Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later

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What makes a person an intellectual, Professor Stephen Carter writes, "is the drive to learn, to question, to understand, to criticize, not as a means to an end but as an end in itself." That is a nearly apt description of Kent Greenawalt and his scholarship. Anyone who reads Greenawalt's many contributions to the field of criminal law cannot but come away convinced that he is an intellectual in the finest sense of the term. Greenawalt has no hidden agenda. When he writes, he thinks out loud. He asks questions, seeks to understand, and most of all, reflects. But, perhaps unlike Carter's image of an intellectual, Greenawalt is rooted in reality. His scholarship demonstrates that he believes the criminal law can be made more rational and just through reasoned analysis.

Greenawalt's scholarly temperament displays itself in moderate (for some of us, sometimes, maddeningly moderate) positions on criminal law. Greenawalt avoids "reductionist simplicities." Like the great Justice for whom he clerked, John M. Harlan, Greenawalt is nondogmatic, a balancer, unenamored of bright-line rules, without an "appetite for grandiose intellectual schemes," and disinclined to make statements in bold. Nor does he urge boldness by legislative and judicial bodies.

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3 Greenawalt clerked for Justice Harlan during the 1963 Court Term.
Boldness and moderation are relative terms. I observe this because this Propter Honoris Respectum allows me to invite readers to examine (or reexamine) a very old Greenawalt article, “Uncontrollable” Actions and the Eighth Amendment: Implications of Powell v. Texas (Uncontrollable Actions). This article, published three decades ago, was Greenawalt’s first venture into substantive criminal law scholarship after joining the academy. It focused on Powell v. Texas, a case primarily remembered for what the Supreme Court did not do—get involved in shaping doctrines of criminal responsibility. The article is infrequently cited today in legal scholarship, is probably on no “must read” lists of today’s young criminal law scholars, and is not likely to be on Kent Greenawalt’s own “Top Ten” (or even “Top Twenty”) list of his most important published contributions.

So, why do I use this issue to dredge up this early effort of Greenawalt’s? The primary reason is simple, and yet for me, sad. The past thirty years may have been the richest period ever in substantive criminal law scholarship. But, when I reread Uncontrollable Actions today it reminds me of how little the legislatures and courts have done in the past three decades to devise just principles of criminal responsibility. We have moved not one whit in the direction of Greenawalt’s 1969 visions and, indeed, have often moved in the opposite direction. So, for me, reading Uncontrollable Actions in 1999 is a little like pulling out a wonderful old book from the library, dusting it off, inhaling its musty aroma, and magically returning to a different—and, in this regard, better—time.

The Kent Greenawalt of the late 1960s—a moderate in an immoderate era—looks nearly radical when viewed in today’s conservative light. Ambrose Bierce defined radicalism as “the conservatism of

7 Separate searches of LEXIS and WESTLAW libraries discovered only 11 citations (one by Greenawalt himself) to the article in law journals. Search of LEXIS, Lawrev library, Allrev file (April 13, 1999); search of WESTLAW, TP-ALL (April 13, 1999). The WESTLAW search also turned up four A.L.R. citations.
8 In 1987, I bemoaned that “nineteenth and twentieth century American law journals include precious few articles that analyze, much less question, the underlying theories of criminal responsibility.” Joshua Dressler, Justifications and Excuses: A Brief Review of the Concepts and the Literature, 33 WAYNE L. REV. 1155, 1155 (1987). In the large picture of two centuries this was (and still is) correct, but there has been a welcome renaissance in theoretical and philosophical criminal law scholarship in the past few decades. See George Fletcher, The Fall and Rise of Criminal Theory, 1 BUFF. CRIM. L. REV. 275, 275 (1998) (describing these as “good times” in the theory of criminal law).
tomorrow injected into the affairs of today." In regard to matters of criminal law, we may fairly say that liberalism is the moderation of yesterday injected into the legal affairs of today.

Greenawalt wrote Uncontrollable Actions during an era, indeed at the peak, of judicial activism. By the standards of his time—a time when many lawyers and even more scholars felt that nearly all perceived ills could and should be resolved by the Supreme Court—Greenawalt counseled caution. When I first read his article, I considered his recommendations too timid. Yet today, criminal law and judicial "activists" would welcome the Supreme Court taking the path that Greenawalt recommended at that time. And yet, there is probably not a single member of today's high court prepared to take his 1969 counsel.

Thus, my contribution to this well-deserved tribute to Kent Greenawalt's scholarship comes in this odd form: a chance for us to return to the late 1960s, to a time when it was still possible to imagine a Supreme Court prepared to stick its institutional toes into philosophical waters and shape criminal law doctrine under the aegis of the United States Constitution. The title of this Article might just as well be "The Road Not Taken." It is too late to expect the Supreme Court to take Kent Greenawalt's sage 1969 advice, but I retain just enough of the spirit of those days in my aging bones to wish I were wrong.

I. Putting Greenawalt's Article in Historical and Philosophical Context

Robinson v. California seemed to foreshadow a critical period in constitutional history. The Supreme Court, already in its most activist stage, appeared ready to reform substantive criminal law as it was doing to criminal procedure. Justice Stewart announced that a California law, which made the status of narcotics addiction a criminal offense punishable upon conviction of not less than ninety days in county jail, inflicted cruel and unusual punishment in violation of the Fourteenth and, inferentially, Eighth Amendments to the United States Constitution. By so holding, the Court was not simply saying

9 Ambrose Bierce, The Devil's Dictionary 275 (1911).
10 The publication date of Uncontrollable Actions was June, 1969. See Greenawalt, supra note 5. Chief Justice Earl Warren retired from the Court on June 25, 1969. His departure and Warren Burger's appointment as Chief Justice commenced the gradual end of federal judicial activism in the criminal law field.
11 I did not read Uncontrollable Actions when it was first published (I was a year away from entering law school), but I remember reading it in the early 1980s.
13 See id. at 667.
that Robinson's punishment was grossly disproportional to the offense. It was making a more basic and important point—the State of California lacked constitutional authority to use the criminal justice system to punish Robinson at all for his status condition:

To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.14

The narrowest reading of Robinson is that punishment was barred because there was no proof that Robinson committed any act in the State of California resulting in his status of addiction.15 But to some—those who favored judicially inspired criminal law reform—the potential message of the case (at least, if one were prepared to downplay some troubling dicta)16 was that the Supreme Court might soon interpret the Eighth Amendment as prohibiting punishment not simply for status conditions, but also for conduct of morally blameless wrongdoers. Put differently, Robinson suggested the possibility that the Court would announce that the Eighth Amendment incorporates retributive "just desert" principles. To the question of who may be punished for their conduct, the answer would be "only morally culpable wrongdoers."

