evil.[50] A person who committed a crime due to threats of death or bodily harm could raise a limited defense of compulsion, because he committed the crime unwillingly.[51] A person could not be punished for killing in self-defense, for "the law of nature . . . [has] made him his own protector."[52]

B. THE COMMON LAW, THE CRIMINAL LAW, AND THE CONSTITUTION

Although there was broad agreement in England about the normative power of the common law—particularly in its capacity as fundamental law—it was not entirely clear what would happen if the common law came into conflict with the actual power of Parliament. Coke himself, for example, sometimes seemed to assert that that common law could "void" an unreasonable act of Parliament,[53] but at other times seemed to claim that Parliament possessed "ultimate wisdom," and thus would never pass a fundamentally unreasonable law.[54] By the late eighteenth century, however, it was abundantly clear that Parliament could and did pass laws that were contrary to fundamental common law principles. After the civil wars, regicide, abdications, and revolutions of the seventeenth century, England moved to a system of parliamentary supremacy in the eighteenth century.[55] The ascendancy of Parliament gave rise to an increasing number of laws that ran contrary to basic common law principles. The most famous example of this phenomenon was the "bloody code," a set of laws that imposed the death penalty for more than 150 crimes, including crimes as minor as cutting down a cherry tree in an orchard.[56] Orthodox English

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[50] *See id.* at *30–31.

[51] *See id.* at *27 ("As punishments are therefore only inflicted for that abuse of that free will, which God has given to a man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion."). This defense did not excuse homicide, however, "for he ought rather to die himself, than escape by the murder of an innocent." *Id.* at *30.

[52] *Id.* at *30.

[53] *See* COKE, *Dr. Bonham's Case*, *as reprinted in* 1 COKE, SELECTED WRITINGS, *supra* note 35, at 275 ("[W]hen an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void . . . .").

[54] 4 COKE, INSTITUTES (1644), *supra* note 36, ch. 1, at 1067 ("[I]n the politique body when the King and the Lords Spirituall and Temporall, Knights, Citizens, and Burgesses, are all by the Kings command assembled and joyned together under the head in consultation for the common good of the whole Realm, there is *ultimum Sapientiae*.").

[55] *See* Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1782.

[56] *See* 4 BLACKSTONE, *supra* note 26, at *4.

jurists such as Blackstone deplored the injustice of these laws,[57] but also opined that Parliament had unchallengeable authority to enact them.[58]

Importantly, Americans took precisely the opposite position. They described royal and parliamentary actions that violated fundamental principles of justice embodied in the common law as "injuries and usurpations."[59] In fact, Americans justified revolt against England largely on the basis of Parliament's violation of their common law rights.[60] When the United States Constitution was adopted a decade after the revolution, various common law protections were written into the text. Many of these were protections for criminal defendants, designed to prevent punishment without culpability. Defendants were given the rights to be indicted by a grand jury,[61] to be tried by a petit jury,[62] to confront witnesses,[63] to subpoena witnesses,[64] and to have the assistance of counsel.[65] Defendants were also given the right not to be subjected to ex post facto laws,[66] to

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[57] *See id.* at *17 ("[S]anguinary laws are a bad symptom of the distemper in any state. . . . [T]hat magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.").

[58] *See* 1 BLACKSTONE, *supra* note 35, at 160 ("[Parliament] hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws . . . : this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution.").

[59] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For a discussion of the relationship between the Declaration of Independence and the common law, see Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1797–98.

[60] In the run-up to the American Revolution, Americans frequently argued that Parliament had violated their natural rights as reflected in the common law. For example, in the first Continental Congress, Richard Henry Lee claimed that American rights "are built upon a fourfold foundation, namely natural law, the British constitution, the charters of the several colonies, and 'immemorial usage.'" John Adams, Notes of Debates (Sept. 8, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 46 (Paul H. Smith ed., 1976). Roger Sherman asserted that American rights were based on the common law: "The Colonies adopt the common Law, not as the common Law, but as the highest Reason." *Id.* at 47. The 1774 Declaration and Resolves of the Continental Congress stated that American rights were based on "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" of the various colonies; that the colonists retained the "rights, liberties, and immunities of free and natural born subjects, within the realm of England"; and that these rights included the right to "the common law of England." DECLARATIONS AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), *available at* http://avalon.law.yale.edu/18th_century/resolves.asp.

[61] U.S. CONST. amend. V.

[62] U.S. CONST. amend. VI.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] U.S. CONST. art. I, § 9.

double jeopardy,[67] or to cruel and unusual punishments.[68] These provisions made it harder to convict the innocent, forbade punishment for conduct that was legal when committed, and prohibited multiple or excessive punishments. Taken together, they were supposed to ensure that punishment is not imposed in the absence or in excess of culpability.

Although the Constitution does not explicitly mention substantive limits to Congress's power to define crime, the various provisions listed above—especially the Cruel and Unusual Punishments Clause—imply such a limit.[69] On the few occasions in the late eighteenth and early nineteenth centuries when legislatures passed laws that authorized punishment without culpability, courts did not hesitate to declare such laws unconstitutional. For example, in *Ely v. Thompson*, the Kentucky Court of Appeals held that it would be unconstitutional under a state analogue to the Cruel and Unusual Punishments Clause to punish a person for exercising the common law right of self-defense, even though the criminal statute purported to permit such punishment.[70] Similarly, in *Jones v. Commonwealth*, the Supreme Court of Appeals of Virginia held that abrogation of the common law rule prohibiting imposition of a joint fine in a criminal case would be cruel and unusual because it could require some defendants to bear the punishment for others.[71] As noted above, as late as 1877, the United States Supreme Court refused to read a federal criminal statute to authorize punishment of a person who acted reasonably and in good faith, even though the defendant knowingly violated the criminal statute. Punishment without culpability "would shock the sense of justice of every one."[72]

All this changed by the 1920s. The reasons for this change are discussed immediately below.

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[67] U.S. CONST. amend. V.

[68] U.S. CONST. amend. VIII.

[69] This silence may have resulted from the fact that neither Parliament nor colonial or state governments had previously attempted to violate fundamental common law rules regarding the definition of crimes. Many of the rights listed in the Bill of Rights—for example, the Sixth Amendment right to a jury trial in criminal cases—arguably made it into the Constitution because of prior governmental attempts to violate them. *See, e.g.*, Stinneford, *Original Meaning of Unusual, supra* note 1, at 1796 (discussing American reaction against British attempts to avoid colonial juries by moving cases into the Admiralty Court); *id.* at 1802 (describing Antifederalist concern that the federal government would attempt to circumvent jury trials).

[70] 10 Ky. (3 A.K. Marsh.) 70, 70–73 (1820).

[71] 5 Va. (1 Call) 555 (1799).

[72] Felton v. United States, 96 U.S. 699, 703 (1877).

C. INSTRUMENTALISM AND THE REJECTION OF MORAL TRADITION

The period after the Civil War marked a turning point in American legal thought. The reasons for the change were both social and intellectual. The Civil War was a profoundly traumatic event that left many participants (including the young Oliver Wendell Holmes Jr.) skeptical of any claims about a connection between morality and law.[73] This skepticism was bolstered by the increasingly influential writings of Charles Darwin and Herbert Spencer, whose ideas of natural selection and survival of the fittest challenged the notion that fundamental principles of justice even exist.[74] During this same time period, an explosion in population and in manufacturing activity occurred, at least in the North. For many people community life became more anonymous and impersonal, and relationships between employers and employees became more distant.[75] Common law doctrines of contract and tort appeared inadequate to deal with the imbalanced bargaining power and the numerous accidents associated with an industrial economy.[76] For both theoretical and practical reasons, it was increasingly argued that the best measure of a law's goodness was efficiency, not justice.

These changes are reflected in Oliver Wendell Holmes Jr.'s famous article, "The Path of the Law," published in the *Harvard Law Review* in 1897. The primary goal of this article was to delegitimize morality and tradition as bases for law and to replace them with the values of power and efficiency. Holmes argued that law is really nothing more than the result of a "concealed, half conscious battle" among competing interests.[77] The point of judging was to give effect to the will of the victors in the most straightforward and efficient way possible.[78] Morality and tradition were obstacles to what Holmes considered "rational policy" because they focused judicial attention on irrelevancies.[79] Thus Holmes wanted to ban "every word of moral significance" from the law and to eviscerate the role of tradition in legal analysis[80]: "I look forward to a time when the part played

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[73] *See, e.g.*, ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 41–51 (2000); LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 69 (2001).

[74] *See, e.g.*, ALSCHULER, *supra* note 73, at 9, 49; BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 38–39 (2006).

[75] *See* Morissette v. United States, 342 U.S. 246, 253–54 (1952).

[76] *See, e.g.*, Harold Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916).

[77] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

[78] Thus Holmes described judicial decisions as "do[ing] no more than embody[ing] the preference of a given body in a given time and place." *Id.* at 466.

[79] *See id.* at 472.

[80] *Id.* at 464.

by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."[81] In other words, "the man of the future is the man of statistics and the master of economics."[82]

Holmes applied the "cynical acid" of his argument directly to the question of criminal punishment, arguing that the sole focus of the criminal law should be "the dangerousness of the criminal," not his culpability.[83] Holmes noted approvingly that "well known men of science" believed that "the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite."[84] If this turned out to be true, Holmes argued, then criminals (like rattlesnakes) "must be got rid of."[85] If, on the other hand, the "well known men of science" turned out to be wrong, something short of extermination might be justifiable if it adequately deterred criminal conduct.[86] Deterrence and extermination were the only two rational alternatives. Traditional moral ideas, such as the principle that punishment in excess of culpability is unjust, were deliberately excluded from his analysis.

Although this rejection of morality was grounded largely in Holmes's own nihilism, progressive reformers in the first decades of the twentieth century saw it as a path of liberation. For example, John Dewey saw Holmes's argument as a basis for furthering the interests of the labor movement in their struggle against the interests of capital.[87] Dewey followed Holmes in arguing that "the essence of all law" is "coercion" and that the only measure of a law's goodness lay in "the relative efficiency and economy of the expenditure of force as a means to an end."[88] This rationale justified increased industrial regulation despite claims that it violated the rights of employers.[89] It also justified the labor movement's use of violence when regulatory action failed.[90]

Like many of his contemporaries, Dewey assumed that the march toward greater efficiency necessarily entailed a march toward greater

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[81] *Id.* at 474.

[82] *Id.* at 469.

[83] *Id.* at 462, 471.

[84] *Id.* at 470, 471.

[85] *Id.* at 470 ("If the typical criminal is a degenerate, bound to swindle or to murder by as deep-seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction.").

[86] *See id.* at 470–71.

[87] *See* John Dewey, *Force and Coercion*, 26 INT'L J. OF ETHICS 359 (1916).

[88] *Id.* at 359, 364.

[89] *Id.* at 359.

[90] *Id.* at 362.

justice. He claimed that governmental coercion was becoming less brutal precisely because it was becoming more efficient.[91] Indeed, he argued that protections for individual rights were nothing more than the byproduct of the drive toward efficiency:

> [T]he question of the limits of individual powers, or liberties, or rights, is finally a question of the most efficient use of means for ends. That at a certain period liberty should have been set up as something antecedently sacred *per se* is natural enough. Such liberty represented an important factor which had been overlooked. But it is as an efficiency factor that its value must ultimately be assessed.[92]

This argument is strange in several ways. First, Dewey asserts that respect for individual rights generally promotes efficiency, but makes no effort to prove this counterintuitive claim.[93] Second, Dewey asserts that respect for individual rights is *only* justifiable insofar as it promotes efficiency. In other words, there are no values deeper than efficiency, not even liberty, dignity, or justice. Third, and strangest of all, Dewey never tells us what the law is supposed to be efficient at *doing*. Efficiency is a measure of the relationship between means and ends. Neither the law nor anything else can simply be "efficient." But Dewey has nothing to say about the proper purposes or ends of the law.

D. INSTRUMENTALISM AND THE CONSTITUTIONAL LAW OF CRIME

The turn toward instrumentalism represented by the writings of Holmes and Dewey had three profound implications for the constitutional law of crime. First, it implied that there are no predetermined ends or purposes for law, including criminal law. Holmes argued that the purpose of the law is simply to effectuate the will of the victors; Dewey consciously avoided any discussion of the purposes of the law. If there are no predetermined ends for the law, then presumably the legislature can pursue

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[91] *Id.* at 364 ("With advance of knowledge, refined, subtle and indirect use of force is always displacing coarse, obvious and direct methods of applying it.").

[92] *Id.* at 366.

[93] For example, Dewey references a common law maxim that dates back at least to Edward Coke: the principle that it is unjust for a person to be a judge in his own case. Over a period of 250 years, common law thinkers had repeatedly used this principle as an example of a fundamental moral limitation on the power of the government. Dewey accepts the principle, but tries to restate it in terms of efficiency: "[E]xperience in the past has shown that it is not usually efficient for parties to be judges in their own cause: that an impartial judge is an energy saver." *Id.* at 362–63. What exactly is this assertion supposed to mean? Why is an impartial judge "usually" more efficient than a biased one? When is a biased judge more efficient? Most fundamentally, since efficiency can only be measured in terms of the end sought to be achieved, what is the end or purpose of judging? Dewey never answers any of these questions.

whatever ends it wishes to pursue.[94] Second, the turn toward instrumentalism implied that traditional moral limitations on the means employed to accomplish the law's purposes should be discarded. Dewey was willing to discard individual rights whenever they failed to promote efficiency.[95] Holmes was willing to dispense with rights altogether, at least where Holmes considered the holders of those rights socially undesirable.[96] Third, because instrumentalism denied the existence of any moral limit as to either the means or the ends of the law, tradition became marginalized as a source of legal standards. In the wake of the instrumentalist revolution, courts would look to tradition or precedent to promote the relatively thin value of uniformity ("deciding like cases alike") rather than to determine the substantive reasonableness of a law.

These changes may be seen in two major constitutional criminal cases from the first half of the twentieth century: *United States v. Balint*[97] and *United States v. Dotterweich*.[98]

In *Balint*, the defendants were charged with violating the Narcotic Act of December 17, 1914 by selling a "derivative of opium" and a "derivative of coca leaves" without obtaining a "written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue."[99] This was a felony offense involving a maximum sentence of five years imprisonment.[100] The statute did not specify whether mens rea was required for conviction, and the indictment did not allege that the defendants knew they were selling narcotics.[101] As noted above, the common law had long required proof of culpability in order to convict a defendant of a crime. For this reason, courts generally interpreted criminal statutes to require some proof of mens rea even where the statute did not explicitly mention it. Thus, the defendants in *Balint* argued that the statute

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[94] In this way, instrumentalism represents a turn toward legislative supremacy, a political principle that is inconsistent with the premises of the American Revolution and the United States Constitution. *See* Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1792–1810.

[95] *See* Dewey, *supra* note 87, at 366.

[96] *See* Holmes, *supra* note 77, at 470 (comparing criminals to rattlesnakes and suggesting that they be "got rid of"); *see also* Buck v. Bell, 274 U.S. 200 (1927) (Holmes, J.) (upholding law that authorized the involuntary sterilization of "mental defectives"). Holmes summed up with the now infamous quip, "Three generations of imbeciles are enough." *Id.* at 207.

[97] 258 U.S. 250 (1922).

[98] 320 U.S. 277 (1943).

[99] *Balint*, 258 U.S. at 251 (citing Pub. L. No. 63-223, 38 Stat. 785 (1914)).

[100] *See Dotterweich*, 320 U.S. at 285 (noting the five-year maximum punishment available under the Narcotic Act at issue in *Balint*).

[101] *Balint*, 258 U.S. at 251.

should be interpreted to require proof of some kind of culpable state of mind.[102] They further argued that it would violate the Fifth Amendment's Due Process Clause to convict them of a crime without proof of culpability.[103]

The Supreme Court rejected these arguments on the ground that the primary purpose of the Narcotic Act was regulatory rather than penal. Although the Court acknowledged that mens rea was historically required for criminal conviction,[104] it claimed that "there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement."[105] The Court would not interpret a criminal statute to require proof of mens rea "where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes."[106] The Court dismissed without discussion the idea that the Constitution requires proof of culpability.[107] In short, the *Balint* Court agreed with Holmes and Dewey that the legislature should be free to pursue its regulatory goals by whatever means it considers most efficient, even if those means include criminal conviction without proof of moral culpability.

