St. John's Law Review

Volume 94, 2020, Number 2 Article 9

Manning, Powell, and the Habitual Misunderstanding of Addiction

Matt Dean

COMMENT

MANNING, *POWELL*, AND THE HABITUAL MISUNDERSTANDING OF ADDICTION

MATT DEAN[†]

INTRODUCTION

Bryan Manning, a homeless resident of Roanoke, Virginia, has been arrested and prosecuted more than thirty times for drinking or possessing alcohol.[1] Although alcohol is generally legal in Virginia,[2] Mr. Manning was forbidden for many years to "possess" it, "consume" it, or "purchase" it.[3] On at least one occasion, police arrested him merely for "smelling like alcohol."[4] On another occasion, he was arrested because he happened to be shopping in a Walmart where alcoholic beverages were sold.[5] For decades, Virginia law permitted a state circuit court to issue a civil order declaring an individual to be "an habitual drunkard" and "prohibiting," or interdicting, "the sale of alcoholic beverages" to that individual "until further ordered."[6] At a civil hear-

[†] Managing Editor, *St. John's Law Review*; J.D. Candidate 2021, St. John's University School of Law. I am grateful to Professor Sheldon A. Evans for his guidance in writing this Comment, to the editorial board and staff of the *Law Review* for their hard work and friendship, and to my family and my chosen family for their love and support. Also, a special thanks to my husband and biggest cheerleader, Brian J. Keller, who encourages me in everything I do.

[1] *See* Complaint for Declaratory and Injunctive Relief ¶¶ 51, 54, Hendrick v. Caldwell, 232 F. Supp. 3d 868 (W.D. Va. 2017), *aff'd sub nom.* Manning v. Caldwell, 900 F.3d 139 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019) (No. 16-CV-0095) [hereinafter Complaint].

[2] Nine Virginia counties forbid the sale of "liquor by the drink" and are thus classified as "dry," but sales of beer and wine are permitted everywhere. VA. ALCOHOLIC BEVERAGE CONTROL AUTH., A COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR FISCAL YEAR ENDED JUNE 30, 2018, at 41 n.1 (2018), https://www.abc.virginia.gov/library/about/pdfs/2018-annual-report.pdf [https://perma.cc/2KYV-JMH5]. Even within "dry" counties, "certain towns" and "election districts" may choose by referendum to permit the sale of liquor by the drink. *Id.*

[3] *See* Complaint, *supra* note 1, ¶ 50.

[4] *Id.* ¶ 52.

[5] *Id.*

[6] *See* Act of Mar. 29, 1993, ch. 866, § 1, 1993 Va. Acts 1257, 1293 (current version at VA. CODE ANN. § 4.1-333); Manning v. Caldwell (*Manning II*), 930 F.3d

ing on October 5, 2010, the Circuit Court for the City of Roanoke entered just such an interdiction order against Mr. Manning.[7] "[N]either Mr. Manning nor counsel on [his] behalf" attended that proceeding.[8]

An individual subject to an interdiction order could face as much as a year in jail merely for possessing or attempting to possess alcohol, or for public intoxication.[9] The statute neither defined the term "habitual drunkard" nor provided guidance for courts in determining how or when to apply it.[10] In *Manning v. Caldwell* (*Manning II*), the United States Court of Appeals for the Fourth Circuit, sitting en banc, invalidated Virginia's interdiction scheme on two grounds.[11] First, the court held that the statutory scheme was unconstitutionally vague because it failed to establish "any standard of conduct by which persons [could] determine whether they [we]re violating the statute."[12] Second, relying in part on the United States Supreme Court's plurality opinion in *Powell v. Texas*,[13] the Fourth Circuit concluded that Virginia's interdiction scheme violated the Cruel and Unusual Punishment Clause of the Eighth Amendment because it penalized homeless alcoholics "for conduct that [was] both compelled by their illness and [was] otherwise lawful for all those of legal drinking age."[14] According to the dissent, however, the majority's opinion introduces a "nebulous 'nonvolitional conduct' defense," which promises to "metastasize and absolve individuals from

264, 268 (4th Cir. 2019) (en banc). In 2020, the Virginia General Assembly amended the interdiction statute to preclude the interdiction of "habitual drunkard[s]." Act of Mar. 4, 2020, ch. 150, § 1, 2020 Va. Acts (Va. Advance Legis. Serv. Mar. 2020) (codified at VA. CODE ANN. § 4.1-333).