There were signs in Robinson that the Court was moving in that direction. One lesson a person can draw from Justice Stewart's opinion is that, at some point, the Eighth Amendment requires lawmakers to draw a line in the constitutional sand between criminal punishment and civil commitment:

[R]egulation [of drug addiction], it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase or possession of narcotics within its borders. In the interest of discouraging the violation of such laws, or in the interest of

14 Id.
15 See id. at 666 ("[W]e deal with a statute which makes the 'status' of narcotics addiction a criminal offense . . . whether or not [the offender] has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there."). According to Justice Harlan, the Constitution prohibits "punishment for a bare desire to commit a criminal act." Id. at 679 (Harlan, J., concurring).
16 The Court distinguished between Robinson's status offense, on the one hand, and laws punishing for purchase, possession, or use of narcotics, as well as for antisocial conduct resulting from drug use, on the other hand. See infra note 17 and accompanying text.
the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program . . . might require periods of involuntary confinement . . . . Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education . . . . In short, the range of valid choice which a State might make in this area is undoubtedly a wide one . . . .

. . . .

This statute, [however], is not one which punished a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotics addiction a criminal offense . . . .

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration . . . . But . . . a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . . .

Justice Douglas made much the same point in his concurrence:

I do not see how under our system being an addict can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person . . . .

. . . . The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.\(^\text{18}\)

Notice the italicized sentence. Justice Douglas (and others on the Court) believed that confinement itself was not a constitutional problem. What was a problem was convicting an addict or sick person of a crime. Douglas was only considering here punishment of a person for the "crime" of being insane or for being an addict, rather than for the acts of such persons. But the civil/criminal distinction runs deeper, and the Court might have been prepared in another case to look more deeply at the subject. As Professor Henry Hart explained, "What distinguishes a criminal from a civil sanction and all that distin-

\(^{17}\) Robinson, 370 U.S. at 664–66.

\(^{18}\) Id. at 674, 676 (Douglas, J., concurring) (emphasis in last paragraph added).
guishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."¹⁹ Such condemnation is the essence of a conviction because a crime is conduct that justifies the moral condemnation of the community.²⁰ Therefore, if condemnation of an actor is undeserved, a criminal conviction is unjust;²¹ if a blameless individual is dangerous, she can be subjected to civil commitment or other noncriminal law intervention.

This sharp dichotomy between civil and criminal forms of commitment, important to retributivists, is of minimal relevance in a utilitarian system.

[A utilitarian] theory rejects the importance of criminal law as a separate discipline and locates the criminal sanction within a matrix of devices designed to further the all-encompassing goal of social protection. The instrumentalist maintains that there is no intrinsic difference between criminal punishment and civil commitment; they both function to further the same goal of confining dangerous persons.²²

Thus, the seeds of something very important were planted in Robinson. The Supreme Court of 1962 was interventionist, and perhaps prepared to use the Eighth and Fourteenth Amendments to compel statutory reform of penal codes, particularly when criminal laws offended retributive principles of moral blameworthiness.

Robinson is not the only case that seemed to take this approach. Consider Coker v. Georgia.²³ A Georgia jury sentenced Ehrlich Coker to death after he raped a sixteen-year-old married female. The death sentence could easily have been justified on specific deterrence grounds. When he raped his victim, Coker was a prison escapee, serving three life sentences for a previous rape and murder of one young woman and the rape of a second. Thus, conclusively, Coker was a serial rapist willing to kill his victims. And it was evident that a sentence of life imprisonment could not—and did not—protect the com-

²⁰ See id. at 405.
   To blame a person is to express a moral criticism, and if the person’s action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law's excuses.
munity, as Coker committed his last rape as a "lifer" escapee. In the absence of a death penalty, Coker would receive no additional punishment for the new rape. As Coker told the victim's husband, "[I] have nothing to lose."  

Nevertheless, the Supreme Court held that Georgia could not execute Coker because rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not . . . We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.  

Thus, the Court applied a simplistic lex talionis, eye for an eye, retributive definition of what constitutes grossly disproportional punishment. If Robinson could be read as invoking a retributive answer to the question, "Who may be punished?," Coker seemed to provide a retributive answer to the related question, "How much punishment may be imposed?" A potential lesson from Robinson and Coker was this: punishment may not exceed in severity the harm caused by the offender (Coker); and a person may not be punished more severely than her personal desert (Robinson). If the offender is blameless, then no punishment—not even one day in prison—is permissible. 

Now of course, we know today that this "lesson" is incorrect. The Justices backed off from Robinson in Powell v. Texas. In Powell, the plurality held that conviction for public drunkenness of a person who, at least to some degree, was compelled by alcoholism to drink, did not violate the Fourteenth or Eighth Amendments. Justice Marshall distinguished Robinson on the ground that the California statute in that case punished a mere status, whereas the Texas law punished public conduct, albeit conduct of a chronic alcoholic. Marshall candidly explained why Robinson was not more broadly read:  

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless Robinson is so viewed it is diffi-

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24 Id. at 609 n.4 (Burger, C.J., dissenting) (emphasis omitted).
25 Id. at 598.
26 See George P. Fletcher, Rethinking Criminal Law 462 (1978) ("[T]he maximum level of punishment is set by the degree of wrongdoing; punishment is mitigated according as the actor's culpability is reduced."); Robert Nozick, Philosophical Explanations 363-64 (1981) (formulating that retributive punishment should be based on $R \times H$, in which $H$ is the magnitude of the wrongness of the act, and $R$ represents the person's degree of moral responsibility for the act, in which $R$ varies between "1" (full responsibility) and "0" (no responsibility)).
28 See id. at 536.
cult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.\textsuperscript{29}

The Supreme Court likewise cut back on \textit{Coker}. In \textit{Rummel v. Estelle}\textsuperscript{30} and \textit{Harmelin v. Michigan},\textsuperscript{31} the Court upheld, as not grossly disproportional, life sentences that were defensible only on utilitarian grounds.\textsuperscript{32} If \textit{Coker} remains good law, it only applies in the death penalty context; \textit{Rummel} and \textit{Harmelin} are to \textit{Coker}, then, what \textit{Powell} was to \textit{Robinson}.

And these two lines of cases do not stand alone. The Court’s on-again, off-again treatment of criminal responsibility doctrine is evident elsewhere. In \textit{In re Winship},\textsuperscript{33} the Supreme Court held that, to provide “concrete substance for the presumption of innocence,” the Due Process Clause requires the state to persuade the factfinder “beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”\textsuperscript{34} Accordingly, in \textit{Mullaney v. Wilbur}\textsuperscript{35} the Court determined that Maine could not allocate to the defendant the burden of persuasion regarding the common law provocation defense. \textit{Mullaney} applied a fairly sophisticated version of the \textit{Winship} concept of “the crime charged,” holding that part of what constitutes “the crime charged” is the person’s degree of blameworthiness. Thus, Maine had to prove beyond a reasonable doubt that the defendant’s culpability was commensurate with murder rather than

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\textsuperscript{29} \textit{Id.} at 533.
\textsuperscript{30} 445 U.S. 263 (1980).