Two decades later, in *Dotterweich*,[108] the Supreme Court elevated the instrumentalism of *Balint* almost to the level of moral principle. Dotterweich was the president and general manager of a pharmaceutical company that purchased drugs from a manufacturer and resold them under its own name. He was convicted of three misdemeanor violations of the Food, Drug, and Cosmetic Act (FDCA) because the company shipped misbranded and adulterated drugs in interstate commerce.[109] The Supreme Court emphatically rejected the argument that the statute should be interpreted to require some knowledge of wrongdoing:

> The purposes of this legislation . . . touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it

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[102] *See id.*

[103] *Id.* at 252.

[104] *Id.* at 251.

[105] *Id.* at 252.

[106] *Id.*; *see also* United States v. Behrman, 258 U.S. 280, 288 (1922) ("If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.").

[107] *Balint*, 258 U.S. at 254 (asserting that the Narcotic Act "merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic").

[108] 320 U.S. 277 (1943).

[109] *Id.* at 278 (citing Ch. 675, § 301(a), 52 Stat. 1040, 1042 (1938) (codified as amended at 21 U.S.C. § 331(a) (2006))).

> is to be treated as a working instrument of government and not merely as a collection of English words.[110]

Because protection of public health is of paramount importance, the Court implied, the statute should be interpreted as broadly as possible.[111] Thus the *Dotterweich* Court construed the FDCA to impose not merely strict liability, but *vicarious* strict liability. It permitted prosecution not only of those who unwittingly shipped misbranded goods, but of anyone who stood in "responsible relation" to such shipments.[112] The Court refused to specify what "responsible relation" meant, on the ground that any attempt to define it would undermine the flexibility that was necessary to accomplish the statute's regulatory goals.[113]

Taken together, *Balint* and *Dotterweich* implied that there is no fundamental distinction between criminal law and any other sort of governmental regulation. Of course, if this were true, the legislature would be free not only to eliminate the mens rea requirement, but also to redefine crimes as civil causes of action, shift the burden of proof from the prosecution to the defendant, and impose harsh punishments for conduct involving little or no culpability. In other words, the legislature's freedom would conflict with the numerous protections for criminal defendants built into the Constitution itself.

As we will see below, the entire history of constitutional criminal law from the 1950s onward constitutes the Supreme Court's effort to deal with this conflict in the aftermath of the instrumentalist revolution. In cases involving the criminal–civil distinction, it has tried to deal with the conflict by relying on tradition without reference to morality. In cases involving legislative efforts to manipulate the elements of criminal statutes to undermine the culpability requirement, it has tried to rely on morality without reference to tradition. In cases involving proportionality in punishment, it follows no principled approach whatsoever, deferring blindly to the legislature in some cases and imposing its own will in others. None of these approaches has proved workable. Until the Court returns to the

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[110] *Id.* at 280.

[111] *Id.* at 281 ("Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.").

[112] *Id.*

[113] *Id.* at 285 ("It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility.").

common law synthesis of morality and tradition, the constitutional law of crime will remain radically incomplete.

III. PUNISHMENT AND THE CRIMINAL–CIVIL DISTINCTION

Crime is one of the central preoccupations of the United States Constitution, but the term is never defined anywhere in the text. The Constitution provides protections for those accused of crime[114] and it makes reference to the consequences that may flow from criminal convictions.[115]

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[114] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder [or] ex post facto Law . . . ."); U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."); U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

[115] *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."); U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

It defines the substance of one crime (treason),[116] gives Congress the power to punish a second crime (counterfeiting),[117] and allows Congress to define and punish a third set of crimes (piracies and felonies committed on the high seas and offenses against the law of nations).[118] But it does not ever tell us what a crime is. The reader's knowledge of the concept appears to be assumed.

The Supreme Court has not attempted to give a comprehensive definition of "crime," but it has engaged in a sustained effort since at least 1798 to draw a constitutional line between civil and criminal statutes.[119] The issue typically arises when Congress or a state legislature enacts a putatively civil statute that deprives individuals of some property or liberty interest, but does not provide the protections that defendants receive within the criminal process. In response, the defendant claims that the statute is really criminal in nature and that he has been deprived of some constitutional right promised to criminal defendants—for example, the right to indictment by a grand jury, the right not to be subjected to ex post facto laws or to double jeopardy, the right against compelled self-incrimination, etc.[120]

To resolve this issue, the Court has drawn the following constitutional line: If the statute's purpose is to punish the defendant, it is a criminal statute and the defendant must be accorded the protections of the criminal

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[116] *See* U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

[117] *See* U.S. CONST. art. I, § 8, cls. 1, 6 ("The Congress shall have Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . . .").

[118] *See* U.S. CONST. art. I, § 8, cls. 1, 10 ("The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . .").

[119] *See* Calder v. Bull, 3 U.S. 386 (1798) (holding that the Ex Post Facto Clause of the United States Constitution only applies to laws that impose a criminal punishment).

[120] *See, e.g.*, Smith v. Doe, 538 U.S. 84, 89–92 (2003) (holding that a law requiring sex offender registration and publication of identifying information does not violate the Ex Post Facto Clause); Kansas v. Hendricks, 521 U.S. 346, 350 (1997) (holding that a law authorizing civil commitment of "sexually violent predators" does not violate the Ex Post Facto and Double Jeopardy Clauses); United States v. Ursery, 518 U.S. 267, 270–72 (1996) (holding that a law permitting forfeiture of property allegedly used to manufacture marijuana does not violate the Double Jeopardy Clause); United States v. Salerno, 481 U.S. 739, 741–45 (1987) (holding that a law permitting pretrial detention based on a finding of future dangerousness does not violate due process by permitting punishment before trial); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 146 (1963) (holding that a statute imposing loss of citizenship on those who leave or stay out of the country to avoid military service violated the Constitution by failing to provide the procedural protections of the Fifth and Sixth Amendments).

process.[121] If the purpose of the statute is not punitive, the Court accepts the "civil" label and denies the defendant these protections.

If a statute's purpose is punitive, it is criminal. This is all well and good, but it does not get us very far. We still must ask what "punitive purpose" means. More specifically, what is it about a punitive purpose that differentiates it from a non-punitive purpose and calls for the heightened protections of the criminal justice system?

The Supreme Court's criminal–civil cases make clear that a punitive purpose is not merely a purpose to deprive an individual of liberty or property. As early as 1798 the Court held that a statute depriving a person of property rights was not a criminal statute (and thus not subject to the Ex Post Facto Clause) unless the deprivation was imposed for the purpose of punishment.[122] More recently, the Court held that a statute that authorized the total, permanent deprivation of a person's liberty was not criminal, and thus not subject to the Ex Post Facto and Double Jeopardy Clauses, because the deprivation of liberty was not imposed for the purpose of punishment.[123]

As these cases indicate, the key issue is not the *nature* of the deprivation but the *reason* for it. A statute is only criminal if it evinces a purpose to punish. But what *is* a purpose to punish? In its early criminal–civil distinction cases, the Supreme Court seemed to assume that everyone knew what the purpose of punishment was, and it focused instead on evidence that the legislature had such a purpose. In some cases, the Court focused on whether the form of the sanction was inherently punitive,[124] and

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[121] *See, e.g.*, *Calder*, 3 U.S. at 390, 396–97, 399 (defining criminal laws as laws that "punish" the defendant for prior conduct); United States v. Ward, 448 U.S. 242, 248–49 (1980) ("[W]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."). Civil statutes that authorize imposition of punitive damages are arguably the biggest exception to the rule that a punitive purpose triggers the protections of the criminal process. The Supreme Court has distinguished such statutes from criminal statutes on the ground that the government is typically neither a party to cases seeking punitive damages nor a recipient of the damages award. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989).

[122] *See Calder*, 3 U.S. at 390.

[123] *See* Kansas v. Hendricks, 521 U.S. 346, 351, 371 (1997) (holding that a statute calling for long-term commitment of "sexually violent predators" was not punitive).

[124] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 237 (1896) (holding that Congress lacks the power to authorize a non-judicial tribunal to sentence aliens to sixty days at hard labor: "[W]hen congress sees fit to . . . [subject] the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."); *cf.* Mackin v. United States, 117 U.S. 348, 352 (1886) ("[I]mprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment."); *Ex parte* Wilson, 114 U.S. 417, 428–29 (1885) (holding that a fifteen-year term of imprisonment amounted to an "infamous punishment" giving rise to the Fifth Amendment

in others it focused on whether the sanction truly furthered the non-punitive purpose it purported to serve.[125] This approach was satisfactory because there was no apparent disagreement as to what a punitive purpose was.

The assumption that the phrase "punitive purpose" enjoyed a shared cultural meaning was called into question by the instrumentalist revolution. Instrumentalists denied that the terms "crime" and "punishment" had any particular meaning that distinguished them from other legal categories. "Crime" was merely a term that could be applied to any social problem and "punishment" was merely a means for resolving any social problem. Thus, as shown above, Holmes argued that the true purpose of the criminal law was to neutralize the danger posed by criminals (either through extermination or deterrence), not to punish them on the basis of their moral culpability. Similarly, the *Balint* and *Dotterweich* Courts authorized legislatures to create regulatory crimes whose purpose was to prevent some social harm rather than impose punishment.[126] Following this line of reasoning, many argued that crime and punishment—like all other social problems—should be analyzed in purely utilitarian terms.[127]

This approach to criminal law posed an obvious problem for constitutional interpretation. If there is no inherent difference between

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requirement of indictment by a grand jury: "[A] sentence to the state prison, for any term of time, must be considered [an infamous punishment]. The convict is placed in a public place of punishment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meager food, and to severe discipline. Some of these a convict in the house of correction is subject to; but the house of correction . . . had not the same character of infamy attached to it. Besides, the state prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use.") (citations omitted).

[125] *See, e.g.*, Cummings v. Missouri, 71 U.S. 277, 320 (1866) (holding that a provision of the Missouri constitution forbidding clergy to preach unless they take an oath declaring that they have "never, by act or word, manifested [their] adherence to the Confederate side in the Civil War" was an ex post facto criminal law and a bill of attainder because "it was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen"); *Ex parte* Garland, 71 U.S. 333 (1866) (holding that a federal statute requiring attorneys who wished to practice in federal court to take an oath that they had never supported Confederacy was an ex post facto criminal law and a bill of attainder).

[126] If a criminal statute is defined as a statute that imposes sanctions for a punitive purpose, then a regulatory crime would be defined as a statute whose punitive purpose is non-punitive. Neither the *Balint* nor the *Dotterweich* Court makes any effort to resolve the self-contradictory, nonsensical nature of this definition, nor has the contradiction been definitively resolved in the decades that have passed since these decisions.

[127] *See generally* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

punitive and non-punitive purposes, there is no principled way to distinguish between civil and criminal laws. Followed to its logical conclusion, instrumentalism would permit the legislature to circumvent all of the protections the Constitution gives criminal defendants by simply relabeling a criminal statute as civil. For this reason, it was imperative that the Supreme Court provide a clear definition of "punitive purpose" that would serve to distinguish civil from criminal statutes.

In the wake of the instrumentalist revolution, however, the Supreme Court had no desire to provide such clarification, needed or not.[128] Instead, in *Kennedy v. Mendoza-Martinez*,[129] the Court provided a confoundingly opaque test for determining whether a statute has a punitive purpose: (1) whether the sanction authorized by the statute imposes "an affirmative disability or restraint"; (2) whether the sanction "has historically been regarded as a punishment"; (3) whether the sanction "comes into play only on a finding of *scienter*"; (4) whether the sanction "promote[s] the traditional aims of punishment—retribution and deterrence"; (5) whether the sanction applies to behavior that is "already a crime"; (6) whether the sanction is "rationally connected" to a possible "alternative purpose"; and (7) whether the sanction "appears excessive in relation to the alternative purpose."[130]

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[128] A number of scholars have noted how the Supreme Court's failure to articulate a clear method for distinguishing between criminal and civil statutes has led to confusion as to where the line actually falls. *See, e.g.*, Jonathan Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 481 (1974) ("[T]he trend at the federal level is toward changing many criminal sanctions to civil penalties."); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1875 (1992) (describing the "encroachment of the criminal law into areas previously thought to be civil or 'regulatory' in character"); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2 (2005) ("It is no exaggeration to rank the distinction among the least well-considered and principled in American legal theory."); Gail Heriot, *An Essay on the Civil–Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 45 (1996) ("From civil penalties to punitive damages, civil forfeiture to criminal restitution, legal devices that are arguably criminal–civil hybrids seem to be more common than they were a century ago."); Paul H. Robinson. *The Criminal–Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 210 (1996) ("Civil law has taken on some characteristics of criminal law, such as its increased use of punitive damages, but more commonly criminal law has been expanded to include what were traditionally civil violations."); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal–Civil Procedural Divide*, 85 GEO. L.J. 775, 796–97 (1997) (noting that "the overlap between modern modes of criminal punishment and civil regulation has made it harder to distinguish between the two").

[129] 372 U.S. 144 (1963).

[130] *Id.* at 168–69.

To call this multifactor test confusing and amorphous is an understatement. The Court never tells us how these factors relate to each other, nor how they are supposed to tell us whether a statute has a punitive purpose. More fundamentally, the Court never tells us what a punitive purpose *is*. One of the factors (number four) asks whether the statute furthers the goals of retribution or deterrence. Does this mean that a punitive purpose is the same thing as a retributive or deterrent purpose? If so, why is this merely one of seven factors in the Court's analysis? Can the fact that a statute furthers other purposes often associated with punishment, such as rehabilitation or incapacitation, demonstrate that the statute has a punitive purpose? If so, why are these purposes omitted from the test? If not, why not? The list of questions goes on and on, and the answers are quite unclear.

The remaining factors in the *Mendoza-Martinez* test do not shed much additional light on the definition of punitive purpose. Some factors focus on the sanction's effect (factor one) or its historical status (factor two). Others focus on the defendant's conduct (factor five) and state of mind (factor three). Still others focus on the relationship between the sanction's effect and the purposes it seems to serve (factors six and seven).

The Supreme Court's efforts in *Mendoza-Martinez* only start to make sense when one realizes that the Court's goal was to specify a method for determining whether a statute has a "punitive purpose" without defining the term "punitive." The Court apparently hoped that by following this approach it could continue to draw a line between criminal and civil statutes without having to choose between traditional and instrumentalist ideas about crime. Thus the *Mendoza-Martinez* test focused solely on the results of prior civil–criminal distinction cases, not the moral reasoning that animated them. This is why the factors listed in the *Mendoza-Martinez* test appear so random.

When one examines the moral basis for the cases underlying the *Mendoza-Martinez* factors, it becomes clear that they represent the two conflicting approaches to the definition of "punitive purpose" discussed above. The pre-*Balint* cases focus on facts tending to show that the challenged statute had a retributive purpose. For example, a statute that allows conviction only where the defendant has a culpable state of mind (factor 3)[131] or that imposes an "infamous" sanction like imprisonment (factor 2)[132] is punitive because it imposes sanctions as an expression of

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[131] *See id.* at 168 n.24 (citing prior criminal–civil distinction cases that focused on the presence or absence of a "scienter" requirement).

[132] *See id.* at 168 n.23 (citing prior criminal–civil distinction cases that focused on whether the sanction authorized by the statute had traditionally been considered punishment).

societal blame. Some of the post-*Balint* cases, however, imply that a punitive purpose could be *either* retributive or deterrent in nature (factor 4)[133] because punishment is just another form of regulation. The *Mendoza-Martinez* Court papered over the incompatibility of these two lines of precedent by focusing solely on the holdings and by ignoring the reasoning underlying them. This approach allowed the Court to ask whether the challenged statute looked or operated like other statutes that have been found to have a punitive purpose, without ever asking the foundational question of what a punitive purpose is. But if we do not know that, we do not really know anything. Put differently, what is the point of relying on the holdings of prior cases without either acknowledging the conflicting rationales for those holdings or trying to reconcile such conflicts?