Only one other state, Utah, implements an interdiction scheme similar to Virginia's. *See* Brief of National Law Center on Homelessness & Poverty as Amicus Curiae in Support of Plaintiffs-Appellants at 17, *Manning II*, 930 F.3d 264 (No. 17-1320).

[7] *See* Complaint, *supra* note 1, ¶ 49.

[8] *Id.*

[9] *See* VA. CODE ANN. § 4.1-322 (2016) (providing that an interdicted individual who "possess[es] any alcoholic beverages" or is "drunk in public" is "guilty of a Class 1 misdemeanor"); *id.* § 18.2-11 (2014) (providing that the "authorized punishment[ ] for conviction of a [Class 1] misdemeanor" is "confinement in jail for not more than twelve months"); *Manning II*, 930 F.3d at 269.

[10] *Manning II*, 930 F.3d at 268.

[11] *Id.* at 285–86.

[12] *Id.* at 274.

[13] 392 U.S. 514 (1968).

[14] *Manning II*, 930 F.3d at 281 (emphasis omitted).

personal responsibility for all forms and manners of criminal acts."[15]

Legal scholar Glanville Williams once wrote that "cases in which the moral indignation of the judge is aroused frequently make bad law,"[16] and *Manning II* may be just such a case. A majority of the en banc court concluded that the burden of interdiction was too great for Mr. Manning and other homeless alcoholics to bear. But in lifting that burden, the en banc court erred in relying on the Supreme Court's fragmented decision in *Powell*.

Within weeks of the decision in *Manning II*, litigants in the Fourth Circuit and elsewhere began to cite it either as precedent or as a candidate for reversal.[17] For example, the plaintiffs in a case before the United States District Court for the District of Maryland cited *Manning II* to support an argument that the Immigration and Nationality Act's Public Charge Rule "is subject to void-for-vagueness review."[18] And the correct interpretation of *Powell* recently became an issue in *City of Boise v. Martin*.[19] Noting that the various interpretations of *Powell* among the Courts of Appeals have created a "three-way split," the petitioner in *Martin* asked the Supreme Court to review "the fractured opinion in *Powell*," which has "left unsettled an important question of . . . law."[20] Whether and to what extent *Powell* remains good law has been an open question for some time.[21] The Fourth Circuit's decision in *Manning II* has only served to renew the urgency of that question.

---

[15] *Id.* at 304 (Wilkinson, J., dissenting).

[16] GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 105 (1957).

[17] Moreover, as is to be expected, Courts in the Fourth Circuit have begun treating *Manning II* as binding precedent. *See, e.g.*, Hill v. Coggins, 423 F. Supp. 3d 209, 218 (W.D.N.C. 2019) ("[L]aws that nominally impose only civil consequences warrant a 'relatively strict test' for vagueness if the law is 'quasi-criminal' and has a stigmatizing effect." (quoting *Manning II*, 930 F.3d at 273)).

[18] Plaintiffs' Motion for a Preliminary Injunction and Supporting Memorandum at 28–30, CASA de Maryland v. Trump, No. 19-CV-2715, (D. Md. Sept. 16, 2019).

[19] Reply Brief for Petitioner at 6, City of Boise v. Martin, 140 S. Ct. 674 (2019) (No. 19-247).

[20] *Id.* The Court denied the petition for certiorari and let stand the three-way circuit split. *See Martin*, 140 S. Ct. 674 (mem.).

[21] *See* Maria Slater, Note, *Is* Powell *Still Valid? The Supreme Court's Changing Stance on Cruel and Unusual Punishment*, 104 VA. L. REV. 547, 564–72 (2018).