In \textit{Harmelin}, the Court upheld a life sentence for the first-time offense of possession of 650 grams or more of cocaine. Justice Kennedy, speaking for a three-Justice plurality, stated that “the Eighth Amendment does not mandate adoption of any [particular] penological theory.” \textit{Harmelin}, 501 U.S. at 999. Justice Scalia, writing for himself and Chief Justice Rehnquist, observed that “[p]roportionality is inherently a retributive concept.” \textit{Id.} at 989. As a consequence, these two Justices would have held that, death penalties aside, the Eighth Amendment contains \textit{no} proportionality requirement and, thus, does not mandate a retributive approach to punishment.
\textsuperscript{33} 397 U.S. 358 (1970).
\textsuperscript{34} \textit{Id.} at 363–364.
\textsuperscript{35} 421 U.S. 684 (1975).
\end{quote}
manslaughter.\textsuperscript{36} In \textit{Patterson v. New York},\textsuperscript{37} however, over the objection of Justice Powell, the author of \textit{Mullaney}, the Court turned formalistic and essentially held that the constitutional presumption of innocence only applies to expressed or implied elements of an offense. Consequently, a state may largely avoid the dictates of due process by redefining crimes. A "crime" is little more than what the legislature says it is. Again, Professor Henry Hart tells us what we need to know and what makes Greenawalt's efforts at coherence desirable:

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 ["What is a crime?"] is simply that a crime is anything which is called a crime . . . . So vacant a concept is a betrayal of intellectual bankruptcy.\textsuperscript{38}

So, \textit{Patterson} was to \textit{Mullaney} what \textit{Rummel} and \textit{Harmelin} were to \textit{Coker}, and \textit{Powell} was to \textit{Robinson}.\textsuperscript{39} Each time the Court took steps toward providing some framework—typically retributive-based just desert principles—for conducting constitutional analysis of criminal law doctrine, it backed away. Herbert Packer's wry comment about the Supreme Court's \textit{mens rea} jurisprudence—that the Court believes that "\textit{mens rea} is an important requirement, but it is not a constitutional requirement, except sometimes"\textsuperscript{40}—applies to criminal responsibility doctrine more broadly.

Why has the Court been so inconsistent? Personnel changes on the Court—its increasing judicial conservatism—obviously influenced the process. But this is not a full explanation and has nothing at all to do with the \textit{Robinson-Powell} story, since the personnel changes follow-

\textsuperscript{36} See \textit{id. at 704}.

\textsuperscript{37} 432 U.S. 197 (1977).

\textsuperscript{38} Hart, \textit{supra} note 19, at 404.

\textsuperscript{39} I am oversimplifying this line of cases. After \textit{Patterson}, in sharply divided and unclear opinions, the Court further undermined—indeed, arguably overruled \textit{sub silentio}—\textit{Mullaney} and even \textit{Winship}. See, e.g., \textit{Montana v. Egelhoff}, 518 U.S. 34, 39-40 (1996) (upholding a Montana statute that provided that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of an offense"); \textit{Martin v. Ohio}, 480 U.S. 228, 230 (1987) (holding that a jury was not improperly instructed that a defendant had the burden of persuasion to prove self-defense in a murder prosecution, although murder required proof of "prior calculation and design," elements that seemingly cannot exist if the defendant acted in self-defense); \textit{see also} Ronald J. Allen, \textit{Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority}, 87 J. CRIM. L. \\& CRIMINOLOGY 633, 646 (1997) ("\textit{Winship} may very well have been eliminated [by \textit{Egelhoff}] as an independent constitutional doctrine.").

\textsuperscript{40} Herbert L. Packer, \textit{Mens Rea and the Supreme Court}, 1962 \textit{SUP. CT. REV.} 107, 107.
The Court's unwillingness to move boldly in this area is explained on more fundamental grounds. It was relatively easy for the Justices to intervene in the field of criminal procedure. The Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution expressly deal with matters of criminal procedure. The Court could interpret the text of these Amendments broadly or narrowly, but there was no doubt that the Framers intended to bring the Constitution to bear on matters of procedure. Thus, the legitimacy of the Court's intervention in that arena could not seriously be questioned, and the Justices had textual and historical guidance in their efforts.

In contrast, the Constitution says little or nothing about matters of criminal responsibility. The Eighth Amendment's Cruel and Unusual Punishment Clause has a murky history, and one reading of that history is that the Framers intended only to prohibit certain barbarous methods of punishment, not to bar excessive (disproportional) punishment. And it is far from evident that the Framers intended to incorporate in the Constitution any particular moral theory of "distribution" of punishment. That leaves only the vague Due Process Clause as a plausible candidate for the constitutionalization of principles of criminal responsibility. Thus, even for a Court inclined to do so, the Constitution provides little guidance in matters of criminal responsibility. This fact must have served as a yellow light of caution to the Justices. If they were going to intervene, they needed some limit-

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41 Justices Fortas and Marshall replaced Justices Frankfurter and Clark, respectively. In each case, the new Justice had a more activist approach to constitutional adjudication than his predecessor. Also, neither departure undermined the Robinson majority: Frankfurter did not participate in Robinson, and Clark dissented.

42 See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839 (1969) (suggesting that the Framers misinterpreted English law when they adopted the Eighth Amendment).


44 I use the term "distribution" as it is used in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11 (1968) (stating that "distribution" involves two questions: "Who may be punished?" and "What amount of punishment may be imposed?"). In light of my textual remarks about the Framers, candor compels me to point out that in Dressler, supra note 32, I urged the Court to apply retributive principles of punishment. As a matter of good criminal law doctrine, I believed then, as I do now, that this would be the best course of action. But there is no solid evidence that the Framers thought about distribution of punishment issues in adopting the Constitution, much less that they wanted to impose any particular moral theory on the states.
ing principles—some way to avoid ending up in the deep end of the pool without the capacity to stay afloat.

But, there may be more. Would we be surprised to learn that most, if not all, of the Supreme Court Justices were—and are—more comfortable wrestling with issues of criminal procedure than with matters of criminal responsibility? The former subject involves the familiar terrain of trial practice (many appellate judges were once trial judges and, before that, litigators) and the only-slightly-less familiar field of police practices (many appellate judges are former prosecutors). In contrast, to enter the realm of criminal responsibility, the Justices must delve into moral philosophy, criminology, and other nonlaw disciplines. Inbau and Reid are much easier to fathom than Kant and Rawls.

So, the Justices had reason to move slowly in the area of substantive criminal law. In the absence of constitutional text to guide them, the Justices—even the activists of the late 1960s—needed help in discovering a way to adjudicate without usurping the legislative branch. And this is where Kent Greenawalt and his *Uncontrollable Actions* article entered the picture. He and others may have sensibly read Powell as saying, in essence, “We will not become ultimate arbiters of criminal responsibility—this is a matter for the states—but we are prepared to enforce basic principles of penal justice if we can be convinced that there is some sensible way to limit our involvement.”