Adding to the inadequacy of the *Mendoza-Martinez* test, the Supreme Court has made judicial policing of the line between criminal and civil statutes more difficult by building a wall of deference around the legislative decision to call a statute civil rather than criminal. In *Flemming v. Nestor*, the Court announced that if the legislature labels a statute civil, "only the clearest proof" of a punitive purpose would lead the Court to conclude that it was actually criminal in nature.[134] Of course, if we do not have a clear idea of what a punitive purpose is, it will be exceedingly difficult to provide the "clearest proof" that a given statute exhibits such a purpose. *Flemming* furthered the instrumentalist goal of giving the legislature freedom to choose both the means and the ends of the criminal law by making it much harder for the judiciary to reject the label (civil or criminal) that the legislature gives a statute. But it did so by making the criminal–civil distinction exponentially more difficult to enforce.

But all is not lost. Although the Supreme Court has avoided defining what a punitive purpose *is*, in recent years it has been less reluctant to say what a punitive purpose is *not*. By engaging in a little reverse engineering, we can obtain a surprisingly clear picture of what the Supreme Court now means by "punitive." As two relatively recent cases illustrate, when the Supreme Court says that a statute's purpose is punitive, it really means retributive. Despite the obfuscation of *Mendoza-Martinez* and *Flemming*, it is becoming increasingly clear that neither a purpose to deter, incapacitate, nor to rehabilitate[135] can transform a putatively civil statute into a criminal one. Only a retributive purpose can.

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[133] *See id.* at 168 n.25 (citing post-instrumentalist criminal–civil distinction cases that focused on the presence of both retributive and deterrent purposes).

[134] 363 U.S. 603, 617 (1960).

[135] The Supreme Court has not directly considered the claim that a purpose to rehabilitate can transform a putatively civil statute into a criminal one. But in the context of civil commitment statutes, the Court held that a purpose to provide "treatment" for sexually

The first case, *Kansas v. Hendricks*, involved a man who was civilly committed under Kansas's Sexually Violent Predator Act (SVPA) after completing a ten-year prison sentence for taking indecent liberties with two thirteen-year-old boys.[136] The SVPA provided for indefinite civil commitment of "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."[137] Because Hendricks was diagnosed as a pedophile and had a long history of child molestation, he was committed under the SVPA shortly after it was enacted.[138] Hendricks argued that the commitment procedure under the SVPA was actually criminal in nature because its purpose was to incapacitate him rather than treat him.[139] Because it was really a criminal statute, its application to him violated the Constitution's prohibition of ex post facto laws[140] and double jeopardy.[141]

The Supreme Court rejected these arguments, holding that the SVPA was not punitive because it did not further the goals of retribution or deterrence. The SVPA was not retributive because its purpose was to protect society, not to impose blame: "The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness."[142] This conclusion was supported by the fact that the SVPA did not require either a prior conviction or a showing of "scienter" to support commitment. The question of the defendant's blameworthiness did not matter; all that mattered was his dangerousness.[143] The Court also

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dangerous persons designed to render them safe to reenter society was an indication that the statute was non-punitive. *See* Allen v. Illinois, 478 U.S. 364, 370 (1986) ("[T]he State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement."). Such "treatment" is indistinguishable from rehabilitation.

[136] 521 U.S. 346, 350–54 (1997).

[137] *Id.* at 352 (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

[138] *Id.* at 353–56.

[139] *Id.* at 365.

[140] *Id.* at 350–53, 360–61.

[141] *Id.* at 360–61.

[142] *Id.* at 362.

[143] *Id.* The *Hendricks* Court's conclusion that the SVPA did not demonstrate a retributive statutory purpose is highly questionable, at best. As Wayne Logan has pointed out, the SVPA was enacted in response to a public outcry arising from a gruesome rape and murder. It was part of a comprehensive package of sentencing changes that increased the severity of penalties for future sex offenses in tandem with the provision allowing for involuntary commitment of prior sex offenders. The legislative history included numerous expressions of punitive intent, and the very title of the statute labeled those subjected to civil

concluded that the SVPA did not further the goal of deterrence, because it covered a class of people who were largely undeterrable.[144]

The *Hendricks* Court denied that incapacitation is an inherently punitive goal. Hendricks argued that the SVPA was different from other civil commitment statutes that had been upheld as non-penal because it did not require the state to attempt to cure him so that he could be released.[145] Rather, the premise of the SVPA was that there is no known cure for sex offenders with certain kinds of "mental abnormalit[ies]," and that the only thing that could be done with them was to segregate them from society.[146] Hendricks argued that because the primary purpose of this statute was incapacitation, civil commitment amounted to a kind of "disguised punishment."[147] The Court rejected this argument, stating that "under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law."[148]

The second case, *Smith v. Doe*,[149] involved a challenge to the Alaska Sex Offender Registration Act (ASORA).[150] The ASORA required

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commitment as "predators." *See* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1312–16 (1998).

[144] *Hendricks*, 521 U.S. at 362–63 ("Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.").

[145] *Id.* at 365.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 365–66. The fact that a purpose to incapacitate is different from a purpose to punish does not mean that the Constitution is unconcerned with involuntary civil commitment statutes. The Due Process Clauses of the Fifth and Fourteenth Amendments forbid the deprivation of liberty without "due process of law." Statutes that permit a complete deprivation of liberty based on a finding of future dangerousness are in tension with the basic premise of a free society, which is that individuals have the capacity for free choice, including the choice whether or not to commit crimes in the future. Many of the same factors that are used to predict "future dangerousness" of sex offenders could also be used to justify the commitment of whole classes of people with personality characteristics indicative of likely future criminal activity. For example, the State could incarcerate persons based on impulsiveness, short-term orientation, or antisocial attitudes and associations, on the ground that it will prevent them from committing future crimes. The Supreme Court tried to mitigate this risk a few years after *Hendricks* was decided by holding that it denies due process to civilly commit a person based on future dangerousness unless "the psychiatric diagnosis, and the severity of the mental abnormality itself, [is] sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Kansas v. Crane, 534 U.S. 407, 413 (2002). It is unclear how protective the Court's creation of a quasi-medical, quasi-legal category of non-insane persons who may be subjected to involuntary civil commitment will turn out to be.

[149] 538 U.S. 84 (2003).

convicted sex offenders who lived within the state to provide a variety of personal information to law enforcement.[151] Much of this information, including the offender's name, address, photograph, and crime (or crimes) of conviction, was then made publicly available via the internet.[152] Doe argued that the ASORA was an ex post facto criminal law because it imposed a sanction—the registration requirement and the resulting public exposure to stigma—for conduct Doe committed prior to the ASORA's enactment. As in *Hendricks*, the Court rejected this argument, holding that the purpose of the law was the protection of public safety, not the imposition of punishment. The ASORA lacked a retributive purpose because the registration requirement was designed to give parents information that would help them keep their children safe, not to cast blame on the registrant.[153] Although the publication of Doe's information on the internet would have a shaming effect, this was merely an incidental effect of the law, not its purpose.[154]

On the other hand, the Court acknowledged that the ASORA served a deterrent purpose. By requiring sex offenders to register with the state and by publishing their identifying information, the Act was intended to deter those offenders and others from committing sex crimes. But the Court held that the existence of a deterrent purpose is not sufficient to transform a civil regulatory law into a criminal law: "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation."[155]

Once we understand that a purpose to deter, incapacitate, or rehabilitate will not serve to distinguish between a criminal and a civil

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[150] 1994 Alaska Sess. Laws ch. 41 (codified as amended at ALASKA STAT. § 12.63.010 (2010)).

[151] *Doe*, 538 U.S. at 90.

[152] *Id.* at 91.

[153] *Id.* at 102.

[154] *Id.* at 97–99. As with the Sexually Violent Predator Act in *Hendricks*, the Supreme Court's conclusion that the ASORA did not have a retributive purpose is open to question. As Justice Ginsburg pointed out in dissent, the registration requirement was triggered by a prior conviction for an aggravated sex offense, implying that the ASORA was focused more on past misconduct than future dangerousness. *Id.* at 116 (Ginsburg, J., dissenting). The Act imposed "onerous and intrusive obligations on convicted sex offenders" and subjected them "to profound humiliation and community-wide ostracism." *Id.* at 115. Finally, it closely resembled both traditional "shaming" punishments and modern punishments such as supervised release or parole. *Id.* at 115–16.

[155] *Id.* at 102 (quoting Hudson v. United States, 522 U.S. 93, 105 (1997) (internal quotation marks omitted)); *see also Hudson*, 522 U.S. at 105 (noting that "deterrence 'may serve civil as well as criminal goals'" (quoting United States v. Ursery, 518 U.S. 267, 292 (1996))); Bennis v. Michigan, 516 U.S. 442, 452 (1996) ("[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose.").

statute, the substantive constitutional meaning of "crime" comes into focus. A statute is criminal if it exhibits a retributive purpose, that is, if it authorizes the state to impose sanctions to express the community's blame or condemnation for the commission of an unlawful act. Although other purposes, such as deterrence or incapacitation, are often associated with punishment, these purposes are also compatible with civil regulatory statutes and so cannot serve to distinguish criminal from civil laws.

The centrality of retributive purpose in distinguishing criminal from civil laws reflects an obvious but often-overlooked fact: A defendant who is subjected to criminal punishment loses more than property or even liberty: he also loses his good name. He is labeled by the community as a person worthy of blame, stigma, and retribution. He is labeled a criminal. This is a very serious thing indeed, and it calls for the protections the Constitution affords criminal defendants.[156]

This brings us back to the culpability requirement discussed above. The Supreme Court's recent criminal–civil distinction cases implicitly recognize the major premise underlying this requirement: that criminal punishment is the community's expression of moral condemnation or blame through the imposition of sanctions. These cases say almost nothing about the moral principle that flows from this premise: that punishment may not justly be imposed without culpability. The high wall of deference imposed by *Flemming v. Nestor* still stands, and judges still have little capacity to prevent the legislature from imposing punishment under the pretextual label of civil liability. We are back on the right road, but we have not moved very far from our post-instrumentalist starting point.

We will not see the Supreme Court straightforwardly assert that the law should inflict punishment only on those who are blameworthy until we have followed the Court's long but irresolute quest to define limits on the legislature's power to create crimes lacking traditional elements associated with blameworthiness, such as mens rea and actus reus. We will go there next.

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[156] Donald Dripps has argued that the imposition of blame is the key factor distinguishing criminal from civil statutes because of the special "political temptations" the blame-casting function of criminal law creates for oppressive governments. Criminal punishment involves "severe sanctions . . . accompanied . . . by the self-congratulatory emotion of blame. The convict is held up for hatred as well as confined; the government inflicts pain with a self-conscious attitude of moral superiority." Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 204 (1996). This combination of sanctions and blame-casting makes the criminal law an attractive tool for the suppression of political opponents. The risk that government will use the criminal law for this purpose is, according to Dripps, a central reason the Constitution provides special protections for criminal defendants. *See id.* at 202.

IV. PUNISHMENT WITHOUT BORDERS—THE CREATION OF STRICT LIABILITY CRIMES

One of the first things law students learn in their introductory Criminal Law course is the principle *Actus non facit reum nisi mens sit rea*[157]: The act does not make one guilty unless the mind is also guilty.[158] As noted above, this principle has been so fundamental to the criminal law that courts and commentators treated it as axiomatic for more than 500 years.[159]

One of the next things law students learn is that this principle is axiomatic no more. Since the middle of the nineteenth century legislatures have created strict liability crimes that punish even those who do not have a guilty mind. Since the first part of the twentieth century, the Supreme Court has explicitly endorsed the constitutionality of such laws. In today's world, the act may make one guilty even though the mind is innocent.

But even this is not entirely correct. As we will see below, even at the height of the instrumentalist revolution, the Supreme Court expressed its belief that it is unjust to impose punishment in the absence of culpability. It has sometimes attempted to enforce this principle directly as a matter of constitutional law, but has retreated in the face of the disruption such enforcement threatened to cause. It now enforces the culpability principle through statutory interpretation and limited constitutional intervention, but this enforcement is incomplete and haphazard.

A. STRICT LIABILITY, INSTRUMENTALISM, AND THE CULPABILITY PRINCIPLE

Strict liability offenses punish the defendant's conduct without requiring proof of any culpable state of mind relating to such conduct.[160]

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[157] 3 COKE, INSTITUTES, *supra* note 36, ch. 1, at 961.

[158] Although mens rea was traditionally required in all criminal prosecutions, the definitions of the state of mind required to establish mens rea could be highly varied and confusing. One of the main purposes of the Model Penal Code was to simplify and clarify the meaning of mens rea. *See, e.g.*, Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1569.

[159] *See supra* notes 26–29 and accompanying text.

[160] Although commentators have given a variety of definitions of "strict liability" offenses, some of which are more inclusive than mine, they generally agree that the term "strict liability" encompasses at least those statutes that punish conduct without requiring any kind of guilty mind. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 145 (5th ed. 2009) (strict liability crimes are those that "do not contain a *mens rea* requirement regarding one or more elements of the *actus reus*"); Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on* Dotterweich *and* Park, 28 UCLA L. REV. 463, 463 n.3 (1981) (describing strict liability as "liability without culpability"); Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267 (1987) ("Strict liability imposes guilt without regard to whether the defendant knew or could

This category of crime first arose as part of the regulatory state's response to the changes wrought by the Industrial Revolution, and its legitimacy was bolstered by the arguments of instrumentalists such as Holmes and Dewey.[161] As Francis Sayre wrote in his seminal article on the topic, these new offenses reflected a conceptual shift in the criminal law from the determination of "individual guilt" to the prevention of "social danger."[162]

This shift toward using criminal punishment as a method of social control presented a potential constitutional problem. As discussed above, the various constitutional provisions relating to criminal law suggest that "crime" has a substantive constitutional meaning. A criminal statute is a statute that uses sanctions to express the community's blame or condemnation for the commission of an unlawful act. Strict liability statutes create the risk that such blame could be directed at morally innocent people—people who perform the forbidden act but do so reasonably, in good faith, and without knowledge of the facts that make the act wrongful or illegal.

Of course, this is only a problem if the idea of culpability—like the ideas of "crime" and "punishment" in the criminal–civil distinction cases—has some substantive constitutional meaning. A positivist would argue that culpability does not have such meaning. Culpability is whatever the legislature says it is.[163] If the legislature enacts a statute that requires a showing of mens rea to establish culpability, mens rea is required. If it enacts a statute that does not require mens rea to establish culpability, mens rea is not required. One is culpable for violating a criminal statute, not for doing so with some constitutionally predetermined state of mind.

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reasonably have known some relevant feature of the situation."); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 830 (1999) ("[S]trict liability crimes contain a material element for which the actor's culpability is irrelevant."); Richard G. Singer, *The Resurgence of* Mens Rea*: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 364 n.114 (1989) (defining a strict liability offense as one in which the mental state of any actor is irrelevant).

[161] *See supra* Part II.C.

[162] Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55 (1933).

[163] *See* BLACK'S LAW DICTIONARY 978 (9th ed. 2009) (defining positivism as "[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law"); *see also* Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335, 337 (2000) ("We might also say . . . that a legal doctrine or concept is 'positivistic' if it derives its content entirely from legislative pronouncement. It is substantive, or nonpositivistic, if it derives its content at least in part from deeper and more fundamental principles. Where the notion of an offense is concerned, the nonpositivistic alternative is to treat the substantive provisions of the criminal law as resting on a set of constitutional values.").

The Supreme Court's early strict liability cases adopted an unabashedly instrumentalist and positivist perspective. As discussed in Part II.D above, the Supreme Court announced in the *Balint* and *Dotterweich* cases that the legislature was free to use the criminal law for regulatory rather than punitive purposes and that there was no requirement that criminal statutes be interpreted to require proof of moral culpability.

But lying just beneath the surface in both cases are suppressed themes of punishment and innocence. The *Balint* and *Dotterweich* courts both acknowledged that strict liability statutes authorized conviction of the "innocent."[164] Both courts also recognized that it is unjust to punish the innocent.[165] Finally, each court carefully avoided mentioning the punishment that would flow from its affirmance of the defendants' convictions.

Violation of the Narcotic Act was a felony that subjected Balint to up to five years in prison, yet the *Balint* court never mentioned either the word "felony" or the maximum punishment available under the statute.[166] Similarly, Dotterweich's three misdemeanor convictions meant that he could be sentenced to up to three years in prison and would spend the rest of his life with a criminal record.[167] But the *Dotterweich* Court took no note of Dotterweich's potential sentence. In order to uphold strict liability criminal statutes as a permissible form of regulation, the *Balint* and *Dotterweich* Courts avoided acknowledging that the punishments they imposed were every bit as real as those imposed by traditional criminal statutes.