I. BACKGROUND

A. Virginia's Interdiction Scheme

As originally enacted in 1873, Virginia's interdiction statute "had a rehabilitative purpose."[22] If at least two of a person's "relatives or friends" believed him to be "an habitual drunkard and lost to self-control," they could swear a "complaint on oath in writing," initiating a process by which the alleged "drunkard" could be committed "to the care and protection" of the Virginia Inebriates' Home.[23] The statute limited the term of confinement to twelve months.[24] It also provided that anyone who felt "aggrieved" by being deemed "an habitual drunkard" could demand a jury trial "as a matter of right."[25] If the jury found that the accused was not in fact "an habitual drunkard and lost to self-control," the court was required to "dismiss[ ] the whole proceeding[ ]" and enter "a judgment against the parties making complaint, for costs."[26]

In 1934, Virginia enacted the interdiction scheme that remained in force until *Manning II* invalidated it in 2019.[27] Section 4.1-333(A) of the Code of Virginia allowed a state circuit court to "enter an order of interdiction prohibiting the sale of alcoholic beverages" to "any person" who "ha[d] been convicted of driving . . . while intoxicated or ha[d] shown himself to be an habitual drunkard."[28] Although the statute required "a hearing upon due notice,"[29] it neither defined "habitual drunkard" nor provided "any elements or standards" to guide a court in determining that an individual "qualifie[d] as an 'habitual drunkard.' "[30] Nor did the statute set forth any procedure by which an interdicted individual could challenge or rescind the "habitual drunkard" label. The circuit court had authority to "alter, amend or cancel" its interdiction orders "as it deem[ed] proper,"[31] but if it declined

---

[22] *Manning II*, 930 F.3d at 270 n.3 (citing Va. Code ch. 83, § 5 (1873)).

[23] Ch. 83, § 5.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Manning II*, 930 F.3d at 270 n.3.

[28] Act of Mar. 29, 1993, ch. 866, § 1, 1993 Va. Acts 1257, 1293 (current version at VA. CODE ANN. § 4.1-333(A)).

[29] *Id.*

[30] *Manning II*, 930 F.3d at 268 ("Instead, [the statute] relegate[d] those matters 'to the satisfaction of the circuit court.' ").

[31] Ch. 866, § 1, 1993 Va. Acts at 1293 (current version at VA. CODE ANN. § 4.1-333(B)).

to do so, interdiction otherwise remained in effect "until further ordered."[32] In other words, unless or until a court acting on its own initiative deemed it proper to lift an interdiction order, "habitual drunkard" became "a lifelong label."[33]

The interdiction scheme, as amended in 2020, no longer applies to "habitual drunkards."[34] However, the statute in its current form still permits the interdiction of any individual who "has been convicted of driving . . . while intoxicated."[35] The 2020 amendments provided nothing new in the way of process; an order of interdiction still stands until the issuing court lifts it.[36] The "portion of the [interdiction] scheme addressing driving while intoxicated" was not at issue in *Manning II*.[37]

Once interdicted, an individual "is subject to incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public."[38] Specifically, section 4.1-305 of the Code of Virginia makes it a Class 1 misdemeanor for an interdicted individual to "consume, purchase or possess, or attempt to consume, purchase or possess, any alcoholic beverage."[39] Section 4.1-322 additionally "establishes a Class 1 misdemeanor for an interdicted person to 'possess any alcoholic beverages,' or to be 'drunk in public.' "[40] In Virginia, the maximum penalty for a Class 1 misdemeanor is "confinement in jail" for one year, a $500 to $2,500 fine, or both.[41] For an individual who has not been interdicted, public intoxication is a Class 4 misdemeanor, which is subject to a maximum fine of $250.[42]

---

[32] *Id.* (current version at VA. CODE ANN. § 4.1-333(A)).

[33] Slater, *supra* note 21, at 584.

[34] *See* sources cited *supra* note 6.

[35] VA. CODE ANN. § 4.1-333(A) (2016 & Supp. 2020).

[36] *Id.* ("[T]he court may enter an order of interdiction prohibiting the sale of alcoholic beverages to [the interdicted individual] *until further ordered*." (emphasis added)).

[37] *Manning II*, 930 F.3d at 269 n.1, 284 & n.21.

[38] *Id.* at 269.

[39] VA. CODE ANN. § 4.1-305(A), (C) (2016).

[40] *Manning II*, 930 F.3d at 269 (quoting VA. CODE ANN. § 4.1-322).

[41] VA. CODE ANN. § 18.2-11(a) (2014) (providing a maximum fine); VA. CODE ANN. § 4.1-305(C) (providing "a mandatory minimum fine").