If I had been writing at the time, I would not have been the proper person to advise the Court. As a retributivist and, at the time, an uncompromising advocate of judicial activism, I would have tried to lead the Justices to the deep end of the pool, where they clearly did not want to go. But Greenawalt offered them a moderate alternative: he was (and is) a mixed theorist, neither a strict utilitarian nor retributivist; and he was (and is), like Harlan, a respecter of judicial restraint. *Uncontrollable Actions* provided the Court with a road map for moderate intervention. They did not take it. But, let's look at the path he recommended, at the road not taken.

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II. GREENAWALT’S MODERATE PATH

Uncontrollable Actions was published in 1969, a year after Powell was decided. Coker had not yet raped his victim, so the Court had not yet taken its retributive direction in that case, much less cut back on it, and the Winship doctrine and its up-and-down, in-and-out path was still around the corner. The Warren Court had just become the Burger Court, and the judicial activist era was “beginning to end,” although we could not know it then.\(^4\) This was still a time of hope for many lawyers and scholars—hope that the Supreme Court would “right wrongs” or, at least, illuminate wrongs and invite legal reform by the lower courts. Uncontrollable Actions was a great scholar’s effort to show the way to judicial reform of the substantive criminal law.

Greenawalt used his Uncontrollable Actions article to test the limiting principles announced in the Powell dissent. Justice Fortas, for four dissenters, claimed that Robinson stood for more than the status/act distinction suggested by Justice Marshall and the Powell majority:

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.\(^5\)

According to Fortas, “Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.”\(^6\) In Robinson, “the law” was a status offense, whereas in Powell, the offense involved conduct (public drunkenness), “[b]ut the essential constitutional defect [in Powell was] the same as in Robinson, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid.”\(^7\) He was punished for being in a state of intoxication in public, “a characteristic and involuntary part of the pattern of the disease.”\(^8\)

This interpretation of Robinson is narrower than the potential message one could have drawn from the case.\(^9\) According to Fortas, the Constitution only forbids a state from punishing a person for con-

\(^4\) After all, who could have predicted that the only Democrat to be elected in the next 24 years (Carter) would serve just one term and have no opportunity to make any Court appointments?


\(^6\) Id.

\(^7\) Id. at 567–68.

\(^8\) Id. at 559 n.2.

\(^9\) See supra text accompanying note 16.
duct that is a "characteristic and involuntary part of the pattern of a disease." But what does this mean? And more importantly, is this a principled limitation? If a person may not be punished for a characteristic pattern of her disease, why is it acceptable to punish her for conduct that, while not a characteristic of the disease, is compelled by it (e.g., a drug addict who robs to support her habit), or is compelled by a nondisease condition (e.g., a person who commits a crime under duress)?

To answer these questions, Greenawalt applied a mixed theory of punishment. He accepted the utilitarian position of "most modern theorists" in regard to the general justification of punishment. However, even then, Greenawalt expressed a tentative endorsement of retribution as a limitation on utilitarian goals. In typically cautious language, Greenawalt wrote that "moral blameworthiness can be argued to be a necessary condition," although not a sufficient one, for punishment. As a consequence of his acceptance of a place for retribution in the distribution of punishment, Greenawalt—like retributivists and the Robinson majority—valued the distinction between criminal punishment and civil commitment. He was prepared to acknowledge that although society has an interest in removing dangerous persons from the street, this interest should sometimes be enforced through non-criminal processes.

But another important part of Uncontrollable Actions was Greenawalt's invocation of the doctrine of "identification":

If a court is unable to differentiate those who should be punished from those who should not be punished, it is inevitable that either

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55 Greenawalt, supra note 5, at 939. Justice Black wrote in 1949 that "[r]etribution is no longer the dominant objective of the criminal law." Williams v. New York, 337 U.S. 241, 248 (1949) (Black, J.). At the time Greenawalt wrote, many (perhaps most) scholars equated retribution with mindless vengeance, as the "legitimation and even glorification of anger and hatred." David Dolinko, Three Mistakes of Retributivism, 39 UCLA L. Rev. 1623, 1650 (1992) (expressing the same view in more recent times).

56 David Dolinko has ruefully pointed out that "[i]t is widely acknowledged that retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment." Dolinko, supra note 55, at 1623.

57 See Greenawalt, supra note 5, at 939 (arguing that as a limitation on punishment, retribution has "considerably more appeal" than as the basis for punishment and that it "may be wrong to punish an innocent man even if that would be useful, or to inflict the death penalty on every person who breaks the speed limit in an automobile, even if that would save lives") (emphasis added).

58 Id. at 940 (emphasis added).
some who should be excused are punished or some who should be
punished are excused, or both. Complete accuracy of determina-
tion is bound to be impossible, but the percentage of possible error
is obviously relevant in deciding what excuses will be allowed.\(^{59}\)

As we will see, it is this matter—the ability to identify those who
should be exculpated from those who should not—that prevented
Greenawalt from taking some of his own retributive arguments as far
as they could go. But it is also the identification factor that should
have made his recommendations for some reform more palatable to
the Supreme Court.

Uncontrollable Actions essentially asked three questions: (1) Is pun-
ishment of chronic alcoholics for public intoxication undeserved or
useless?; (2) If yes, does the reasoning underlying (1) require the rec-
ognition of excuses in broader circumstances?; and (3) To what ex-
tent may the Constitution properly be invoked to compel states to
adopt penal codes consistent with the answers to the first two ques-
tions? On the first question, Greenawalt concluded,

\[\text{[E]ven if a state retains the offense of public intoxication, there are}
\text{strong reasons for excusing chronic alcoholics. Their blameworthi-
ness is questionable and of the utilitarian purposes of criminal pun-
ishment only isolation and rehabilitation are even plausibly served.}
\text{If these are sufficient to justify some form of compulsory treatment,}
\text{they can be satisfied by means other than criminal sanctions.}\(^{60}\)

How did Greenawalt reach this conclusion? In the fashion with which
we have grown familiar over the years, Greenawalt thought out loud,
unafraid of taking tentative positions based on questionable proposi-
tions, in an effort to develop a better argument. Greenawalt jet-
tisoned the “disease” term because it “add[ed] little intellectual
content” to the issue at hand.\(^{61}\) The crucial matter for him was

\(^{59}\) Id. at 941–42.

\(^{60}\) Id. at 956.

\(^{61}\) Id. at 949. As Greenawalt noted, one ordinary connotation of the term “dis-
ease” is that it is a condition acquired through no moral fault of the sufferer. Yet, this
is not necessarily true, as a person can obtain, for example, sexual diseases through
morally wrongful conduct; and, of course, a drug addict may be to blame for her
condition. \textit{See id.} at 947–48. But this fact must be irrelevant, or else \textit{Robinson} was
wrongly decided.

A second connotation of the term “disease” is that it implies medical treatment.
But the fact that a chronic alcoholic may need treatment does not mean that punish-
ment is necessarily inappropriate. \textit{See id.} at 948. Even if a person contracts a medical
condition innocently and even if that condition causes criminal conduct, it does not
inevitably follow that the actor should be excused for her criminal actions. The ques-
tion is not whether an actor’s conduct was caused by a disease, \textit{see generally} Michael S.
whether a chronic alcoholic—whether or not afflicted by a disease—is compelled to drink to excess or, more precisely, suffers from a grave impairment of capacity not to drink to excess.