The culpability principle remained just below the surface in *Balint* and *Dotterweich* because the Court firmly held it there.

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[164] *See* United States v. Dotterweich, 320 U.S. 277, 281 (1943) (acknowledging that the statute authorized punishment of those who were "otherwise innocent but standing in responsible relation to a public danger"); United States v. Balint, 258 U.S. 250, 254 (1922) (noting that the statute authorized punishment of "an innocent seller").

[165] *See Balint*, 258 U.S. at 254 (describing punishment of the morally innocent as an "injustice"); *Dotterweich*, 320 U.S. at 284 (using the more euphemistic term "hardship"). *Dotterweich* went further than *Balint* in expressing the Court's hope that discretionary actors within the criminal justice system would avoid using strict liability statutes to punish the morally innocent: "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers . . . .'" *Id.* at 285 (quoting Nash v. United States, 229 U.S. 373, 378 (1913)). By asserting that prosecutors, judges, and juries would demonstrate "good sense," "wise guidance," "judgment," "conscience," and "circumspection" in declining to punish the morally innocent, the Court strongly implied that such punishment was both immoral and unwise.

[166] *Dotterweich*, 320 U.S. at 285 (noting the facts of *Balint*).

[167] *See* 21 U.S.C. § 333(a)(1) (1940).

B. THE TURN AGAINST STRICT LIABILITY

The *Dotterweich* Court's faith that prosecutors would not use strict liability statutes to prosecute morally innocent people turned out to be ill-founded. In the decade between 1952 and 1962, the Supreme Court considered four cases in which prosecutors used strict liability criminal statutes to prosecute individuals the Court considered morally innocent. In *Morissette v. United States*,[168] the federal government prosecuted a man for theft without proving that he intended to steal and despite strong evidence that he had a reasonable good faith belief that the property had been abandoned. In *Lambert v. California*,[169] the state prosecuted a woman for failing to comply with a registration requirement of which she neither knew nor had any reason to know. In *Smith v. California*,[170] the state prosecuted a bookseller for possessing an obscene book even though he did not know the book's contents. Finally, in *Robinson v. California*,[171] the state prosecuted a person for being addicted to narcotics without proving whether the addiction was acquired voluntarily or involuntarily and without proving any voluntary act of narcotics ingestion.

As will be shown immediately below, in each of these cases the Court thwarted the prosecution because it believed it was unjust to impose punishment without proof of moral culpability. But because the Court had previously rejected the culpability requirement in *Balint* and *Dotterweich*, it struggled to find a legal basis for its decision to invalidate these convictions. In *Morissette*, *Lambert*, and *Smith* the Court held that a conviction could not be sustained without proof of mens rea, but it grounded this holding on a different legal rationale in each case (first statutory construction, then the act–omission distinction, then emanations from the First Amendment). Finally, in *Robinson*, the Court overtly broke with instrumentalism, holding that it was cruel and unusual to impose punishment without proof of culpability. But the decision in *Robinson* was not grounded on the lack of a mens rea requirement. Rather, it was based on the Court's belief that narcotics addicts are not responsible moral agents—despite the fact that Robinson's addiction did not meet the traditional definition of legal insanity. In other words, although *Robinson* rejected instrumentalism's rejection of morality, it retained instrumentalism's rejection of tradition as a source of moral and legal standards. As we will see below, this rejection of tradition in favor of

[168] 342 U.S. 246 (1952).
[169] 355 U.S. 225 (1957).
[170] 361 U.S. 147 (1959).
[171] 370 U.S. 660 (1962).

scientism made *Robinson*'s effort to revive the culpability principle too disruptive for the Supreme Court to maintain.

1. Morissette *and Statutory Construction*

The first case, *Morissette v. United States*,[172] involved a defendant who went onto a practice bombing range owned by the federal government, collected a number of spent bomb casings, and made $84 selling them for scrap.[173] The casings had been "dumped in heaps" on the bombing range, and had been allowed to sit rusting for up to four years.[174] Morissette removed the casings in broad daylight and in plain view of those passing by, making no effort to hide what he was doing.[175] When the government investigated the disappearance of the casings, Morissette admitted taking them but told the investigators he thought they had been abandoned.[176] He was ultimately charged with violating 18 U.S.C. § 641, which made it a crime to "embezzle[], steal[], purloin[], or knowingly convert[]" government property.[177] At trial, Morissette tried to argue that he should be acquitted because his belief that the casings were abandoned negated any intent to steal, but the court refused to let him do so.[178] The Court of Appeals upheld this ruling on the ground that "knowing conversion" was a strict liability crime. Because Congress did not specifically state that intent to steal was an element of the offense, the court felt bound by *Balint* to construe the statute as imposing strict liability.[179]

The Supreme Court reversed Morissette's conviction and appeared to be shocked by the government's effort to prosecute him for theft under circumstances strongly suggesting that he was innocent of any intent to steal. Unlike the *Balint* and *Dotterweich* Courts, the *Morissette* Court focused on the fact that a criminal conviction would cause the defendant to suffer real punishment. The Court noted that Morissette was not only sentenced to two months imprisonment or a $200 fine,[180] but was

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[172] 342 U.S. 246.

[173] *Id.* at 247.

[174] *Id.*

[175] *Id.* at 248.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 248–49.

[179] *Id.* at 250 ("The court ruled that this particular offense requires no element of criminal intent. This conclusion was thought to be required by the failure of Congress to express such a requisite and this Court's decisions in *United States v. Behrman* and *United States v. Balint*." (citations omitted)).

[180] *Id.* at 248.

"brand[ed] . . . as a thief."[181] Such branding would impose significant stigma on Morissette because theft crimes are "invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution."[182] Had the bomb casings Morissette took been worth just a little more money, the crime would have had "the infamy . . . of a felony, which, says Maitland, is . . . 'as bad a word as you can give to man or thing.'"[183]

The imposition of punishment in the absence of culpability was, the *Morissette* Court said, "inconsistent with our philosophy of criminal law."[184] In language that had strong constitutional overtones, the Court asserted:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to."[185]

Two core ideas underlie this passage. The first is the culpability principle: Because punishment is the community's formal expression of blame or condemnation through the imposition of sanctions, it is unjust to impose punishment in the absence of culpability. The second idea flows from the first: A person is only culpable if he has a blameworthy state of mind. These ideas are "universal and persistent" in mature legal systems, *Morissette* asserted, and are so closely tied to our natural intuitions that they come spontaneously even to a small child.

The *Morissette* Court also pointed out that strict liability crimes tend to undermine many of the criminal procedural protections contained within the Constitution. By eliminating the mens rea requirement, such crimes move culpability questions from jurors to prosecutors, undermining the right to a jury trial.[186] More generally, such crimes "strip" the morally innocent defendant of the legal protections he would have received at common law, a

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[181] *Id.* at 276.

[182] *Id.* at 260.

[183] *Id.* (citations omitted). The statute under which Morissette was charged, 18 U.S.C. § 641 (1994), treated thefts of property worth less than $100 as misdemeanors and thefts of property worth more than $100 as felonies. *Morissette*, 342 U.S. at 248 n.2. The bomb casings Morissette took were worth $84. *Id.* at 247.

[184] *Id.* at 250.

[185] *Id.* at 250–51 (footnote omitted).

[186] *See id.* at 274 ("It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime." (quoting People v. Flack, 125 N.Y. 324, 334 (1891))).

move that constitutes "a manifest impairment of the immunities of the individual."[187]

And yet *Morissette* did not overturn the Court's prior decisions upholding strict liability crimes.[188] Rather, it framed its discussion of mens rea as a question of statutory construction rather than constitutional law.[189]

The *Morissette* Court did try to soften the instrumentalism of *Balint* and *Dotterweich* by characterizing them as involving "public welfare" offenses.[190] The Court noted that public welfare statutes imposed duties on members of a regulated industry who could reasonably be expected to know of these duties and comply with them.[191] Under such circumstances, failure to comply with a statutory duty involved culpability akin to negligence.[192] Moreover, the punishment such statutes imposed was light and involved little or no stigma.[193] Because public welfare offenses covered only those people who could reasonably be expected to know and comply with their statutory duties, and because such statutes imposed only light punishments, the *Morissette* Court did not call their constitutionality into question. But it left open the question of whether a strict liability criminal statute that was not restricted to unreasonable conduct or that imposed significant punishment or stigma was constitutional.

The Supreme Court considered this question in a series of cases decided in the late 1950s and early 1960s: *Lambert v. California*,[194] *Smith v. California*,[195] and *Robinson v. California*.[196] Because these were state

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[187] *Morissette*, 342 U.S. at 263.

[188] *Id.* at 260.

[189] *See id.* at 250 ("If [the strict liability cases] be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. . . . We think . . . that an effect has been ascribed to them more comprehensive than was contemplated.").

[190] *Id.* at 255.

[191] *Id.* at 256 ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.").

[192] *Cf.* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262 (1996) ("A defendant's culpability is . . . thought to consist either of a mental state that has a prohibited harm as its object . . . , or of the fact that the defendant had available to him evidence from which he should have formed a mental state concerning a prohibited harm (i.e., negligence).").

[193] *Morissette*, 342 U.S. at 256 ("[P]enalties [for public welfare offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation."). This assertion seems at odds with the fact that the statute at issue in *Balint* branded the accused as a felon and subjected him to up to five years in prison. *See supra* note 100 and accompanying text.

[194] 355 U.S. 225 (1957).

[195] 361 U.S. 147 (1959).

[196] 370 U.S. 660 (1962).

rather than federal cases, the Supreme Court could not use statutory construction to vindicate the culpability principle, for it had to accept the construction given the statute by the state courts. It could only invalidate these prosecutions through constitutional interpretation. In each case, the Court found that a statute authorizing punishment without culpability was unconstitutional, but in each case the Court employed a different rationale for its decision.

2. Lambert *and the Act–Omission Distinction*

In *Lambert*, the defendant was convicted of violating a statute that required all convicted felons who remain in Los Angeles for more than five days to register with the authorities.[197] Lambert had lived in Los Angeles for seven years, during which time she had been convicted of forgery, a felony. She never registered with authorities, but continued living in Los Angeles after her conviction.[198] There was no evidence that Lambert knew or had reason to know of the registration requirement.[199] Because the registration statute imposed strict liability, however, she was convicted.[200]

The Supreme Court held that Lambert's conviction violated her right to due process, but had real difficulty in stating why it reached this conclusion. The Court focused primarily on Lambert's lack of notice[201]: Lambert neither knew nor had reason to know of the registration requirement,[202] and therefore her failure to register was morally innocent. Her conviction certainly violated the culpability principle. But in *Balint* and *Dotterweich* the Court had affirmed the power of the legislature to authorize punishment of the morally innocent, and the *Lambert* Court was not interested in overturning those precedents.[203] Ultimately, it distinguished those cases on the ground that Lambert's conduct was "wholly passive—mere failure to register," whereas the other strict liability cases involved affirmative acts.[204] *Lambert* thus appears to stand for the proposition that when a statute criminalizes an omission, prosecutors are constitutionally required to prove "actual knowledge of the duty [to act] or proof of the probability of such knowledge."[205] But when the statute

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[197] 355 U.S. at 226.

[198] *Id.*

[199] In fact, the Court assumed that Lambert had no actual knowledge of the registration requirement. *Id.* at 227.

[200] *Id.* at 225, 227.

[201] *Id.* at 228.

[202] *Id.* at 227.

[203] *See id.*

[204] *Id.*

[205] *Id.* at 229.

criminalizes an affirmative act, it would appear that no such proof is required. As Justice Frankfurter (the author of *Dotterweich*) pointed out in dissent, it is hard to discern why there should be a moral or constitutional distinction between acts and omissions,[206] but this is the distinction the *Lambert* Court made.

3. Smith *and the First Amendment*

In *Smith*, the defendant was the owner of a bookstore who was convicted under an ordinance that criminalized possession of obscene books.[207] The ordinance did not require the defendant to know that the book was obscene. Possession—even without knowledge of the book's contents—was sufficient to support conviction.[208] As in *Lambert*, the statute authorized punishment of the morally innocent, and as in *Lambert* the Supreme Court struck it down as unconstitutional.[209] But this time the Court relied on the fact that the statute threatened First Amendment protections for freedom of speech. Although there is no First Amendment right to possess obscene materials, the Court noted that a statute forbidding such possession without any mens rea requirement will tend to inhibit the bookseller's willingness to carry many books that do enjoy First Amendment protection. If the only way to avoid criminal liability is to inspect every book one sells, a rational bookseller may limit his offering to those books he actually has time to inspect.[210] Because this strict liability anti-obscenity statute had a strong "tendency to inhibit constitutionally protected expression" the Supreme Court struck it down as unconstitutional.[211]

4. Robinson *and the Culpability Principle*

Finally, the defendant in *Robinson* was convicted under a California statute that made it a crime to "be addicted to the use of narcotics."[212] The

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[206] *See id.* at 230–31 (Frankfurter, J., dissenting) ("Surely there can hardly be a difference as a matter of fairness, of hardship, or of justice, if one may invoke it, between the case of a person wholly innocent of wrongdoing, in the sense that he was not remotely conscious of violating any law, who is imprisoned for five years for conduct relating to narcotics, and the case of another person who is placed on probation for three years on condition that she pay $250, for failure, as a local resident, convicted under local law of a felony, to register under a law passed as an exercise of the State's 'police power.'").

[207] 361 U.S. at 148–49.

[208] *Id.* at 149 (quoting L.A., CAL., MUN. CODE § 41.01.1 (declared unconstitutional 1959)).

[209] *Id.* at 155.

[210] *Id.* at 153–54.

[211] *Id.* at 155.

[212] Robinson v. California, 370 U.S. 660, 660 (1962).

statute did not require prosecutors to prove that the defendant ever possessed or used narcotics within the state, just that he was found within the state at a time when he was addicted.[213] In other words, the statute punished Robinson for the "status" of being addicted to narcotics.[214] The Supreme Court found that this statute violated the constitutional prohibition of cruel and unusual punishments because narcotics addiction was an "illness" that could be contracted "innocently or involuntarily."[215] Although the state had the power to restrict the liberty of those with illnesses that impact public health and safety, it did not have the power to *punish* them for having such conditions.[216] Just as the state could not constitutionally impose punishment for the "crime of having a common cold," it could not impose punishment for the "crime" of being a narcotics addict.[217] In his concurrence, Justice Douglas asserted that narcotics addicts are similar to the legally insane because they suffer from "compulsions" that deprive them of the capacity to control their actions.[218] Because narcotics addicts were not morally responsible for their actions, they could not constitutionally be punished for addiction.[219]

5. Summary

In these four cases, the Supreme Court moved toward full constitutional enforcement of the culpability principle, but this progress occurred on two separate tracks. In *Morissette*, *Lambert*, and *Smith*, the Court struck down statutes that punished those who were morally innocent because they lacked mens rea. Although the Court came close to holding that mens rea is a constitutional prerequisite to criminal punishment, it stopped just short of doing so and rested its decision in each case on a separate rationale: statutory construction (*Morissette*), the action–omission distinction (*Lambert*), or the First Amendment (*Smith*). In *Robinson*, on the other hand, the Court actually held that it was unconstitutional to punish a defendant in the absence of culpability. The Court did not base its decision on the lack of a mens rea requirement, however, but on the sense that the defendant himself was not a responsible moral agent, at least regarding his narcotics addiction. This holding appeared to represent a major,

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[213] *Id.* at 666.
[214] *Id.*
[215] *Id.* at 667.
[216] *Id.* at 666.
[217] *Id.* at 667.
[218] *Id.* at 671, 676 (Douglas, J., concurring).
[219] *See id.* at 677 ("A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well.").

constitutionally mandated change to the concept of criminal responsibility, and thus its implications were potentially much more radical and disruptive to prevailing criminal law doctrines than would be any holding that the Constitution requires proof of mens rea. As we shall see below, these implications caused the Supreme Court in *Powell v. Texas* to step back from its decision to enforce the culpability principle as a matter of constitutional law.