[42] VA. CODE ANN. § 18.2-388 (providing that "any person" who appears "in public" under the influence of "alcohol" or any "other intoxicant or drug of whatever nature" is "guilty of a Class 4 misdemeanor"); *id.* § 18.2-11(d) (providing that the "authorized punishment[ ] for conviction of a [Class 4] misdemeanor" is "a fine of not more than $250"); *see also Manning II*, 930 F.3d at 269.

Between 2007 and 2018, "[s]lightly more than 1,700 people were interdicted . . . in Virginia."[43] During that period, two-thirds of all interdiction proceedings—1,151 in all—occurred in Virginia Beach, a city that accounted for six percent of the state's population.[44] Additionally, although only a little more than one percent of Virginians live in Roanoke,[45] that city pursued 160 interdictions—more than nine percent of the total.[46] By contrast, some cities interdicted very few individuals. Between 2010 and 2015, for example, Petersburg and Richmond interdicted only one and nine persons, respectively.[47] Some cities and counties reported zero interdictions.[48]

About a quarter of those who were interdicted as "habitual drunkards" were absent from their own interdiction hearings.[49] In such cases, the " 'habitual drunkard' label" became "indelible" and subjected "people on the interdicted list" to years, or even decades, of suspicion, arrest, and incarceration.[50] Bryan Manning's interactions with the criminal justice system were not atypical. Interdicted individuals were arrested while shopping at a 7-Eleven where alcohol was sold,[51] after " 'sleeping in a park bathroom' where 'a beer can was found in the trash,' " and even "for being 'near' beer cans."[52]

---

[43] Jane Harper, *Virginia Law Allows People To Legally Be Declared a Drunk. Two-Thirds of Them Are in Virginia Beach*, VIRGINIAN-PILOT (Apr. 4, 2019, 9:00 AM), https://www.pilotonline.com/news/crime/article_2f5f511e-3613-11e9-85df-db99c9ec636a.html [https://perma.cc/7AVW-4DEN].

[44] *Id.*

[45] *Population Statistics of Roanoke City, Virginia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/roanokecityvirginia,VA/PST045218 [https://perma.cc/5Q2Q-3KD7] (last visited Jan. 8, 2021).

[46] Harper, *supra* note 43.

[47] *Interdiction Fact Sheet*, LEGAL AID JUST. CTR. 2, https://www.justice4all.org/wp-content/uploads/2016/03/LAJC_Interdiction_Fact_Sheet.pdf [https://perma.cc/EW5J-ZF9L] (last visited Jan. 8, 2021).

[48] Harper, *supra* note 43.

[49] *Id.*

[50] M.L. Nestel, *Virginia Jails People for Even Smelling Like Alcohol*, THE DAILY BEAST (Apr. 13, 2017, 4:31 PM), http://thedailybeast.com/virginia-jails-people-for-even-smelling-like-alcohol [https://perma.cc/VMR5-WPLL].

[51] *Id.*

[52] Manning v. Caldwell (*Manning I*), 900 F.3d 139, 157 (4th Cir. 2018) (Motz, J., concurring), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019).

B. Procedural History

1. The Plaintiffs' Complaint

In March 2016, Bryan Manning and four other homeless alcoholics filed a putative class action in the United States District Court for the Western District of Virginia against the Commonwealth's Attorneys for Roanoke and Richmond.[53] The plaintiffs in *Hendrick v. Caldwell* sought declarative and injunctive relief "on their own behalf and on behalf of all individuals who ha[d] been, or [we]re at risk of being, 'interdicted' while being homeless and suffering from alcohol use disorder."[54] The plaintiffs alleged, among other things, that application of Virginia's interdiction scheme constituted cruel and unusual punishment in violation of the Constitutions of the United States and Virginia;[55] that interdiction was "a quasi-criminal proceeding" routinely conducted without "adequate due process protections" guaranteed under the state and federal constitutions;[56] and that the statutory scheme was unconstitutionally vague.[57]

The five named plaintiffs were interdicted between August 2009 and January 2016.[58] In each case, the court specified that its interdiction order would remain in effect until the court "alter[ed], amend[ed], or cancel[ed]" it.[59] One plaintiff, Cary Hendrick, was present at his interdiction hearing.[60] Hendrick "requested court-appointed counsel," but the "court denied his request."[61] The four remaining plaintiffs were interdicted in absentia and without the assistance of counsel.[62]

Interdiction subjected at least four of the five plaintiffs to frequent, repeated arrest. At the time of the complaint, for example, Richard Deckerhoff had been arrested "at least eleven

---

[53] *See* Complaint, *supra* note 1, ¶ 1.