Greenawalt started in characteristically mild fashion. Even if an alcoholic is (relatively speaking) powerless to drop drinking once he starts, in many cases "the alcoholic does not experience an overwhelming compulsion before he takes his first drink." So, why is the chronic alcoholic "compelled"? He offered a trial balloon:

If [the alcoholic] rationalizes his first drink by denying to himself the danger that intoxication will follow, it might be concluded that his conscious will is rendered effectively unable to deal with strong unconscious impulses. Blame may be inappropriate and deterrence impossible because the likelihood of an antisocial consequence, intoxication, is blocked from the alcoholic's perception.

But, Greenawalt conceded that his argument was hardly self-evident. Therefore, he suggested, "[p]erhaps the strongest arguments for saying that all chronic alcoholics are compelled are that punishment has proved utterly futile to reform them or deter them for any length of time, and that condemnation is not usually meted out for acts so pathetic and self-destructive." Ultimately, he backed away from the proposition that all alcoholics are compelled: "My general conclusion is that although there are problems with the dissent's model of chronic alcoholism, it does afford a sufficiently accurate description of at least some persons who suffer from one form of that condition."

Based on this narrower observation, he concluded that punishment of chronic alcoholics who are genuinely compelled is retributively wrong as undeserved; as for individual (specific) deterrence, the sufferer is undeterrable. Any general deterrence or rehabilitative justifications for punishing the sufferer are satisfied by civil commitment and other noncriminal procedures.

At first glance, the retributive component of Greenawalt's argument is an easy one to accept, but a second glance suggests difficulties. An alcoholic's "pathetic and self-destructive" condition cannot in itself

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62 Greenawalt, supra note 5, at 950.
63 Id. at 951.
64 See id. at 951-52.
65 Id. at 952 (emphasis added).
66 Id. at 953 (emphasis added).
justify the conclusion that alcoholics are morally blameless for their intoxication. Compassion is neither a sufficient nor necessary condition for recognizing an excuse defense. The real issue, as Greenawalt indicated, is whether an alcoholic suffers from a grave impairment of the capacity to take the first drink. In this regard, Greenawalt could be right (although the issue remains very much in doubt even today) that some alcoholics suffer such an incapacity and, therefore, once intoxicated, cannot justly be blamed for manifesting the drunken condition in public.

The problem arises when we move from the assumption that some alcoholics do not deserve punishment for their public intoxication to the question of how we distinguish the truly compelled alcoholic from those who merely suffer from a strong, but not overwhelming, desire to drink. The difficulty is that "coercion" has both an empirical component (what were the circumstances that drove the actor, and how strong were the pressures?) and a normative one (what strength of character do we have a right to expect of ourselves and others?). How does one measure the internal urges felt by an individual alcoholic so that a jury can make the normative judgment regarding coercion?

It is far harder to determine whether an alcoholic is truly compelled than it is to make sense of a coercion claim of a victim of an external threat of imminent death. Indeed, is there any way to make a reliable determination in the alcoholic's case? Perhaps not. But that leaves us in the untenable position of denying an excuse in all

67 See Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 So. Cal. L. Rev. 1331, 1361 n.175 (1989) (arguing that compassion is not a necessary condition for excusing: we sometimes properly excuse wrongdoers, such as the insane, although fear may prevent us from expressing deserved feelings of compassion); Dressler, supra note 61, at 682-89 (arguing that although compassion is a moral virtue, and that there is an "intimate relationship" between showing compassion and excusing, compassion is not a sufficient condition for excusing).

68 See, e.g., Herbert Fingarette, Heavy Drinking: The Myth of Alcoholism as a Disease (1988) (arguing, in part, that an addict's or alcoholic's behavior is the result of character, environment, culture, and other factors, that she does not suffer from a total lack of control, and that she can alter her damaging conduct); see also Herbert Fingarette, Addiction and Criminal Responsibility, 84 Yale L.J. 413 (1975).

69 See Dressler, supra note 67, at 1365-67.

70 Greenawalt incorrectly finds the case for a constitutionally-based excuse weaker in the case of a gun-to-the-head threat than in the Powell circumstances. See infra notes 114-17 and accompanying text.

71 It may be that the weak link in Greenawalt's article—the reason it had no impact on the Supreme Court—was that he starts with an analysis of alcoholics, whose claim of coercion is especially weak.
cases, even though, by hypothesis, some people deserve exculpation and, if so, are treated unjustly if they are convicted. Greenawalt’s solution seems to be to focus on external symptoms: he would have the court look at the drinker’s life and excuse those whose drinking is so self-destructive that we can assume that the internal pressures were beyond the actor’s capacity to withstand.

But does this work as a retributivist test? At first glance we might assume that those who drink constantly are persons suffering from overwhelming pressures, whereas those who avoid drinking for extended periods of time before going on a binge are the subject of weaker, noncoercive pressures. But in fact, the latter actor might be a strong-willed person who has the will to avoid drinking for long periods, but who occasionally succumbs to exceedingly strong pressures, whereas the constant drinker could be a weak-willed individual who regularly gives in to low-level temptation.72

Here, Greenawalt’s mixed theory of punishment and, in particular, his utilitarian beliefs, came to his (and chronic alcoholics’) rescue:

If it is assumed that all those who habitually drink to excess and behave in the manner of “loss of control” drinkers are, in fact, compelled, relatively accurate categorization on the basis of a defendant’s drinking habits and capacity to drink in private should be possible. . . . If the line is drawn more narrowly to excuse only those who can demonstrate powerlessness through evidence that goes beyond establishing a pattern of behavior, then identification would be more complicated and difficult. Since many authorities doubt the value of criminal penalties for public drunkenness at all, and no one regards public intoxication as a serious offense, the possibility that some who are not “powerless” will be excused under the broader category is not particularly disturbing.73

In short, there are alcoholics who don’t deserve punishment and there are people for whom the threat of the criminal law is useless, so we should define the excuse broadly enough to encompass the truly coerced; that some deterrable and blameworthy drunks will “get off” is a minor problem given the ineffectiveness of public intoxication laws and the triviality of the conduct at issue. This is no ringing endorsement for an excuse for chronic alcoholics, but one which makes utilitarian sense, and one which a retributivist who accepts the premise

72 See United States v. Moore, 486 F.2d 1139, 1145 (D.C. Cir. 1973) (giving the example that one addict may have a craving of 4 on a scale of 1 to 10, but a strength of character of only 3; another addict may have stronger medically-induced cravings at level 6, but with a stronger will of 8; the former will have intoxication problems, and the latter will not).
73 Greenawalt, supra note 5, at 955–56.
that some alcoholics are compelled to drink in public should find less unpalatable than the alternative of permitting the stigmatization of some morally innocent alcoholics.\footnote{A positive retributivist would not be altogether happy, since Greenawalt's solution results in morally guilty persons avoiding their just deserts. Nonetheless, the excuse might be defensible on the basis of the deontological principle that "it is better that ten guilty persons escape, than that one innocent suffer." \textit{4} WILLIAM BLACKSTONE, \textit{COMMENTARIES} \*358.}