C. *POWELL V. TEXAS* AND THE LIMITS OF THE CULPABILITY PRINCIPLE

In *Powell v. Texas*,[220] a fractured Supreme Court simultaneously reaffirmed the constitutional status of the culpability principle articulated in *Robinson* and refused to enforce it.

Powell involved a defendant who was charged with public intoxication.[221] In his defense, Powell argued that he was an alcoholic, that alcoholism was a disease like the narcotics addiction at issue in *Robinson*, and that his public intoxication was simply a manifestation of this disease.[222] Just as the *Robinson* Court declared that it would be unconstitutional to punish someone for the "'crime' of having a common cold," Powell argued that it should be unconstitutional for Texas to punish him for exhibiting a symptom of alcoholism.[223]

To support this argument, Powell presented a psychiatrist to testify about his alcoholism. The psychiatrist defined "chronic alcoholic" as "an involuntary drinker, who is powerless not to drink, and who loses his self-control over his drinking."[224] He testified that Powell was a "chronic alcoholic, who by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink."[225] On cross-examination, the psychiatrist agreed that Powell's decision to take the first drink in any given drinking binge was a "voluntary exercise of his will," but then qualified this by saying "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence."[226]

Five Justices agreed with the proposition that chronic alcoholics could not be punished for drinking because "[c]riminal penalties may not be

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[220] 392 U.S. 514 (1968).
[221] *Id.* at 517.
[222] *Id.*
[223] *Id.*
[224] *Id.* at 518 (internal quotation marks omitted).
[225] *Id.* (alterations in original) (internal quotation marks omitted).
[226] *Id.*

inflicted upon a person for being in a condition he is powerless to change."[227] Nonetheless, the Court affirmed Powell's conviction on the ground that public intoxication involved some conduct—an appearance in public—that could not clearly be attributed to Powell's alcoholism.[228]

Although the ground of decision in *Powell* was narrow, the plurality opinion raised broad concerns about the argument that a person could not be held criminally responsible if his actions were caused by a "compulsion" or "disease" like alcoholism. Powell knew right from wrong, and he knew what he was doing when he decided to take a drink.[229] Thus he could not be said to lack mens rea, and his condition did not fall within the definition of legal insanity that had been the rule in many states since the mid-nineteenth century.[230] A reversal of Powell's conviction would have to be based on a psychiatric version of the culpability principle that was far from universally accepted within existing criminal law doctrine.

To enforce this version of the culpability principle, the plurality argued, the Court would have to answer a series of seemingly unanswerable—or at least highly contestable—questions. The two most prominent were: (1) What counts as a disease or compulsion, as opposed to a mere character flaw or personality trait?[231] (2) What is the relationship between a given "disease" or "compulsion" and a given defendant's moral

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[227] *Id.* at 567 (Fortas, J., dissenting) (opinion joined by Justices Douglas, Brennan, and Stewart); *see id.* at 548–49 (White, J., concurring in the judgment) ("Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.").

[228] *Id.* at 536–37 (plurality opinion). Justice White's concurrence in the judgment argued that Powell could not constitutionally be punished for drinking because this conduct was caused by his alcoholism, but that he could be punished for appearing in public while drunk because the record did not show that he could not have chosen to stay at home. *See id.* at 553 (White, J., concurring in the judgment) ("[N]othing in the record indicates that [Powell] could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street."). The plurality opinion, by contrast, held that Powell could be punished for drinking even if the drinking was "caused" by his alcoholism. Because Justice White's position was the broadest ground upon which a majority of the Justices agreed, it represents the actual holding of *Powell*.

[229] *Id.* at 518 (plurality opinion).

[230] *See* M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 719 (holding that a defendant could be acquitted on the basis of insanity only if he was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or as not to know what he was doing was wrong").

[231] *Powell*, 392 U.S. at 522 ("[T]here is no agreement among members of the medical profession about what it means to say that 'alcoholism' is a 'disease.' One of the principal works in this field states that the major difficulty in articulating a 'disease concept of alcoholism' is that 'alcoholism has too many definitions and disease has practically none.' This same author concludes that 'a disease is what the medical profession recognizes as such.'" (emphasis omitted)).

responsibility? In other words, at what point does the fact that the defendant has a strong urge or proclivity to commit a forbidden act strip him of moral responsibility for giving in to that urge?[232]

Underlying this difficulty was the fact that psychiatry and criminal law operate under a different set of assumptions.[233] Psychiatry assumes a deterministic world in which all aberrant behavior—indeed all behavior—can be explained through biological or environmental causes.[234] Criminal law, on the other hand, assumes that people possess free will and are capable of making moral choices, except in extreme cases such as those covered by the insanity defense. Were the Court to use the deterministic assumptions of psychiatry as a basis for overturning Powell's conviction, this reasoning could be used to move entire categories of criminal behavior outside of the criminal justice system.[235] Indeed, it could transform the entire criminal justice system from a "penal" system to a "therapeutic" one. Such a result would not necessarily be good news for criminal defendants. The plurality noted that if the government abandoned a punitive approach to crime in favor of a therapeutic one, the result could actually be *more* coercive in many cases: "One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit . . . . 'Therapeutic civil commitment' lacks this feature; one is typically committed until one is 'cured.'"[236]

The *Powell* plurality also worried about the institutional implications of enforcing the psychiatric approach to culpability advocated by Powell. By adopting such an approach, the Court could be forced to modify or

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[232] *Id.* at 526 ("It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a 'compulsion' to take a drink, but that he also retains a certain amount of 'free will' with which to resist.").

[233] *See id.* ("This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.").

[234] *See American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983) ("Psychiatry is a deterministic discipline that views all human behavior as, to a good extent, 'caused.'").

[235] *See Powell*, 392 U.S. at 534 ("If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'"). In fact, if all behavior is biologically or environmentally determined, it would seem that no one could be punished on the basis of moral culpability. The logical end result would be either the elimination of the criminal justice system or the abandonment of culpability as the measure of criminal responsibility.

[236] *Id.* at 529. This danger is vividly realized in the sexual predator commitment statute described in *Kansas v. Hendricks*, 521 U.S. 346 (1997), discussed in Part II, *supra*.

abandon several core criminal law doctrines. Traditional criminal elements (such as actus reus and mens rea) and defenses (such as insanity, duress, and mistake) developed over the centuries to determine the defendant's culpability in light of his conduct, state of mind, cognitive or volitional infirmities, and the pressures he faced in the situation. The *Powell* plurality expressed concern that the scope and application of such doctrines could be significantly altered by adoption of Powell's psychiatric approach to culpability.[237] Such alteration would be imposed on all fifty states and the federal government as a matter of constitutional law.

In light of the limited nature of psychiatric knowledge and the highly contested nature of the relationship between psychology and moral agency, the *Powell* plurality felt it was unwise to adopt a psychiatric approach to culpability. By constitutionally enforcing what the plurality saw as a radical new approach to culpability, the Court would drastically alter the relationship between the federal government and the states[238] and turn the Court into "the ultimate arbiter of the standards of criminal responsibility."[239] The *Powell* plurality refused to take on this role.

D. THE CONTINUED VITALITY OF THE CULPABILITY PRINCIPLE

Since *Powell*, the Supreme Court's efforts to enforce the culpability principle in the context of strict liability crimes have been less ambitious but more consistent. The Court has continued to maintain that criminal punishment in the absence of culpability could violate the Constitution,[240] but it has avoided deciding cases on a constitutional basis. Methodologically, the Court has chosen the statutory construction of *Morissette* over the constitutional interpretation of *Lambert*, *Smith*, and *Robinson*. Substantively, the Court has returned to *Morissette*'s focus on mens rea and avoided *Robinson*'s and *Powell*'s focus on psychology and moral agency. Throughout this period, and up to today, the Court has

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[237] *Id.* at 535–36 ("We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.").

[238] *See id.* at 535 ("Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant.").

[239] *Id.* at 533.

[240] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (noting that strict liability crimes do not "invariably" violate the constitution); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564 (1971) (noting that it "might raise substantial due process questions" if Congress enacted a strict liability statute regarding conduct that would not put a reasonable person on notice of the likelihood of regulation).

sought to vindicate the culpability principle in two ways: (1) by creating a stronger presumption of mens rea in criminal statutory interpretation,[241] and (2) by emphasizing the link between culpability and the justice of punishment.[242] But because the Court has limited itself to statutory interpretation, its current approach provides no protection to defendants prosecuted under state strict liability criminal statutes, nor even to federal defendants prosecuted under statutes the Court has previously construed as imposing strict liability, such as the Food, Drug, and Cosmetic Act.[243]

The Supreme Court has held since the 1970s that strict liability crimes are disfavored,[244] and has applied a presumption that federal criminal statutes require proof of mens rea even where they are silent as to this requirement.[245] Under this presumption, the Supreme Court interprets federal criminal statutes that are silent regarding mens rea to require prosecutors to prove that a defendant had a culpable state of mind.[246] Where the conduct covered by the statute is neither inherently wrongful nor dangerous, the Court interprets the statute to require actual knowledge of

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[241] Several commentators have praised the Court's adoption of a presumption of mens rea. *See, e.g.*, Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 888 (1999); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 889 (2005) (noting that the Supreme Court "uses heightened mens rea requirements to hard-wire into the definition of the crime judicially enforceable protections for blameless conduct"); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Criminal Interpretation*, 85 VA. L. REV. 1021, 1022 (1999); Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2434–35 (2006); *cf.* Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HAST. L.J. 137, 139 (2007) ("Although the apparent innocence rule is preferable to outright strict liability, it is now apparent that it has fallen far short in practice of ensuring mandatory culpability.").

[242] *See* cases cited *infra* note 245.

[243] *See* United States v. Park, 421 U.S. 658 (1975) (upholding *Dotterweich*'s reading of the Food, Drug, and Cosmetic Act as imposing vicarious strict liability on corporate officers).

[244] *See U.S. Gypsum Co.*, 438 U.S. at 437–38 ("While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements . . . [they have a] generally disfavored status." (citations omitted)).

[245] *See, e.g.*, Carter v. United States, 530 U.S. 255, 268 (2000) (noting the existence of a "presumption in favor of scienter"); Staples v. United States, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded."); Liparota v. United States, 471 U.S. 419, 426 (1985) ("[T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law."); *U.S. Gypsum Co.*, 438 U.S. at 438 ("[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.").

[246] *See Carter*, 530 U.S. at 269 ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'").

the law. For example, in *Liparota v. United States*, the Supreme Court held that a person could not be convicted of receiving food stamps without proper authorization unless that person knew of the authorization requirement.[247] Because acquisition of food stamps was not "a type of conduct that a reasonable person should know is subject to stringent public regulation [or one that] may seriously threaten the community's health or safety,"[248] a person who was unaware of the requirement could not reasonably be blamed for violating it. Thus the Court interpreted the statute to permit conviction only if prosecutors proved that the defendant knew he was violating the law.

On the other hand, where the conduct covered by the statute is wrongful in itself, the Supreme Court has interpreted the statute to require the lowest level of mens rea sufficient to ensure that only culpable defendants are subject to prosecution. For example, in *Carter v. United States*, the Court held that a federal statute prohibiting the taking of property from a bank "by force and violence, or by intimidation" did not require proof of a specific intent to steal the property.[249] The Court held that the mens rea presumption generally "requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[250] Because it is wrongful to take property by force, violence, or intimidation, there was no need for prosecutors to prove anything more than the intent to do so.

The Supreme Court has continued to follow the holding in *Smith v. California* that a heightened level of mens rea is required where a criminal statute implicates conduct protected by the First Amendment. In *United States v. X-Citement Video*,[251] the defendant was convicted of distributing child pornography for selling sexually explicit videotapes starring an underage actress to an undercover FBI agent.[252] The Court of Appeals held that the statute was unconstitutional because it permitted conviction for knowingly distributing a video without requiring proof that the defendant knew both (1) that the video contained depictions of sexually explicit conduct and (2) that one of the actors shown engaging in sexually explicit conduct was underage.[253] To preserve the constitutionality of the statute, the Supreme Court reinterpreted the statute to require knowledge of both

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[247] *See Liparota*, 471 U.S. at 433.
[248] *Id.* at 433.
[249] *Carter*, 530 U.S. at 268 (quoting 18 U.S.C. § 2113(a) (2006)).
[250] *Id.* at 269.
[251] 513 U.S. 64 (1994).
[252] *Id.* at 65–66.
[253] *Id.* at 67.

facts. The Court noted that it would be "absurd"[254] to suppose that Congress intended to punish people such as Federal Express carriers who delivered such videotapes without knowing that they contained pornography, for such people are morally innocent.[255] Moreover, because distribution of "nonobscene" pornography is protected by the First Amendment, the Court interpreted the statute to require knowledge of the facts that took the defendant's conduct outside the scope of constitutional protection, namely, the ages of the victims.[256]

The Supreme Court has interpreted even public welfare offenses to require a sufficiently blameworthy state of mind to satisfy the culpability principle. In such cases, the Court dispenses with the presumption of mens rea only where the defendant's conduct is sufficiently wrongful or dangerous that he can fairly be blamed for failing to realize it is regulated. For example, in *United States v. Freed*, the Court interpreted a federal statute criminalizing the possession of unregistered hand grenades to require proof that the defendant knew he possessed a hand grenade, but not proof that he knew of the registration requirement.[257] Hand grenades are sufficiently dangerous to put the defendant on notice that unrestricted ownership is probably not allowed: "One would hardly be surprised to learn that possession of hand grenades is not an innocent act."[258] Similarly, in *United States v. International Minerals & Chemical Corporation*,[259] the Court interpreted a statute criminalizing shipment of mislabeled acid to require proof that the defendant knew he was shipping acid, but not that he knew of the labeling requirement: "[W]here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[260] Where the defendant's conduct is so dangerous or wrongful that he should be aware that it is regulated, his failure to realize this fact is sufficiently culpable that he can constitutionally be punished. But if a law prohibits conduct that is innocuous in itself, the Court

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[254] *Id.* at 69.

[255] The Supreme Court's hypothetical Federal Express carrier is not unlike the hypothetical UPS delivery man described in Part I, *supra*, as being prosecuted under Florida's strict liability narcotics statute.

[256] *Id.* at 78.

[257] 401 U.S. 601, 607 (1971).

[258] *Id.* at 609.

[259] 402 U.S. 558 (1971).

[260] *Id.* at 565.

observed, a statute that punished it without requiring actual knowledge of the prohibition would raise "substantial due process questions."[261]

Perhaps most significantly, the Supreme Court has acknowledged that the reason it employs a presumption of mens rea is to avoid the injustice of imposing punishment without culpability.[262] The Court discussed the link between a mens rea requirement and the justice of punishment in *Staples v. United States*.[263] In *Staples*, the defendant possessed a semiautomatic rifle that had been modified into a machine gun.[264] He was charged with possession of an unregistered machine gun, a felony with a maximum sentence of ten years imprisonment.[265] Staples claimed he did not know that the gun was capable of operating as a machine gun.[266] The question in the case was whether the National Firearms Act required proof that the defendant knew his gun was fully automatic, or whether it simply required proof that he knew it was a gun.[267] The Supreme Court concluded that the statute required knowledge that the gun was fully automatic. Given the widespread private ownership of guns in this country, and their legitimate use for hunting or self-defense, gun ownership was not sufficiently dangerous or deleterious to put the defendant on notice of the likelihood of regulation.[268] Only knowledge that the gun was actually a machine gun would be sufficient to provide such notice, and therefore the Court required proof of such knowledge.[269]

In reaching this conclusion, the Court focused on the harsh punishment authorized under this statute. Possession of an unregistered machine gun was a felony with a ten-year maximum sentence: "In a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous."[270] Because

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[261] *Id.* at 564 ("Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . '*mens rea*' as to each ingredient of the offense.").

[262] *See, e.g.*, Carter v. United States, 530 U.S. 255, 269 (2000) (purpose of the presumption of mens rea is avoidance of "the risk of punishing seemingly innocent conduct"); s*ee also* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 754 (2002) (arguing that "[t]he [Supreme] Court has been interpreting mens rea to protect the morally innocent if the sentencing guidelines would likely require imprisonment upon conviction").

[263] 511 U.S. 600 (1994).

[264] *Id.* at 603.

[265] *Id.* at 602–03.

[266] *Id.* at 603.

[267] *Id.*

[268] *See id.* at 608–16.