[54] *Id.*

[55] *Id.* ¶¶ 118, 127, 135; *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); VA. CONST. art. I, § 9.

[56] Complaint, *supra* note 1, ¶¶ 141, 150; *see also* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); VA. CONST. art I, § 11.

[57] Complaint, *supra* note 1, ¶¶ 155–58, 163.

[58] *Id.* ¶¶ 40, 49, 63, 75, 89.

[59] *Id.* ¶¶ 41, 50, 64, 76, 90.

[60] *Id.* ¶ 40.

[61] *Id.*

[62] *Id.* ¶¶ 49, 63, 75, 89.

times."[63] In one of those arrests, police officers "determined [that] a beer can on the ground near Mr. Deckerhoff was in his constructive possession."[64]

The Complaint asserted, as a statement of fact, that the five plaintiffs "suffer[ed] from alcohol use disorder, commonly referred to as alcoholism."[65] Alcohol dependence is typically characterized by, among other things, an inability to control the "onset, termination or level of use" of alcohol, "physiological withdrawal" symptoms "when alcohol use is reduced or ceased," and persistent use "despite clear signs of harmful consequences."[66] All five plaintiffs likely suffered from alcohol dependence syndrome. Three of the five plaintiffs received at least "limited" treatment for their addiction, but all struggled to maintain sobriety.[67] At least two of the plaintiffs, Cary Hendrick and Ryan Williams, suffered from severe physical withdrawal symptoms: Hendrick had seizures when denied access to alcohol,[68] and Williams suffered from "shaking, dry-heaves, and increased blood pressure."[69] All of the plaintiffs faced "harmful consequences" as a result of their drinking—including interdiction, repeated arrest, and incarceration—but all nevertheless persisted in drinking alcohol.[70]

2. The Proceedings in District Court (*Hendrick*)

In April 2016, the defendants, the Commonwealth's Attorneys for Roanoke and Richmond, moved to dismiss the plaintiffs' complaint.[71] In addition to various procedural challenges, the defendants argued that the "plaintiffs ha[d] failed to state a claim upon which relief [could] be granted."[72] The district court con-

[63] *Id.* ¶ 77.
[64] *Id.* ¶ 78.
[65] *Id.* ¶ 23.
[66] THOMAS BABOR ET AL., ALCOHOL: NO ORDINARY COMMODITY 19 & box 2.2 (2nd ed. 2010).
[67] Complaint, *supra* note 1, ¶¶ 46, 59, 72, 97.
[68] *Id.* ¶ 47.
[69] *Id.* ¶ 73.
[70] *Id.* ¶¶ 124–26.
[71] *See* Motion to Dismiss at 1, Hendrick v. Caldwell, 232 F. Supp. 3d 868 (W.D. Va. 2017), *aff'd sub nom.* Manning v. Caldwell, 900 F.3d 139 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019) (No. 16-CV-0095); Memorandum in Support of Defendants' Motion to Dismiss at 1, *Hendrick*, 232 F. Supp. 3d 868 (No. 16-CV-0095).
[72] *Hendrick*, 232 F. Supp. 3d at 877.

sidered, and subsequently dismissed, each of the constitutional claims of the four plaintiffs.[73]

First, the district court considered whether the interdiction statute "violate[d] the Eighth Amendment's prohibition of cruel and unusual punishment."[74] The plaintiffs relied on the Fourth Circuit's holding in *Driver v. Hinnant*[75] that "the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease."[76] Additionally, the plaintiffs cited two Ninth Circuit cases, *Ledezma-Cosino v. Lynch*[77] and *Jones v. City of Los Angeles*,[78] for the proposition that a statute cannot "criminalize[ ] the status of being an alcoholic."[79] The district court rejected *Ledezma-Cosino* as "inapposite," in part because the Ninth Circuit had "expressly" declined to consider "when or how persons with chronic alcoholism may be punished for criminal acts committed while in an alcoholic state."[80] The district court also rejected the holding in *Jones* and instead dismissed the plaintiffs' Eighth Amendment claim[81] based on a line of cases extending from *Robinson v. California*[82] through *Powell v. Texas*[83] to *Fisher v. Coleman*.[84]