On the second issue—do the principles underlying recognition of an excuse for public intoxication justify a defense in other circumstances?—Greenawalt correctly criticized the dissent for providing no reasoned basis for its expressed\footnote{\textit{See supra} notes 51–54 and accompanying text.} limitations on the defense.\footnote{\textit{See Greenawalt, supra} note 5, at 956.} Therefore, Greenawalt struck out on his own to develop principled limitations. He divided his analysis into three categories: other "compelled" acts; conduct that an actor does not realize is wrong; and non-compelled acts committed by chronic alcoholics and addicts. Greenawalt's analysis went on for pages, but here was his conclusion:

\begin{quote}
[T]he principle of the \textit{Powell} dissent is very broad, when viewed from the perspective of retribution and individual deterrence. When other utilitarian considerations and problems of identification are taken into account, however, many possible excuses based on the absence of blameworthiness or individual undeterrability are distinguishable, and may be rationally rejected even if the \textit{Powell} dissent is accepted.\footnote{\textit{Id.} at 972.}
\end{quote}

Greenawalt reasoned sensibly that, from a retributivist perspective, it is unjust to punish a person for \textit{any} compelled act; and a compelled actor is not personally deterrable. Consequently, he concluded that the \textit{Powell} dissent had broader implications than the Court was willing to admit. First, and notwithstanding \textit{Robinson's} dictum,\footnote{\textit{See supra} note 15.} Greenawalt reasoned that punishment for use, possession, or purchase for personal use of drugs by addicts is unjustifiable; the prospect of extended civil commitment should deter would-be addicts as effectively as the criminal law.\footnote{\textit{See Greenawalt, supra} note 5, at 958.} Second, Greenawalt concluded that "acceptance of the \textit{Powell} dissent certainly casts severe doubt on the tenability of a strict cognitive standard of insanity and compels a thorough reexamination of the grounds for such a standard."\footnote{\textit{Id.} at 962.} In short, the
M'Naghten\textsuperscript{81} standard is too narrow; either the law should include the "irresistible impulse" test\textsuperscript{82} or adopt the Model Penal Code version of nonresponsibility,\textsuperscript{83} which similarly includes a volitional prong.\textsuperscript{84} As for compelled acts that are not the result of mental illness, intoxication, or addiction—for example, acts committed under duress or necessitous natural circumstances—Greenawalt stated that it would be possible to permit a generalized compulsion defense, determined on a case-by-case basis, "that one's will was overborne, either by internal psychic pressures or by external force or necessity."\textsuperscript{85} Indeed, I would submit, a normative determination of coercion can be made more reliably in cases involving external forces than in intoxication circumstances. Nonetheless, Greenawalt unwisely punted on this suggestion: "one might reject" this defense on the ground that it would "be highly uncertain and would decrease the law's general deterrence by encouraging people to succumb to strong impulses they would have otherwise resisted."\textsuperscript{86}

Once Greenawalt turned from volition to cognition—from compelled actions to conduct that an actor does not realize is wrong—he concluded that the Powell dissent required no drastic changes in the law. According to Greenawalt, some forms of non-public-welfare strict liability offenses are defensible;\textsuperscript{87} as for public welfare offenses, he

\begin{itemize}
  \item \textsuperscript{81} See Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843).
  \item \textsuperscript{82} See, e.g., Parsons v. State, 2 So. 854, 859 (Ala. 1887) (stating that "so far under the duress of such disease as to destroy the power to choose between right and wrong").
  \item \textsuperscript{83} See MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).
  \item \textsuperscript{84} Even in 1969, Greenawalt was on very thin constitutional ice in this recommendation, as he recognized. In 1952, the Supreme Court unanimously rejected a due process claim that an insanity test devoid of a volitional prong was unconstitutional. See Leland v. Oregon, 343 U.S. 790, 800-01 (1952).
  \item \textsuperscript{85} Greenawalt, \textit{supra} note 5, at 963.
  \item \textsuperscript{86} Id. I find it hard to understand why Greenawalt resisted a defense in such circumstances, unless he did not want to appear too radical in his proposals. Yet, his position on the insanity defense was surely of greater practical significance than the proposed defense here. And it is hard to see how recognition of a defense of duress or necessity, especially if it were limited to imminent threats or circumstances, would reduce the general deterrent effect of the law or make otherwise law-abiding people more willing to succumb to "strong impulses."
  \item \textsuperscript{87} Greenawalt defended felony murder, although the actor is strictly liable for the death, because he is blameworthy for committing the initial felony: "[h]is only real complaint is that his penalty is disproportionate to his blameworthiness." Greenawalt, \textit{supra} note 5, at 965. He made a similar, concededly weaker, argument regarding statutory rape, applying the moral wrong doctrine: a male who has sexual intercourse out of wedlock with a female of any age is not free of blame and, therefore, assumes the risk that she is underage. See \textit{id}. To a retributivist, Greenawalt's arguments are unacceptable: disproportionate punishment is unjust because it results in punishment
took the fairly traditional position that they are acceptable, except where a serious penalty is imposed. In general, he concluded that punishment for negligence is justifiable, he was relatively unconcerned about punishment based on an objective standard of reasonableness that an actor cannot subjectively satisfy, and with two exceptions he supported retention of the strict ignorance of law and mistake of law doctrines that have developed over the centuries.

And what about serious criminal acts committed by alcoholics and drug addicts to obtain their intoxicants? The Powell dissent provided no defense here, and neither did Greenawalt. He felt it was unlikely that an alcoholic could prove that she lacked the capacity to get alcohol by any legal means, but "[m]ore important, such an excuse would probably weaken deterrence of those who might acquire money by legal means or who are voluntary users."

Thus, when the dust settled, Greenawalt had demonstrated that by applying a mixed theory of punishment—one that justifies punishment of morally blameless offenders if there are utilitarian grounds for doing so—and by recognizing the identification factor as an additional basis for retaining some criminal prohibitions, a quite moderate recipe for reform was possible.

in excess of that actor’s wrongdoing and as a consequence, involves punishment of an innocent portion of that wrongdoer. See id.

88 See id. at 966–67.

89 In a concededly "summary treatment [that] does not do justice to a complex subject," Greenawalt concluded that many negligent actors deserve blame for their carelessness. Id. at 967.

90 See id. at 968–69. If the person is "dim-witted or clumsy," she may be blamed for putting herself in a risky situation or for failing to make special efforts to conform to the standards of the ordinary person. As for those who cannot bring themselves up to the standard of the ordinary person, Greenawalt falls back on concerns of identification (one cannot distinguish those who cannot live up to the objective standard from those that simply do not), and specific deterrence (isolation of those who represent an ongoing danger).