[269] *Id.* at 619.

[270] *Id.* at 616–17.

the degree of punishment is supposed to reflect the degree of culpability,[271] it makes no sense to interpret a statute as authorizing ten years in prison for defendants who have no knowledge of the facts that make their conduct wrongful. The Court noted (as it had in *Morissette*) that "felony" is "as bad a word as you can give to man or thing,"[272] and that imprisonment was a punishment historically reserved for "infamous crimes."[273] It was "incongruous" (to say the least) to label someone as a felon and impose an "infamous" punishment on him without ever proving that he was morally culpable.

Despite enforcing a fairly strong presumption of mens rea, the Supreme Court has remained ambivalent regarding the constitutional status of the culpability principle. *Lambert* and *Robinson* have not been overturned, but they have not given rise to a significant line of constitutional culpability cases. The Court periodically implies that a statute that directly contravened the culpability principle might be unconstitutional.[274] On the other hand, the Court has never overturned *Balint* or *Dotterweich*. In fact, in *United States v. Park*,[275] the Court upheld *Dotterweich*'s ruling that the Federal Food, Drug, and Cosmetic Act imposes vicarious strict liability on responsible corporate officers.[276] Because the presumption of mens rea is predicated on statutory interpretation rather than constitutional interpretation, it does not directly affect state criminal statutes and it does not prevent Congress from enacting strict liability criminal statutes so long as it clearly expresses its intent to do so. What Herbert Packer wryly observed of the Court's approach in 1962 remains true today: "*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."[277]

V. WHAT IS AN ELEMENT? THE CULPABILITY PRINCIPLE, THE BURDEN OF PROOF, AND THE RIGHT TO A JURY TRIAL

One implication of the culpability principle is that the burden of proof in criminal cases should be higher than in civil cases. As discussed in Part

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[271] The question of proportionality between culpability and punishment is discussed more fully in Part VI, *infra*.

[272] *Id.* at 618.

[273] *Id.* at 617.

[274] *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564 (1971).

[275] 421 U.S. 658 (1975).

[276] *Id.* at 673 (referencing Ch. 675, 52 Stat. 1040, 1042 (1938)) ("Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.").

[277] Packer, *supra* note 12, at 107.

III, the key distinction between criminal and civil cases is that the former impose punishment whereas the latter merely impose liability. Put differently, the central question in a civil case is typically who should bear the *cost* of repairing an injury or furthering a social goal. The central question in a criminal case, on the other hand, is who should bear the *blame* for committing an unlawful act. Since social costs have to be borne by someone, it may be just to require that they be borne by the person who is most likely to have caused them, even if we are not certain that this person is responsible. But before we inflict formal societal blame on someone—before we label him as a criminal—we should be as certain as reasonably possible that he is guilty.

The Supreme Court formally announced in *In re Winship* that the Due Process Clause requires proof beyond a reasonable doubt of "every fact necessary to constitute the crime with which [the defendant] is charged."[278] The *Winship* Court predicated this holding explicitly on the culpability principle. Because criminal punishment involved not only the "possibility"[279] that the defendant would lose his liberty but also the "certainty that he would be stigmatized,"[280] courts could not use a burden of proof standard that would "leave[] people in doubt whether innocent men are being condemned."[281] The "moral force of the criminal law" would be "diluted" by the use of a lower burden of proof.[282] In concurrence, Justice Harlan wrote that our criminal justice system is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[283]

Winship is replete with language associated with the culpability principle: Criminal law performs a "moral" function.[284] Those convicted of crime are "condemned"[285] and "stigmatized."[286] For this reason, the law should take extra care to avoid conviction of the "innocent."[287] And yet there is an ambiguity at the heart of *Winship*, the same ambiguity we saw in the strict liability cases discussed in Part IV above. Despite the Court's use of the language of culpability, its actual holding in the case—that "every fact necessary to constitute the crime with which [the defendant] is

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[278] 397 U.S. 358 (1970).
[279] *Id.* at 363.
[280] *Id.*
[281] *Id.* at 364.
[282] *Id.*
[283] *Id.* at 372 (Harlan, J., concurring).
[284] *Id.* at 364 (majority opinion).
[285] *Id.*
[286] *Id.*
[287] *Id.* at 372 (Harlan, J., concurring).

charged"[288] must be proven beyond a reasonable doubt—does not preclude an instrumentalist approach to criminal law. A legislature could choose to eliminate an element central to culpability (such as mens rea) or reclassify it as an affirmative defense or sentencing factor and still comply with the literal terms of *Winship*, so long as the remaining elements are proven beyond a reasonable doubt. On the other hand, such an action would undermine the moral concerns that gave rise to the reasonable doubt standard in the first place. *Winship* left open the question of whether the Due Process Clause limits the power of the legislature to evade the reasonable doubt standard by eliminating elements or reclassifying them as affirmative defenses or sentencing factors.

This question was raised a few years later in *Mullaney v. Wilbur*.[289] Wilbur killed a man in a hotel room, apparently in reaction to the victim's sexual advances.[290] Maine's homicide statute defined murder as an unlawful homicide "with malice aforethought."[291] It defined manslaughter as an unlawful homicide committed "in the heat of passion, on sudden provocation, without express or implied malice aforethought."[292] Maine's Supreme Judicial Court interpreted the statute as imposing a presumption that every intentional homicide was committed with malice aforethought.[293] The defendant could negate this presumption by proving that he acted in the heat of passion upon adequate provocation.[294] The United States Supreme Court invalidated this burden-shifting scheme, holding that it violated *Winship*'s reasonable doubt requirement by forcing the defendant to disprove the existence of a key element of the offense. The question of whether the defendant acted in the heat of passion upon adequate provocation had been considered "the single most important factor in determining the degree of culpability" for homicide "almost from the inception of the common law of homicide."[295] Maine still considered this question central to the defendant's culpability, since the distinction between murder and manslaughter rested upon it.[296] Maine considered murderers

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[288] *Id.* at 364 (majority opinion).
[289] 421 U.S. 684 (1975).
[290] *Id.* at 685.
[291] *Id.* at 686 n.3.
[292] *Id.*
[293] *Id.* at 688.
[294] *Id.*
[295] *Id.* at 696.
[296] *Id.* at 698.

more "'blameworth[y]'" than manslaughterers and subjected them to much harsher punishment.[297]

The Supreme Court rejected the argument that *Winship* did not apply to this case because Maine law did not consider "heat of passion" an element but a partial affirmative defense that affected only sentencing.[298] *Winship* was concerned with "substance" rather than "formalism,"[299] the Court held, and therefore the question of whether a given fact was an element did not depend on how it was "defined by state law."[300] Otherwise the state "could undermine many of the interests that [*Winship*] sought to protect" by redefining the key elements of a crime as sentencing factors.[301] Because the question of whether the defendant killed in the "heat of passion" determined the defendant's degree of culpability and the extent of his punishment, it was an element that had to be proven beyond a reasonable doubt.

The Supreme Court's decision in *Mullaney* was similar to its decision in *Robinson* (discussed in Part IV.B above) in that it rejected a tradition as a source for defining and limiting the application of the culpability principle.[302] Prior to *Mullaney*, the burden of proving affirmative defenses had often been placed on the defendant.[303] These included not only the provocation defense at issue in *Mullaney*,[304] but other traditional affirmative defenses like insanity[305] and self-defense.[306] Maine's own practice of

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[297] *Id.* (alteration in original) (quoting State v. Lafferty, 309 A.2d 647, 671, 673 (Me. 1973) (Wernick, J., concurring)).

[298] *Id.*

[299] *Id.* at 699.

[300] *Id.* at 698.

[301] *Id.*

[302] *Mullaney* engendered significant academic commentary about its possible implications for constitutional criminal law. *See, e.g.*, Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 32 (1977) (noting the disruptive impact the Supreme Court's ruling in *Mullaney* could have on criminal law doctrine).

[303] *See* Patterson v. New York, 432 U.S. 197, 202 (1977) (Noting that "at common law the burden of proving the [provocation defense], as well as other affirmative defenses indeed, 'all . . . circumstances of justification, excuse or alleviation' rested on the defendant. This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." (citations omitted)).

[304] *See id.*

[305] *See* Leland v. Oregon, 343 U.S. 790, 797–98 (1952) (noting that "[i]n most of the nineteenth-century American cases . . . the defendant was required to 'clearly' prove insanity" and that some twenty states continued to place the burden of proving insanity on the defendant); M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 719 ("[E]very man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to [the jury's] satisfaction").

requiring the defendant to prove the provocation defense was over a hundred years old.[307] In fact, the Supreme Court itself had previously approved a statute giving the defendant the burden of proving the insanity defense.[308] The Supreme Court's holding in *Mullaney* threatened to invalidate hundreds of years of criminal law doctrine relating to affirmative defenses and to overturn the Supreme Court's own precedent relating to this issue, all in the name of the culpability principle.

Two years later the Supreme Court retreated. In *Patterson v. New York*,[309] the Court reinterpreted *Winship* and *Mullaney* as turning purely on the formal distinction between elements and defenses. *Patterson* presented almost precisely the same issue the Court decided in *Mullaney*: whether the state could require the defendant to prove that his intentional homicide should be treated as manslaughter because the defendant acted in the heat of passion. Patterson discovered his wife with the victim in a state of "semi-undress" and immediately shot the victim twice in the head, killing him.[310] Under the applicable New York statutes, an intentional homicide was considered murder unless the defendant could prove that he acted "under the influence of extreme emotional disturbance."[311] The defendant argued that his case was indistinguishable from *Mullaney*[312]: under both statutory schemes, the prosecution had the burden of proving that the defendant committed an intentional homicide, and the defendant had the burden of proving the partial defense of heat of passion or emotional disturbance. Under both statutes, the defendant's success in proving this defense determined both the amount of culpability attributed to the defendant and the amount of punishment he would receive. Thus Patterson argued that the prosecution should be required to prove beyond a reasonable doubt that he did *not* act under the influence of extreme emotional disturbance.

The Supreme Court ruled against Patterson, noting that Maine's murder statute made "malice aforethought" an element of the offense while

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[306] *See* Martin v. Ohio, 480 U.S. 228, 235 (1987) (noting that "the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove").

[307] *Mullaney*, 421 U.S. at 688.

[308] *Leland*, 343 U.S. 790.

[309] 432 U.S. 197 (1977).

[310] *Id.* at 198.

[311] *Id.* at 198 n.2. This language was taken from the Model Penal Code's reformulation of the "heat of passion" defense, which made the defense theoretically applicable in a broader range of cases by eliminating the requirement that the victim wrongfully provoke the defendant and that the defendant act before he had reasonable time to "cool off." Neither of these distinctions would have made any difference to Patterson's case, which fell within one of the most traditional "heat of passion categories," discovery of one's spouse in an act of adultery.

[312] *Id.* at 201.

New York's murder statute did not.[313] Maine's requirement that the defendant prove the provocation defense in order to negate the presumption of malice shifted the burden on a statutory element, but New York's requirement that the defendant prove the "extreme emotional disturbance" defense did not. This holding amounted to a purely formalistic reinterpretation of *Winship* and *Mullaney*. According to the *Patterson* Court, the requirement of proof beyond a reasonable doubt only applies to facts that the legislature designates as elements, regardless of the actual role those facts play in determining the defendant's culpability and punishment.[314]

The *Patterson* Court recognized that its formalistic approach to burden of proof created the risk that legislatures might redefine statutes in such a way as to create a higher risk of punishing innocent defendants.[315] But it considered this risk to be outweighed by the burden that a contrary decision would place on state criminal justice systems. The principle championed by the defendant seemed to have no limit to its application.[316] If the Court required prosecutors to prove every fact relevant to culpability beyond a reasonable doubt, it would have to invalidate the rules governing affirmative defenses that had been followed in many states over a period of centuries. Such a sweeping change was not justified by tradition, as the common law traditionally placed the burden of proving affirmative defenses on the defendant.[317] To avoid the disruption threatened by *Mullaney*'s application of the culpability principle, the *Patterson* Court reinterpreted *Winship* and *Mullaney* to cover only the burden of proving facts that the legislature had formally defined as elements. This negated the threat posed by the culpability principle, but also negated nearly all of the value of *Winship* and *Mullaney*.

After *Patterson*, the Supreme Court seemed willing to give the legislature almost complete free rein to decide which facts are elements and which are not. In a number of cases, it upheld statutes that made the judge rather than the jury the finder of facts that triggered significant enhancements of the defendant's punishment. These included statutes

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[313] *Id.* at 215–16.

[314] The *Patterson* Court acknowledged that the legislature's power to redefine the elements of an offense was subject to "constitutional limits," but the only limits the Court mentioned were that the legislature may not declare an individual guilty of an offense or declare that the issuance of an indictment or the proof of the defendant's identity creates a presumption of guilt. *Id.* at 210. The Court pointedly failed to say that the legislature lacks the power to transform elements relevant to culpability into defenses or sentencing factors.

[315] *Id.* at 208.

[316] *See id.* ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.").

[317] *Id.* at 202.

where the fact found by the judge triggered a five-year mandatory minimum sentence,[318] subjected the defendant to the possibility of the death penalty,[319] or increased the maximum sentence from two to twenty years.[320]

The Supreme Court reversed course once again, however, in the line of cases starting with *Apprendi v. New Jersey*[321] and culminating in *United States v. Booker*.[322] In these cases the Court struck down a number of statutes that predicated an increase in the defendant's punishment on a judicial finding of a given fact.[323] These statutes—some of which were virtually identical to those the Court had upheld over the prior decade—were held unconstitutional because they impermissibly reclassified an element of the offense as a sentencing factor. As the Court asserted in *Ring v. Arizona*: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[324]

In some ways, the *Apprendi* line of cases looks like a repudiation of *Patterson* and a reaffirmation of the original holding in *Mullaney*. In these cases, the Supreme Court rejected *Patterson*'s formalism, holding that the label the legislature attaches to a given fact was not dispositive in determining whether it is an element.[325] Rather, the key question was whether the fact increased the degree of punishment authorized for the crime.[326] If so, that fact was an element, and the constitutional requirements of a jury trial and proof beyond a reasonable doubt applied to it.[327]

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[318] *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986) (upholding a statute that required a five-year mandatory minimum sentence where the judge found that the defendant visibly possessed a firearm during commission of a specified felony).

[319] *See* Walton v. Arizona, 497 U.S. 639 (1990) (upholding a statute that called for the judge to find the existence of aggravating factors that subjected the defendant to the death penalty).

[320] *See* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (interpreting federal statute to increase the maximum penalty for illegal reentry into the United States from two to twenty years where the judge has found that the defendant was convicted of an aggravated felony prior to his initial deportation).

[321] 530 U.S. 466 (2000).

[322] 543 U.S. 220 (2005).

[323] The relationship of the *Winship–Mullaney–Patterson* line of cases to the *Apprendi–Booker* cases is also discussed in Ronald J. Allen & Ethan A Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005).

[324] 536 U.S. 584, 602 (2002).

[325] *See id.*

[326] *See Apprendi*, 530 U.S. at 490.

[327] *Id.* The only type of fact that the *Apprendi* Court excluded from this holding was the fact of a defendant's prior conviction.

On the other hand, the constitutional focus of the *Apprendi–Booker* line of cases differed fundamentally from that of *Winship* and *Mullaney*, in that the *Apprendi* Court made almost no reference to the culpability principle. Although the Court based its holding partly on the right to proof beyond a reasonable doubt,[328] its primary focus was on the right to a jury trial.[329] The Court asserted that the right to a jury trial was adopted because jury members are private citizens who can serve as a buffer between the defendant and the state.[330] By requiring that a jury find the existence of every fact that authorizes an increase in punishment, the Constitution protects defendants against the possibility of government oppression.[331]

The Supreme Court's decision in *Apprendi* to focus on the liberty-protecting function of the jury rather than the innocence-protecting function of the reasonable doubt standard enabled it to provide enhanced protection for defendants without being forced to invalidate broad areas of traditional criminal law doctrine. In fact, the Court took pains in *Apprendi* to show that its definition of "element" would not go farther than traditional common law doctrine in requiring facts relevant to punishment to be decided by the jury.[332] At common law, any fact that increased the defendant's punishment had to be alleged in the charging document and proven to a jury.[333] Under *Apprendi*, by contrast, the judge retained discretion to increase the defendant's punishment based on facts not proven to a jury, so long as the sentence remained within the range authorized by the statute.[334] *Apprendi*'s liberty-based holding was much easier to incorporate into the existing criminal justice system than *Mullaney*'s culpability-based holding would have been.