In *Robinson*, the Supreme Court struck down a California law that criminalized the " 'status' of narcotic addiction."[85] After police officers "had occasion to examine the appellant's arms" and "observed discolorations and scabs" that appeared to be needle tracks, the appellant was arrested, prosecuted, and convicted under a state statute that made it a misdemeanor for a person to "be addicted to the use of narcotics."[86] The Supreme Court recognized the "broad power of a State to regulate the narcotic drugs

---

[73] *See id.* at 883, 891–92, 895. In August 2016, the parties moved jointly to dismiss the state-law claims, and the court did so. *See id.* at 876 n.2. The court, having received a Suggestion of Death with respect to named plaintiff Cary Hendrick, did not consider any of his claims. *See id.* at 875 n.1.

[74] *Id.* at 884.

[75] 356 F.2d 761 (4th Cir. 1966).

[76] *Hendrick*, 232 F. Supp. 3d at 884 (quoting *Driver*, 356 F.2d at 765).

[77] 819 F.3d 1070 (9th Cir.), *vacated*, 839 F.3d 805 (9th Cir. 2016).

[78] 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

[79] *Hendrick*, 232 F. Supp. 3d at 884.

[80] *Id.* at 885 (quoting *Ledezma-Cosino*, 819 F.3d at 1078 n.1).

[81] *Id.* at 885–86.

[82] 370 U.S. 660 (1962).

[83] 392 U.S. 514 (1968).

[84] 486 F. Supp. 311 (W.D. Va. 1979), *aff'd*, 639 F.2d 191 (4th Cir. 1981), *overruled by* Manning v. Caldwell (*Manning II*) 930 F.3d 264 (4th Cir. 2019).

[85] *Hendrick*, 232 F. Supp. 3d at 885 (quoting *Robinson*, 370 U.S. at 666).

[86] *Robinson*, 370 U.S. at 661–62.

traffic within its borders," but nevertheless concluded that "narcotic addiction is an illness . . . which may be contracted innocently or involuntarily."[87] The Court further held that

> a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. . . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.[88]

Six years later, in *Powell*, a plurality of the Court held that "*Robinson* did not reach the question of whether the Eighth Amendment prohibits punishment of conduct symptomatic of a disease" and that "the doctrines of criminal responsibility are traditionally the province of the states."[89] Guided by these "important principles,"[90] the District Court for the Western District of Virginia concluded in *Fisher* that the Eighth Amendment does not forbid a state from criminalizing "conduct symptomatic of alcoholism."[91] In fact, the *Fisher* court found that *Powell* "specifically rejected" that proposition.[92]

In *Hendrick*, the district court held that the interdiction statute, like the statute at issue in *Powell*, "impose[d] 'a criminal sanction for public behavior which may create substantial health and safety hazards . . . and which offends the moral and esthetic sensibilities of a large segment of the community.' "[93] Even as it acknowledged that criminal law has evolved over time and continues to evolve in response to "changing religious, moral, philosophical, and medical views of the nature of man,"[94] the court deferred to the legislature's prerogative to shape "the outer contours of what can be punished."[95]

Ultimately, the district court held in *Hendrick* that, because Virginia's interdiction scheme targets the possession and consumption of alcohol, it punishes specific *acts* rather than a

---

[87] *Id.* at 664, 667.

[88] *Id.* at 667.

[89] *Hendrick*, 232 F. Supp. 3d at 885.

[90] *Id.* at 885.

[91] *Id.* at 886 (quoting Fisher v. Coleman, 486 F. Supp. 311, 316 (W.D. Va. 1979), *aff'd*, 639 F.2d 191 (4th Cir. 1981), *overruled by* Manning v. Caldwell (*Manning II*) 930 F.3d 264 (4th Cir. 2019)).

[92] *Id.* at 886 (quoting *Fisher*, 486 F. Supp. at 316).

[93] *Id.* (alteration in original) (quoting Powell v. Texas, 392 U.S. 514, 532 (1968)).

[94] *Id.* at 887 (quoting *Powell*, 392 U.S. at 535–36).