91 According to Greenawalt, Lambert v. California, 355 U.S. 225 (1957), which prohibits punishment "when the actor has no reason to be aware that a course of conduct may be punishable, at least when his conduct is purely passive," was correctly decided. Greenawalt, supra note 5, at 969. He also favored exculpation of those who act on the basis of an incorrect interpretation of the law provided by an agency or tribunal authorized to interpret or enforce the law. See id. at 969–70. Such an excuse already is recognized at common law. See Dressler, supra note 61, § 13.02[B][2]. The Model Penal Code also recognizes this excuse. See Model Penal Code § 2.04(3)(b) (Proposed Official Draft 1962).

92 Greenawalt, supra note 5, at 971.
III. THE ROLE OF THE JUDICIARY IN PENAL REFORM

Greenawalt made a thoughtful case for criminal law reform. But could he justify judicial imposition of that reform? It is here that, reading his article with end of twentieth century sensibilities, Greenawalt seems least moderate. According to Greenawalt, notwithstanding what the framers of the Eighth Amendment may have had in mind,93 twentieth century case law, culminating in Robinson v. California,94 "gives the [E]ighth [A]mendment a sufficiently wide reading to support further extensions by the Court into questions of responsibility."95 And at least in the case of "extreme extensions of liability," the vague contours of the Due Process Clause can withstand use.96

More important were institutional reasons for judicial intervention. Greenawalt, mirroring the ideas of Justice Harlan,97 expressed an abiding faith in judicial rationality and its commitment to basic principles of justice:

Deciding who shall be excused from criminal liability does not ordinarily . . . involve the delicate balancing of political and social interests for which legislatures are so much better suited than courts. Moreover, it is doubtful if legislatures will frequently give this problem enough attention to ensure that its distinctions will be principled and that its determinations will reflect underlying societal notions of justice. In short, there is much to be said in this area for the kind of focused, deliberate, and principled analysis characteristic of the judicial function.98

So, how far was Greenawalt willing to see the judiciary oversee state law? He began with a critical proviso. He reminded readers that an important aspect of the Robinson holding was that "the difference between civil commitment and criminal punishment is of constitutional dimension," that "Robinson is right in holding that one does have a constitutional right not to have the 'criminal' label improperly attached to him," and that "society has a strong interest in punishing as criminal only those whom it condemns, and the general principle that

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93 See supra notes 42–43 and accompanying text.
95 Greenawalt, supra note 5, at 973.
96 Id. at 974.
97 Although Justice Harlan is generally considered a judicial nonactivist, he too saw a significant role for the Court to play in constitutional adjudication. See, e.g., United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (“Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.”).
98 Greenawalt, supra note 5, at 974.
criminal punishment should not be imposed upon those without a fair opportunity or capacity to conform is not one that should be lightly set aside."\(^9\)

How right Greenawalt was. Nobody should be treated as a criminal if he does not deserve condemnation, and a person does not deserve condemnation if he lacks the capacity or fair opportunity to conform his conduct to the law.\(^10\) As radical as this principle may seem to some today, it represents the narrowest and most reasonable retributive basis for recognizing criminal law excuses.\(^11\) Therefore, as a constitutional principle for evaluating state laws, it would bring the judiciary only a relatively small distance into criminal law reform; and, if modified by the identification doctrine, the principle takes the courts ever less far. Yet, as is his way, you will notice that Greenawalt backed away from even this retributive pronouncement, stating only that the retributive principles should not "be lightly set aside." But as a starting point, it was a good one.

Greenawalt suggested two possible "extreme" approaches to constitutional reform, which of course he rejected. The first approach—one that would involve nearly no judicial involvement—was to "declare unconstitutional only those bases of punishment condemned universally by the common law... All debatable issues of philosophy and social fact [would] be resolved by the states as they deem[ed] fit."\(^12\) This is, essentially, the current view of Chief Justice Rehnquist, Justice Scalia, and, apparently, Justice Thomas.\(^13\) Greenawalt consid-

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\(^9\) \textit{Id.} at 976.
\(^10\) \textit{See supra} note 61.
\(^11\) \textit{See} Dressler, \textit{supra} note 61, at 701–02.
\(^12\) Greenawalt, \textit{supra} note 5, at 974–75.
\(^13\) The Chief Justice and Justice Scalia followed this approach in \textit{Harmelin v. Michigan}, 501 U.S. 957 (1991). They concluded that the Eighth Amendment provides no limits on the length of punishment that a state may properly impose for any offense. Scalia and, more recently, Thomas have frequently interpreted constitutional text to coincide with common law doctrine. \textit{See, e.g.}, Wilson v. Arkansas, 514 U.S. 997, 930 (1995) (Thomas, J.) (holding that common law principles relating to an officer's authority to break into a dwelling "form[ ] a part of the Fourth Amendment reasonableness inquiry"); California v. Acevedo, 500 U.S. 565, 584–85 (1991) (Scalia, J., concurring) (concluding that, pursuant to common law understanding, a search of a closed container, discovered outside a privately owned building, is permitted without a search warrant). On occasion, this turn to the common law results in a broader interpretation of constitutional text than would otherwise occur. \textit{See, e.g.}, Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (hinting that pat-down frisks should not have been authorized by the Supreme Court because the purpose of the Fourth Amendment ban on "unreasonable searches" was "to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become
erred this position preferable\textsuperscript{104} to a second, more activist approach, based on the principle:

Blameworthiness—invoking notice of forbidden behavior and a capacity to conform—and usefulness are both constitutional prerequisites to punishment. Any defendant would have a constitutional right to show that he either had no reason to suppose he was doing wrong or lacked the power to avoid doing wrong, or that punishment of him would serve no useful purpose. . . . [S]uch a principle would overturn a good deal of existing law that is rationally defensible. Given the vagueness of the relevant constitutional provisions, so activist a role for the Court does not seem justified.\textsuperscript{105}

Of course, there were other approaches. Rather than take the position that the courts should bar any criminal law doctrine that does not satisfy both retributive and utilitarian goals, Greenawalt could have recommended that courts apply the limiting retributive principle that states may not punish those who lacked the capacity or fair opportunity to obey the law;\textsuperscript{106} punishment of blameworthy persons would not be subject to constitutional objection. Instead, Greenawalt offered a still more moderate compromise:

[T]he Court [would] candidly . . . evaluate considerations of blameworthiness and utility and . . . invalidate forms of criminal liability that are "unjust". . . . The Court may be better able to assess blameworthiness against prevailing standards of moral and criminal responsibility, as well as the deterrability of an individual actor and others like him, than it is to estimate the broader utility of punishment. . . . The starting point of a constitutional test in this area, therefore, should be whether the actor has a possible defense that he can not properly be blamed for and could not have been deterred from the wrongful act. A state should be permitted to preclude the asserted defense only if there is substantial reason for the Court to conclude that problems of identification would make the defense too difficult to administer or that some important purpose

\textsuperscript{104} See Greenawalt, supra note 5, at 979.

\textsuperscript{105} Id. at 975.