Although *Apprendi*'s approach to legislative manipulation of the offense elements is less disruptive than *Mullaney*'s, it is also far less protective. *Apprendi* restricts the legislature's ability to reclassify an element as a sentencing factor, but it does not appear to restrict the

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[328] *See id.* at 477; *see also Booker*, 543 U.S. at 230; Blakely v. Washington, 542 U.S. 296, 301 (2004); Ring v. Arizona, 536 U.S. 584, 600 (2002).

[329] *See Apprendi*, 530 U.S. at 477–83.

[330] *See id.* at 477 (noting that the purpose of the right to a jury trial is to "guard against a spirit of oppression and tyranny on the part of rulers" and to serve "as the great bulwark of [our] civil and political liberties" (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873))).

[331] *See id.* at 498 (Scalia, J., concurring) ("The founders of the American Republic were not prepared to leave [the criminal justice system] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.").

[332] *Id.* at 479 (majority opinion).

[333] *Id.* at 479–80.

[334] *Id.* at 481.

legislature's ability to reclassify an element as an affirmative defense. *Apprendi* has not changed *Patterson*'s holding that the legislature may put the burden on the defendant of disproving virtually any fact, so long as that fact is not labeled as an element.[335] Because the jury will ultimately decide the factual question regardless of whether the fact is treated as an element or an affirmative defense, the core concerns of *Apprendi* are arguably not implicated by such legislative manipulation. Legislatures appear to remain free to shift the burden of proof to the defendant by reclassifying elements closely associated with culpability, including mens rea, as affirmative defenses.[336]

Moreover, the restrictions *Apprendi* and *Booker* place on the power of legislatures to reclassify elements as sentencing factors are not as strong as they seem. So long as the reclassification allows judges to retain some discretion not to apply these factors in any given case, the *Apprendi–Booker* line of cases provides no bar. This line of cases explicitly holds that judges have the power to engage in fact-finding that will affect the defendant's sentence, so long as the fact-finding does not cause the sentence to be greater than that authorized by the statute under which the defendant was convicted.[337] A legislature that wishes to bypass the jury and the reasonable doubt standard can simply enact a basic criminal statute authorizing a wide range of sentences, and then give the judge discretion to impose any sentence within that range based on facts the judge finds at sentencing by a preponderance of the evidence. So long as the judge is not *required* to increase the sentence based on these facts, the statute will satisfy the requirements of the *Apprendi–Booker* line of cases.[338]

This is precisely what the current federal sentencing system does. Numerous federal statutes authorize a long maximum sentence for crimes (such as mail fraud)[339] that encompass a broad range of conduct involving

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[335] *See id.* at 485 n.12.

[336] Florida's strict liability drug-trafficking statute, *see supra* Part I, does precisely this.

[337] *See Apprendi*, 530 U.S. at 481.

[338] The *Apprendi* Court acknowledged that its holding permits legislatures to engage in this sort of manipulation, but dismissed the concern on the ground that "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime." *Id.* at 490 n.16. The Court's assurance that democratic accountability will serve as a constraint on "potentially harsh legislative action," *id.*, seems remarkably naïve or disingenuous in light of the tidal wave of criminal statutes authorizing extremely harsh penalties that has washed over the state and federal criminal justice systems over the past forty years, generally with strong popular support.

[339] *See* 18 U.S.C. § 1341 (2006) (authorizing punishment of up to twenty years for a single mail fraud violation).

varying degrees of culpability. The federal sentencing guidelines contain a long list of culpability-related facts that may be found at sentencing and advise the judge as to the specific weight to be given each fact at sentencing.[340] Judges retain discretion to depart from the guidelines, so long as these departures are "reasonable" in light of the statutory purposes of sentencing.[341] Under this system, many of the facts that have the greatest impact on the actual sentence to be served by the defendant are never presented to the jury and are proved under a mere preponderance of the evidence standard.[342]

As in the mens rea cases discussed in Part IV, the Supreme Court's protection against legislative manipulation of the elements of an offense is imperfect at best. In both sets of cases, the Court attempted to use the culpability principle to provide constitutional protections for criminal defendants, but did not use tradition as a guide for defining and limiting the scope of the culpability principle. In both sets of cases, the Court had to retreat from this effort once it realized the disruption the effort would cause to a broad range of traditional criminal law doctrines. Finally, in both sets of cases, the Court sought to protect the basic values underlying the culpability principle through compromise measures. In the mens rea cases, the Court enforced the culpability principle primarily through statutory construction. In the elemental manipulation cases, the Court focused on the structural protections provided by the jury. But in both sets of cases, the Court allowed legislatures ample room to subvert the culpability principle through crafty drafting of criminal statutes. We will see this pattern repeat itself one more time in the Supreme Court's cases regarding proportionality in sentencing, discussed immediately below.

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[340] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2010) (listing a range of factors to be considered in sentencing for mail fraud and similar crimes).

[341] *See* United States v. Booker, 543 U.S. 220, 261 (2005); *see also* Kimbrough v. United States, 552 U.S. 85, 101 (2007) ("[W]hile the statute still requires a court to give respectful consideration to the Guidelines . . . *Booker* permits the court to tailor the sentence in light of other statutory concerns as well.").

[342] For example, the U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 sets the "base offense level" for mail fraud at 7, which translates into a sentencing range of zero to six months for a first-time offender. If a defendant met all of the aggravating factors listed in § 2B1.1, his offense level would increase from 7 to 77. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1. The recommended sentence for someone with an offense level of 43 or above is life imprisonment. *See id.* § 5 pt. A. Since the statutory maximum sentence for a mail fraud violation is twenty years, such a defendant would receive a twenty-year sentence under the guidelines. In this situation, only one-fortieth of the guidelines sentence (six months) would result from the facts proven at trial. By contrast, thirty-nine-fortieths of the sentence (nineteen and a half years) of the guidelines sentence would result from facts proven to a judge at sentencing by a preponderance of the evidence.

VI. THE CULPABILITY PRINCIPLE AND PROPORTIONALITY IN PUNISHMENT

If it is unjust to impose punishment in the *absence* of culpability, it is also unjust to impose punishment in *excess* of culpability. Because punishment is the community's expression of moral condemnation or blame through the imposition of sanctions, there should be some relationship between the degree of blameworthiness and the degree of punishment. A pickpocket is not as blameworthy as a murderer and should not be punished as harshly.[343]

The Supreme Court has recognized for more than a century that the Cruel and Unusual Punishments Clause prohibits punishments that are excessive in relation to the defendant's culpability.[344] As will be shown below, the Court's effort to enforce the culpability principle followed a similar pattern in its proportionality cases as in the mens rea and elemental manipulation cases discussed above. The Court first sought to enforce the principle directly as a matter of constitutional law while explicitly rejecting tradition as a source of constitutional standards. It then retreated from this position in the face of the disruption it threatened to cause, and finally the Court settled on a middle ground that promotes the culpability principle in a weak and unprincipled fashion.

From the beginning, the Supreme Court's proportionality jurisprudence has been based on the culpability principle. For example, in *Weems v. United States*, the Supreme Court struck down a Philippine statute that imposed the punishment of "cadena temporal" for the crime of knowingly making a false entry in a public record.[345] This crime did not require that the defendant "injure . . . or intend . . . to injure anyone," nor did it require "any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it."[346] "Cadena temporal" required a minimum punishment of twelve years imprisonment doing "hard and painful labor" while wearing shackles and chains, followed

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[343] The idea that justice requires proportionality in punishment is an ancient one with strong acceptance throughout Western history. *See, e.g.*, *Exodus* 21:25; *Leviticus* 24:19–20 ("An eye for an eye; a tooth for a tooth."); 4 THOMAS AQUINAS, SUMMA CONTRA GENTILES 304 (English Dominican Fathers trans., Burns, Oates & Washbourne 1929) (1264) ("[T]he punishment should correspond with the fault, so that the will may receive a punishment in contrast with that for love of which it sinned."); V ARISTOTLE, NICOMACHEAN ETHICS ch. 3 (Roger Crisp trans., Cambridge Univ. Press 2004) (350 B.C.E.) ("What is just in this sense, then, is what is proportionate. And what is unjust is what violates the proportion."); 4 BLACKSTONE, *supra* note 26, at *15; 2 BRACTON, *supra* note 28, at 299 ("It is the duty of the judge to impose a sentence no more and no less severe than the case demands.").

[344] *See* Weems v. United States, 217 U.S. 349, 367 (1910).

[345] *Id.* at 363.

[346] *Id.*

by a lifetime of civil disabilities and subjection to state supervision.[347] The Court held that the imposition of this extremely severe punishment for an offense involving such a small degree of culpability was cruel and unusual: "Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[348] In reaching this conclusion, the Court explicitly refused to rely on tradition as a source of constitutional standards, stating that the Cruel and Unusual Punishments Clause "may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[349]

In the 1970s and early 1980s, the Supreme Court started thinking seriously about what it means to say that a punishment is disproportionate to the defendant's culpability. Although it seems obviously true to say that a major penalty should not be given for a minor offense—for example, a life sentence should not be given for a parking violation—any effort to move beyond this level of generality involves one in a series of difficult problems: How do we compare punishment and culpability against each other? Are the two concepts even commensurable? By what common scale should they be measured?

In *Gregg v. Georgia*,[350] a plurality of the Supreme Court attempted to solve this problem by setting forth a two-part analysis that the Court continues to use (in modified form) today. First, the plurality asked an "objective" question: Does the punishment comport with current "standards of decency," as indicated by legislative action, jury verdicts, and similar indicia of contemporary moral standards?[351] Second, it asked a subjective question: Does the punishment comport with the "dignity of man" or is it unconstitutionally excessive in the Court's judgment?[352] By framing its analysis this way, the plurality hoped to determine proportionality questions

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[347] *Id.* at 364.

[348] *Id*. at 366–67. Although there has been some controversy concerning whether *Weems* should be considered a proportionality case or a case involving inherently cruel methods of punishment, Margaret Raymond has established that Weems was seen in its own time as a proportionality case. *See* Margaret Raymond, *"No Fellow in American Legislation":* Weems v. United States *and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 293–95 (2006).

[349] *Weems*, 217 U.S. at 378. Forty-eight years later, in *Trop v. Dulles*, a plurality of the Court made this rejection of tradition more explicit by stating that the Eighth Amendment should be interpreted according to the "evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958).

[350] 428 U.S. 153 (1976).

[351] *Id.* at 173, 179–82 (citation omitted).

[352] *Id.* at 173 (citation omitted).

in a way that was not purely subjective, but that was also not completely reliant on the vicissitudes of current public opinion.

In several death penalty cases, this dual approach to proportionality analysis seemed to serve the Court well. In *Gregg v. Georgia*, the plurality held that the death penalty was not grossly disproportionate to the crime of murder, because legislative actions and jury verdicts showed strong societal support for it and because the punishment fit the crime in the Court's own judgment.[353] In *Coker v. Georgia*, on the other hand, the Court invalidated a statute imposing the death penalty for simple rape because Georgia was the only state that still authorized this punishment for this crime and because the Court did not consider rapists to be as culpable as murderers.[354] Finally, in *Enmund v. Florida*, the Court invalidated the death penalty for felony murder where the defendant neither intended nor directly caused the death, because this punishment had been rejected in the vast majority of states and because such defendants did not deserve the death penalty in the Court's judgment.[355]

The ease with which the Supreme Court reached its conclusion in these cases masked the deeply problematic nature of its approach to measuring proportionality. In each case, the Court could plausibly assert that both the objective and the subjective prongs of its analysis supported its decision. But the concurrence of the objective and subjective prongs in these cases was pure coincidence. It was unclear what would happen if public opinion strongly supported a punishment that the Court believed contrary to the "dignity of man." Would current "standards of decency" prevail over the Court's judgment, or vice versa?

The inadequacy of the *Gregg* approach to comparing punishment with culpability was further masked by the nature of the punishments in *Gregg*, *Coker*, and *Enmund*. All three cases involved the death penalty, the category of punishment for which it is easiest to make an intuitive comparison between culpability and punishment. One of the oldest and most recognizable statements of retributive proportionality is "an eye for an eye; a tooth for a tooth."[356] Although we do not literally follow this

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[353] *Id.* (noting that the death penalty "is an extreme sanction, suitable to the most extreme of crimes").

[354] 433 U.S. 584, 598 (1977) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.").

[355] 458 U.S. 782, 798 (1982) ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed." (internal citations omitted)).

[356] *See Exodus* 21:25; *Leviticus* 24:19–20.

prescription today, it is relatively easy to translate it to "a death for a death," or at least "a death for an intentional murder." In this light, the results in *Gregg*, *Coker*, and *Enmund* seemed intuitively obvious. But when the crime is not murder and the punishment is prison rather than death, it is much more difficult to find a reliable standard for measuring punishment against culpability. How much time in prison does a burglar deserve? What about a small-time fraudster, check forger, or shoplifter? How much punishment does a recidivist deserve as compared to a first offender? Mere recitation of the phrase "an eye for an eye" does not help answer these questions.

As the Court came to focus on this issue, it sought to abandon or reduce the scope of its proportionality jurisprudence. For example, in *Rummel v. Estelle*[357] the Court strongly implied that the proportionality requirements of the Eighth Amendment did not apply to cases involving sentences of imprisonment. In *Rummel*, the defendant was sentenced to life imprisonment under a recidivist statute after being convicted of obtaining $120.75 by false pretenses.[358] Rummel argued that it was unconstitutional to impose such a severe punishment for such a minor offense.[359] The Supreme Court responded by questioning whether there is any discernable constitutional distinction between "major" and "minor" offenses and whether a court is capable of determining how much punishment a given crime deserves.[360] Although Rummel's crime was nonviolent and involved a small amount of money, the Court noted these characteristics did not necessarily show that Rummel was less culpable than other criminals subjected to life sentences. A number of "major" crimes do not involve violence.[361] As for the dollar amount involved, a small-time or unsuccessful fraudster may be "be no less blameworthy" than a large-scale fraudster, "only less skillful."[362] Rummel himself was a recidivist, a fact that tended to show that he was more morally culpable than less experienced offenders.[363] Finally, the Court questioned whether it was capable of determining how much punishment any given crime deserved: "Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter,

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[357] 445 U.S. 263 (1980).
[358] *Id.* at 275–76.
[359] *Id.* at 265.
[360] *Id.* at 275–76.
[361] *Id.* at 275.
[362] *Id.* at 276.
[363] *Id.*

discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."[364]

In the eyes of the *Rummel* Court, the difficulty of measuring punishment against culpability—at least without the guidance of tradition—threatened to make its proportionality jurisprudence just as disruptive of the criminal justice system as its prior decisions in *Robinson* and *Mullaney*. As in those cases, the Court was being asked to substitute its judgment for that of the legislature based on a free-floating moral principle. There seemed to be no "neutral principle of adjudication"[365] that could prevent proportionality review from becoming the mere substitution of the Court's policy preferences for those of the legislature. Although the "evolving standards of decency" prong of the Court's analysis was supposed to protect against this danger, its actual capacity to do so was unclear.[366]

Rummel was followed by a period of deep instability in the Supreme Court's proportionality jurisprudence that to some degree persists to this day. The Court has not abandoned proportionality review, even in the context of prison sentences,[367] but it also has not found a reliable method for measuring proportionality.[368] Instead it has tried to find new ways to reduce the appearance that proportionality review allows the Court to supplant the primary role of the legislature in determining the appropriate sentence for a given crime. For a time the Court eliminated the subjective prong of the *Gregg* test, focusing solely on whether the punishment violated current "standards of decency."[369] But when this approach proved to be insufficiently protective of criminal offenders,[370] the Court reverted to using

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[364] *Id.* at 283–84.

[365] *Id.* at 267 (quoting Rummel v. Estelle, 568 F.2d 1193, 1201 (5th Cir. 1978) (Thornberry, J., dissenting)).

[366] *See id.* at 281–82 (questioning the value of determining current standards of decency through an interjurisdictional comparison of the authorized punishments for a given crime: "Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States. . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.").