[95] *Id.* at 887–88.

status.[96] And because *Fisher* constrained the court from considering whether the "disease" of alcohol addiction compelled the plaintiffs to commit the prohibited acts, the court was bound to conclude that the interdiction scheme did not offend the Eighth Amendment.[97]

Second, the district court quickly disposed of the plaintiffs' Fourteenth Amendment vagueness claim. Because the plaintiffs had identified themselves in their pleadings as "homeless alcoholics," and had admitted that they were "compelled to possess and consume alcohol," the court "readily" concluded that "the statutory term 'habitual drunkard' " applied to them.[98] And because an individual "may not successfully challenge [a statute] for vagueness" if it is "clearly" applicable to that individual's conduct, the court found that the plaintiffs lacked standing to challenge the interdiction scheme on that ground.[99] The court did not, in any case, find that the statute lacked clarity. Relying in part on *Fisher*, the court held that the meaning of "habitual drunkard" is commonly understood and therefore "sufficiently precise."[100] The court also concluded that the interdiction scheme provided "explicit standards which law enforcement may apply to prevent arbitrary and discriminatory enforcement."[101]

Finally, with respect to the plaintiffs' due process claim, the district court held that the plaintiffs were not entitled to appointed counsel at their interdiction proceedings, which are civil matters.[102] And because government-appointed counsel represented the plaintiffs at their criminal proceedings, the court held that the plaintiffs could not state a valid claim under the Due Process Clause of the Fourteenth Amendment.[103]

---

[96] *Id.* at 888.

[97] *See id.* at 886–88.

[98] *Id.* at 892.

[99] *Id.* (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)).

[100] *Id.* (citing Fisher v. Coleman, 468 F. Supp. 311, 315 (W.D. Va. 1979), *aff'd*, 639 F.2d 191 (4th Cir. 1981), *overruled by* Manning v. Caldwell (*Manning II*) 930 F.3d 264 (4th Cir. 2019) ("[T]he common meaning of the term[ ] habitual drunkard clearly encompasses one who . . . is admittedly in the continual habit of being intoxicated from alcohol.")).

[101] *Id.*

[102] *Id.* at 889–90.

[103] *Id.* at 891.

3. The Appeal to the Fourth Circuit (*Manning I*)

The four surviving plaintiffs[104] appealed, and a panel of the Fourth Circuit affirmed the district court's dismissal.[105] Writing for the panel, Judge Wilkinson devoted just a few paragraphs to the plaintiffs' claim that, "despite their nominally civil character, interdiction proceedings must afford criminal protections" under the Due Process Clause.[106] Finding that interdiction deprives an individual of nothing more than "the legal right to purchase, possess, or consume alcohol," the panel determined that an individual's liberty is not at stake in an interdiction proceeding.[107] The panel further held that, under *Paul v. Davis*, a potential "reputational injur[y]" like the one at stake in an interdiction proceeding is not a constitutionally protected interest, and for that reason the plaintiffs could not prevail in their due process claims.[108]

The panel's opinion devoted significantly more space to determining whether the interdiction scheme punished a status in violation of *Robinson* and the Eighth Amendment. Noting that a fragmented Court decided *Powell* in a 4–1–4 decision, the panel concluded that *Powell*'s plurality opinion could not be read as overturning the status-act distinction in *Robinson*.[109] With no "clear signal from the Supreme Court that *Robinson* no longer remains good law," the panel declined "to overturn or greatly extend" it to criminalize nonvolitional conduct compelled by addiction.[110] Having concluded that neither *Robinson* nor *Powell* prohibits the criminalization of "compelled behavior," the panel held that the interdiction scheme constituted a permissible exercise of Virginia's police power.[111] In the court's view, the Cruel and Unusual Punishment Clause could not be applicable to interdiction itself, because interdiction is a civil, rather than a criminal, proceeding.[112] And because the criminal sanctions that apply to interdicted individuals target specific, well-defined acts,

---

[104] *See supra* note 73.

[105] Manning v. Caldwell (*Manning I*), 900 F.3d 139, 154 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019).

[106] *Id.* at 151.

[107] *Id.*

[108] *Id.* at 151–52 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)).

[109] *Id.* at 146 ("To the extent that post-*Powell* decisions have relied upon the plurality opinion in *Powell*, they have overextended themselves in doing so.").

[110] *Id.* at 146–47.

[111] *Id.* at 147–48.