\textsuperscript{106} In essence, the argument would be that it "shocks the conscience" and violates the "decencies of civilized conduct," Rochin v. California, 342 U.S. 165, 172, 173 (1952), to punish morally blameless wrongdoers. This due process standard, when coupled with the Eighth Amendment's Cruel and Unusual Punishment Clause, could have served as the basis for a "just desert" limitation on state criminal laws.
of punishment, not equally well accomplished by civil remedies, is
served by punishing even those who are not blameworthy or
detrerrable.\textsuperscript{107}

Greenawalt warned that, in applying this standard, “the Court should
not substitute its own notions for prevailing societal views on ‘basic’
questions, such as whether free will exists, whether mental abnormal-
ity is a disease, whether deterrence works. These are not questions to
which reason and existing scientific knowledge give clear answers.”\textsuperscript{108}
On these matters, legislatures are entitled to make binding judg-
ments. But “[i]n working out the implications of [these] accepted
premises, . . . the Court should consider itself freer to reject legal doc-
trines whose inconsistency with those premises is demonstrable even if
not obvious.”\textsuperscript{109}

But isn’t the legislature better equipped than the judiciary to
make the judgment that a particular legal doctrine does not result in
needless or unjust punishment? That, certainly, is present-day gospel,
but it was not the accepted view in 1969, even by nonactivists such as
Greenawalt. And based on Greenawalt’s own cursory summary of
where his standard would take us, we can see that it would not have
resulted in radical changes in state and federal criminal codes. First,
according to Greenawalt, the Constitution requires a narrow igno-
rance of law excuse to encompass cases in which an actor “had no
knowledge of an applicable law, and no reason to think a law might
apply.”\textsuperscript{110} Second, in regard to mistakes of law, a constitutional de-
fense would be recognized in the limited circumstances recognized by
the Model Penal Code.\textsuperscript{111} Third, jail sentences for strict liability pub-
lic welfare offenses would be banned.\textsuperscript{112}

As for the issues raised directly in Powell, after climbing the hill,
Greenawalt nearly backed down. The problem centered on the very
real difficulty of identifying true compulsion. A legislature might do
well to provide a broad defense for chronic alcoholics charged with
public intoxication, but a constitutionally compelled defense could
only be defended in rare circumstances:

Claims of compulsion are harder to analyze than claims of innocent
ignorance because the concept of compulsion is so elusive. One
might decide, for this reason, that although constitutionalization of

\begin{thebibliography}{112}
\bibitem{107} Greenawalt, \textit{supra} note 5, at 975 (footnote omitted).
\bibitem{108} \textit{Id.} at 976.
\bibitem{109} \textit{Id.}
\bibitem{110} \textit{Id.} at 977. This is a moderate extension of \textit{Lambert v. California}, 355 U.S. 225
\bibitem{111} \textit{See Model Penal Code} \S\ 2.04(3)(b) (Proposed Official Draft 1962).
\bibitem{112} \textit{See Greenawalt, \textit{supra} note 5, at 977.}
some standard of fair opportunity to conform is appropriate, states should be able to treat impairments of capacity to resist antisocial impulses as they deem best. Though the issue posed in *Powell* is a close one, my judgment is that the Court should go as a matter of constitutional law [only] as far as . . . [to] acknowledge that there are some persons who can present persuasive evidence that their craving to drink leaves them truly powerless, and it should recognize that the unfairness of punishing such persons for public intoxication is not outweighed by strong countervailing reasons. As a constitutional matter, however, a state should not be required to forego punishment of chronic alcoholics who prove no more than their habitual drinking habits, since it is arguable whether every "loss of control" alcoholic is "compelled to drink in excess." A similar approach should be taken to other forms of addiction, and the constitutional excuse should include the crime of purchase and possession as well as use.\(^\text{113}\)

On other matters of volition, Greenawalt concluded that abolition of the insanity defense was of "very doubtful"\(^\text{114}\) constitutional validity; indeed, the defense needed to be enlarged to include volitional impairment.\(^\text{115}\) Because of identification problems, however, no other defense based on lack of volition—no constitutionally based defense of duress or necessity—was required.\(^\text{116}\)

There it is. The Greenawalt menu for constitutional reform was lean, if not fat-free. It strikes me as hard to disagree with the proposition that a penal system that implemented these changes would be a fairer one—and surely a more rational one—than the criminal law we have today. But there is more. A criminal justice system that had taken seriously his suggestions would have been one that we could have taken seriously. Penal codes too often are little more than a conglomeration of statutes enacted by legislators seeking political advantage, who have no real interest in determining whether the finished product is just or rational. *Uncontrollable Actions* provided a road map strong on rationality and reasonably powerful in terms of fairness. The Supreme Court unwisely ignored Greenawalt's advice.

**IV. Final Reflections**

Let me return to a question I posed earlier. Why have I focused in 1999 on this "early Greenawalt"? Rereading his article is, in part, simply a matter of nostalgia: it is a chance to remember a time when

\(^{113}\) Id. at 977-78.
\(^{114}\) Id. at 978.
\(^{115}\) See id.
\(^{116}\) See id.
many people not only believed that criminal law reform was possible, but that scholars could seriously participate in that reform. But there is another reason for my choice. Reading an “early Greenawalt” is a little like looking at an early Van Gogh painting—part of the fun is in looking to see if we can discover evidence of the greatness of a person early in his career.

Here we can. Uncontrollable Actions concludes with a message that, for me, expresses well the essence of Kent Greenawalt the scholar whom we have enjoyed over the past three decades:

The kind of approach suggested here would require the Court to engage in thorough and subtle analysis of proposed defenses, and would necessitate the making of close distinctions. Simple platitudinous broadsides would not be sufficiently responsive to the competing considerations. There is a strong argument that the Court should simply not embroil itself in this kind of balancing. If one is convinced that such a role is undesirable, he must revert either to the stance of minimum involvement or the general constitutionalization of a subjective standard of mens rea. Of these, the former seems the preferable alternative. But my own view is that the Court can profitably negotiate the suggested middle ground.117

There it is, all in a capsule. We see his desire for deep and subtle analysis, his rejection of shibboleths, his commitment to using his scholarship to help others reason about the Law; and, most especially, we see his devotion to principled legal reform. Everything Greenawalt has written in the past thirty years demonstrates his dedication to reason and his faith that the Law can provide a more compassionate society. We see, too, in this article Greenawalt’s resistance to everything that is not fairly close to the center.

As we prepare to leave the twentieth century, it is too late to think seriously that the Supreme Court will play a supporting role, much less exercise a leadership position, in bringing about a rational and just substantive criminal law. But a troubling question remains. Will Greenawalt’s form of scholarship even have a valued place in twenty-first century legislative ventures in legal reform? Put another way, will scholars who reflect on the criminal law and who reason calmly be heard by lawmakers over the din of those who offer simple solutions to sophisticated problems? I am not sure that there is a pleasing answer to these questions. But about this I feel fairly confident: whenever it is that our nation does return to reasoned debate about the criminal law, Kent Greenawalt’s great body of scholarship should help light the way.

117 Id. at 978-79 (footnote omitted).