[367] *See* Graham v. Florida, 130 S. Ct. 2011 (2010); Solem v. Helm, 463 U.S. 277 (1983).

[368] *See* Stinneford, *Rethinking Proportionality*, *supra* note 1, at 917–26.

[369] *See* Stanford v. Kentucky, 492 U.S. 361, 369 (1989) ("In determining what standards have 'evolved,' however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole."), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989).

[370] As several scholars have pointed out, one of the major flaws of the evolving standards of decency test is that it relies on majority will to protect criminal defendants from punishments authorized by majority will. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND

its "own judgment" once again.[371] The Court also adopted a highly deferential standard of review in proportionality cases,[372] but has only used this standard in prison cases, not those involving the death penalty.[373]

Most significantly for our purposes, the Supreme Court has reduced the importance of the culpability principle by declaring that retribution is merely one of four rationales from which a legislature can choose in determining the maximum permissible sentence for a crime. For nearly a century, the key question in the Court's proportionality analysis was whether the punishment matched the defendant's culpability for committing the crime of which he was convicted.[374] In the 1970s and 1980s, the Court

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DISTRUST 69 (1980) ("[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 n.200 (1989) ("The preferences of the majority should not determine the nature of the [E]ighth [A]mendment or of any other constitutional right."); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006) ("[D]eclaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed."); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 63 (2008) ("The rights enshrined in the Madisonian compromise are supposed to be good against the majority. It does not make sense to give a majoritarian interpretation of minority rights against the majority.").

[371] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313 (2002) ("[I]n cases involving a consensus, our own judgment is 'brought to bear,' . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977))).

[372] *See* Ewing v. California, 538 U.S. 11, 27–28 (2003) (holding that the question of whether a statutorily authorized prison sentence furthers one of the purposes of punishment was "appropriately directed at the legislature," not the Court); Harmelin v. Michigan, 501 U.S. 957, 1003–04 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (advocating "rational basis" review of statutorily authorized prison sentences).

[373] *See* Kennedy v. Louisiana, 554 U.S. 407, 441–45 (2008) (invalidating death penalty for rape of a child because the Court believed it created "risks of overpunishment" and might discourage reporting of this crime); *Roper*, 543 U.S. at 571 (striking down the death penalty for juveniles on the ground that it did not adequately further goals of retribution or deterrence); *Atkins*, 536 U.S. at 319–20 (2002) (striking down the death penalty for the mentally retarded on the ground that it did not adequately further goals of retribution or deterrence). The Court recently refused to give deference to the legislature in a case involving life sentences without possibility of parole for juvenile nonhomicide offenders. *See* Graham v. Florida, 130 S. Ct. 2011, 2028–30 (2010). It is unclear whether *Graham* signals a more general willingness on the Court's part to engage in proportionality review of prison sentences without giving automatic deference to the legislature. The Supreme Court's two-track approach to proportionality review in death penalty and prison cases is discussed in Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009).

[374] *See* Weems v. United States, 217 U.S. 349, 367 (1910) ("Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime

started asking whether the punishment furthered the goal of deterrence as well as retribution, but this inquiry remained formally separate from the Court's proportionality analysis.[375] The Court never upheld a punishment on the ground that it deterred crime,[376] and it never even suggested that a

should be graduated and proportioned to offense."); *see also* Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) ("It is generally agreed that punishment should be directly related to the personal culpability of the criminal defendant."); Solem v. Helm, 463 U.S. 277, 292 (1983) (stating that the severity of the punishment should be compared to the gravity of the offense "made in light of the harm caused or threatened to the victim or society, and the culpability of the offender"); Enmund v. Florida, 458 U.S. 782, 798 (1982) ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968))); Rummel v. Estelle, 445 U.S. 263, 271 (1980) ("This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."); *Coker*, 433 U.S. at 598 ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (holding that the death penalty is an "extreme sanction, suitable to the most extreme of crimes"); Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime."); O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) (noting that the state's power to punish is limited by the severity of the crime: "The state may . . . make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.").

[375] *See, e.g.*, *Gregg*, 428 U.S. at 183, 187 (determining first whether the death penalty for homicide was "totally without penological justification" in terms of retribution and deterrence, and then determining whether the punishment was "disproportionate in relation to the crime for which it was imposed").

[376] The closest the Court came to upholding a punishment on the ground that it furthered the goal of deterrence was the Court's suggestion in several cases that the *lack* of evidence concerning the deterrent effect of a given punishment meant that the Court should defer to the legislature's judgment. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 378 (1989) ("[I]t is not demonstrable that no 16-year-old is . . . significantly deterred [by the death penalty]. It is rational, even if mistaken, to think the contrary."), *abrogated by Roper*, 543 U.S. 551; *Gregg*, 428 U.S. at 184–85 (upholding the death penalty for intentional murder in part because "[s]tatistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have . . . been inconclusive"). In one case during this period, the Court used an apparent lack of deterrent effect as a partial justification for invalidating a punishment, but this decision was based on the Court's own speculation rather than empirical evidence. *See Enmund*, 458 U.S. at 798–99 ("We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" (citation omitted)). In all of these cases, the Court's judgment about the legal effect of deterrence mirrored the Court's judgment regarding the

punishment that was grossly disproportionate to the offender's culpability could be upheld because it furthered the ends of deterrence. In a number of cases, the Court failed even to mention deterrence or any other utilitarian theory of punishment.[377] Culpability remained the touchstone of proportionality review.

This all changed with Justice Kennedy's controlling concurrence in *Harmelin v. Michigan*.[378] Harmelin was sentenced to a mandatory term of life imprisonment as the result of his conviction for possessing in excess of 650 grams of cocaine, despite the fact that he had no prior convictions.[379] He appealed his sentence on the ground that it was so disproportionate to his offense that it amounted to cruel and unusual punishment.[380] The Supreme Court was split as to his claim. Four Justices thought the punishment was unconstitutionally disproportionate.[381] Two Justices refused even to reach this question, arguing that the Constitution does not prohibit excessive prison sentences.[382] Justice Kennedy, writing for himself and two other Justices, denied Harmelin's claim while purporting to preserve the Court's capacity to engage in proportionality review.[383] His opinion stated that the Court should "adhere[] to the narrow proportionality principle" he saw in the Court's prior cases.[384]

The focus of Justice Kennedy's opinion was deference to the legislature. It emphasized the legislature's greater institutional competence to make decisions regarding sentences,[385] the need to preserve the flexibility of the federal system,[386] and the need for the Court to base its proportionality decisions on "objective" standards.[387] It advocated use of

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defendant's culpability. In none of these cases did the Court examine data concerning the deterrent effect of the challenged punishment. In short, even though the Court started mentioning deterrence as one of the primary aims of punishment, none of its decisions upholding a punishment prior to 1990 were based on that punishment's deterrent effect.

[377] *See* Penry v. Lynaugh, 492 U.S. 302 (1989) (focusing on whether the mentally retarded as a group can be said to lack culpability necessary for imposition of the death penalty); *Solem*, 463 U.S. 277 (focusing on the disproportionality between the defendant's culpability for uttering a 'no account' check and imposition of a life sentence); *Coker*, 433 U.S. 584 (focusing on whether the commission of rape evinces sufficient culpability to justify imposition of the death penalty).

[378] 501 U.S. 957 (1990).

[379] *Id.* at 961.

[380] *Id.*

[381] *See id.* at 1009 (White, J., dissenting), 1027 (Marshall, J., dissenting).

[382] *See id.* at 994 (majority opinion).

[383] *See id.* at 996 (Kennedy, J., concurring in part and concurring in the judgment).

[384] *Id.* at 996–97.

[385] *Id.* at 998.

[386] *Id.* at 999–1000.

[387] *Id.* at 1000.

the "rational basis" test for reviewing legislative decisions regarding sentences.[388] Finally, and most significantly for our purposes, the opinion argued that legislatures should be free to choose from any of the four major theories of punishment—retribution, deterrence, incapacitation and rehabilitation—in determining the punishment for a given crime.[389] A majority of the Court now adheres to this aspect of Justice Kennedy's opinion.[390]

The Court's decision to unmoor its proportionality jurisprudence from the culpability principle radically changed the very concept of proportionality.[391] Whereas a culpability-based approach to proportionality asks whether the punishment is greater than the defendant deserves, the three utilitarian approaches authorized by the Court simply ask whether the punishment is useful to society.[392] Deterrence-based proportionality asks whether the punishment deters a sufficient quantity of crime to counterbalance the pain it inflicts on the defendant. Incapacitation-based proportionality asks whether the punishment prevents the defendant himself from committing a sufficient quantity of crime to counterbalance the pain it inflicts on him. Rehabilitation-based proportionality asks whether the punishment sufficiently decreases the risk that the defendant will commit further crimes once he is released.[393]

If legislatures are free to use any of the utilitarian theories of punishment as the measure of proportionality, they are also free to impose

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[388] *Id.* at 1004.

[389] *Id.* at 999.

[390] *See* Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

[391] A number of scholars in recent years have argued that the Court's proportionality jurisprudence under the Cruel and Unusual Punishments Clause should focus on culpability rather than utilitarian concerns. *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 699 (2005); Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1218–22 (2009); Stinneford, *Rethinking Proportionality*, *supra* note 1. *But see* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 286 (2005) (asserting that proportionality is a principle of limited government independent of the primary justifications for punishment).

[392] *See* Stinneford, *Rethinking Proportionality*, supra note 1, at 915–16.

[393] *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 594 (2005) ("Utilitarian theory also argues for punishment in proportion to past harm, but only when this will prevent future similar crimes by this offender, through deterrence, incapacitation, and/or rehabilitation, or prevent such crimes by others, through general deterrence and norm reinforcement."); *cf.* Francis Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 229 (1959) (noting that the "rehabilitative ideal has often led to increased severity of penal measures").

punishment far in excess of the defendant's culpability.[394] This fact was graphically illustrated in *Ewing v. California*.[395] In *Ewing*, the defendant was a small-time recidivist who was convicted of shoplifting three golf clubs and was sentenced to twenty-five years to life in prison under California's "three strikes" law.[396] Ewing appealed the sentence on the ground that it was grossly disproportionate to the offense of shoplifting.[397] A plurality of the Supreme Court decided against Ewing without even *considering* whether he deserved this punishment as a retributive matter. Rather, the plurality found that there was a rational basis for the legislature's judgment that this sentence would further the state's interest in deterrence and incapacitation.[398] On the same day it decided *Ewing*, the Court upheld a sentence of fifty-years-to-life for a defendant convicted of shoplifting videotapes on two occasions.[399] Since *Ewing* was decided, lower courts have upheld sentences of twenty-five years to life for recidivists who commit a crime as minor as stealing a slice of pizza.[400] Although *Harmelin* and *Ewing* purported to preserve proportionality review, the review they preserved was exceedingly weak.

Ewing did not spell the end of proportionality review, but it did bring such review to a new level of arbitrariness. As *Ewing* demonstrates, if the primary question the Court is supposed to ask is whether there is a rational basis for believing that a sentence furthers *some* goal of punishment, it is hard to imagine a proportionality challenge that could ever succeed. And yet the Court in recent years has struck down several punishments on the ground that they were grossly disproportionate to the offense. These punishments included the death penalty for the mentally retarded,[401] for minors,[402] and for anyone convicted of a nonhomicide offense;[403] a life

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[394] Indeed, because utilitarianism focuses on social benefit rather than individual desert, it would permit in principle punishment of the innocent. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 93 n.19 (1997) ("The main problem with the pure utilitarian theory of punishment is that it potentially sacrifices the innocent in order to achieve a collective good."); Kent Greenawalt, *Punishment*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1341 (Sanford H. Kadish ed., 1983) (noting that the most "damaging" critique of utilitarianism is that it "admits the possibility of justified punishment of the innocent").

[395] 538 U.S. 11 (2003).

[396] *Id.* at 17–20.

[397] *Id.* at 20.

[398] *See id.* at 25–27.

[399] *See* Lockyer v. Andrade, 538 U.S. 63 (2003).

[400] *See* Jack Leonard, *'Pizza Thief' Walks the Line*, L.A. TIMES, Feb. 10, 2010, at A1, *available at* http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10.

[401] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[402] Roper v. Simmons, 543 U.S. 551, 568 (2005).

[403] Kennedy v. Louisiana, 554 U.S. 407, 447 (2008).

sentence for a juvenile nonhomicide offender;[404] and a mandatory life sentence for a juvenile homicide offender.[405] To differentiate these cases from the weak *Harmelin–Ewing* approach to proportionality, I will call them the Court's "strong proportionality" cases.

The result in each of the strong proportionality cases appears to have been driven by the Supreme Court's judgment that the offender was not sufficiently culpable to deserve the punishment imposed.[406] But because culpability is no longer the official standard, the Court had to show that the challenged punishments failed to further *any* legitimate goal of punishment—especially deterrence, which the Court had described since the 1970s as being comparable in importance to retribution. The Court achieved this end in the strong proportionality cases by silently replacing the rational basis test it had employed in *Harmelin* and *Ewing* with a much less deferential standard of review. As in every other proportionality case the Supreme Court has decided, no conclusive evidence was presented in these cases as to whether the challenged punishment had a significant deterrent effect. But whereas in cases such as *Harmelin* and *Ewing*, the Supreme Court took the lack of evidence as a signal to defer to legislative judgment, it drew precisely the opposite inference in the strong proportionality cases. In these cases the Court took the lack of evidence as a signal to engage in its own speculation about the possible deterrent effect of the punishment. In each case, the Court concluded that there probably was no such effect.[407]

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[404] Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

[405] Miller v. Alabama, 132 S. Ct. 2455 (2012).

[406] *See Graham*, 130 S. Ct. at 2026 ("[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments."); *Kennedy*, 554 U.S. at 442 ("The goal of retribution . . . does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape."); *Roper*, 543 U.S. at 568, 569 ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. . . . [J]uvenile offenders cannot with reliability be classified among the worst offenders." (internal quotation marks omitted)); *Atkins*, 536 U.S. at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.").

[407] *See Graham*, 130 S. Ct. at 2028–29 ("Deterrence does not suffice to justify the sentence either. . . . Because juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions." (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))); *Kennedy*, 554 U.S. at 441, 444 (noting that "it cannot be said with any certainty that the death penalty for child rape serves no deterrent . . . function," but going on to speculate that "[w]ith respect to deterrence, if the death penalty adds to the risk of non-reporting, that, too, diminishes the penalty's

In sum, the Supreme Court still uses proportionality review to protect the values inherent in the culpability principle, but it does so in an inconsistent and disingenuous manner.[408] The weak proportionality cases (*Harmelin* and *Ewing*) show that where the Court wants to uphold a punishment it employs rational basis review and is willing to justify the punishment even on purely utilitarian grounds. The strong proportionality cases show that where the Court wishes to strike the punishment down, it covertly uses a higher standard of review and focuses primarily on culpability. This approach to proportionality review is not particularly consistent with the idea of the rule of law—but until the Court finds a more reliable way to measure punishment against culpability, it may be the best we can get.

VII. CONCLUSION

With respect to constitutional criminal law, we still live in the aftermath of the instrumentalist revolution. In the first half of the twentieth century, the Supreme Court adopted the instrumentalist rejection of morality and tradition, allowing legislatures to authorize punishment with no proof of culpability. This attitude toward constitutional criminal law conflicted with the various protections the Constitution provides criminal defendants, particularly the protection against Cruel and Unusual Punishments. Since the middle of the twentieth century, the Court has tried to resolve this conflict by renewing its reliance on both morality and tradition, but now in isolation from each other. The result has been the development of constitutional doctrines that are either empty or too disruptive to be workable. Although the Court currently seems to be trying to find its way out of this dilemma, it has not yet done so—and will not be able to do so until it returns to the common law synthesis of morality and tradition that underlies constitutional criminal law.

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objectives"); *Roper*, 543 U.S. at 571 ("As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument. . . . [T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."); *Atkins*, 536 U.S. at 319–20 ("[I]t seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.' . . . [T]hat sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders." (quoting Enmund v. Florida, 458 U.S. 782, 799 (1982))).

[408] Several scholars have noted that when the Supreme Court strikes down acts of legislation without the guidance of a constitutional standard, this creates serious separation of powers problems. *See, e.g.*, Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1159 (2006).