[112] *Id.* at 148.

the panel found that those criminal sanctions also pass constitutional muster under the Eighth Amendment.[113] Although Virginia's interdiction scheme was unique in its precise contours, the panel found it to be no different in kind from other civil-criminal statutory schemes that "adopt a two-step approach" and "sanction relatively minor acts in order to forestall more serious criminal misconduct."[114] For example, courts routinely grant temporary restraining orders in civil proceedings, and anyone who violates such an order may be subject to criminal penalties.[115]

Judge Motz wrote separately to argue that *Powell* could—and should—be read as repudiating the status-act distinction in *Robinson*.[116] She argued that the outcome in *Robinson* would have been the same had the statute at issue in that case permitted the state first to interdict the appellant and deem him a "prescription drug addict[ ]" and then to subject him to criminal penalties for attempting to fill a legally obtained prescription for narcotics.[117] Because Virginia's statutory scheme would be unconstitutional under *Robinson* if it criminalized alcoholism "in one step," and the outcome in *Robinson* would have been the same had California criminalized narcotics addiction in two steps, Judge Motz concluded that the interdiction scheme must be impermissible under *Robinson*.[118] Nevertheless, because *Fisher* "constitute[d] circuit precedent" and compelled the panel's judgment, Judge Motz concurred "with reluctance and regret."[119]

4. Rehearing En Banc (*Manning II*)

After rehearing en banc, the Fourth Circuit reversed itself, held that Virginia's interdiction statute was void for vagueness, and overturned *Fisher*.[120] Judge Motz and Judge Keenan, writing for a majority of eight, based their opinion in large part on Judge Motz's concurrence in *Manning I*. Judge Wilkinson wrote a dissent, in which five judges joined.

Although the plaintiffs argued before the district court that the term "habitual drunkard" is unconstitutionally vague, they

---

[113] *Id.*
[114] *Id.* at 149.
[115] *Id.*
[116] *Id.* at 156 (Motz, J., concurring).
[117] *Id.* at 157.
[118] *Id.*
[119] *Id.* at 160 & n.4.
[120] Manning v. Caldwell (*Manning II*), 930 F.3d 264, 285 (4th Cir. 2019) (en banc).

"expressly declined" to argue the issue on appeal, either before the panel or the en banc court.[121] The majority in *Manning II* nevertheless concluded that it had discretion to consider, *sua sponte*, arguments not raised by the parties[122] and "excus[ed]" the plaintiffs' "abandonment or forfeiture" of their vagueness claim.[123] In his dissent, Judge Wilkinson characterized the plaintiffs' "failure to press a claim" as a waiver rather than a forfeiture and argued that the court had "no basis for reaching the vagueness challenge."[124]

As to the merits of the vagueness claim, the majority found that Virginia's statutory scheme failed to establish "any standard of conduct by which persons [could] determine whether they [we]re violating the statute" or even "minimal guidelines to govern law enforcement" in enforcing the statute.[125] The court held the statutory scheme to be "unconstitutionally vague" even as applied to the plaintiffs, who "admitted difficulty in maintaining sobriety."[126]

The dissent found the vagueness claim unavailing.[127] Judge Wilkinson argued that the "sole purpose" of the interdiction process itself is to "provide notice" and "address the very concerns that motivate vagueness doctrine in the first place."[128] Even if that were not so, the dissent argued, "the term 'habitual drunkard' . . . is simply not vague under any conceivable standard."[129]

With respect to the plaintiffs' Eighth Amendment claim, the majority cited *Powell* for the proposition that, for homeless alcoholics who could neither resist drinking nor avoid public places, a public intoxication statute "would be unconstitutional as applied to them."[130] Because the plaintiffs were "pathologically" driven to "pursue alcohol use," had no "volitional control over their drinking," and could not avoid drinking in public, the majority concluded that Virginia's statutory scheme was unconstitutional

---

[121] *Id.* at 271.

[122] *Id.* (collecting cases).

[123] *Id.* at 271–72, 271 n.6.

[124] *Id.* at 300 (Wilkinson, J., dissenting) ("We do not have here a simple failure to press a claim. The appellants instead expressly waived any appeal on their vagueness challenge.").

[125] *Id.* at 274 (majority opinion).

[126] *Id.* at 277–78.

[127] *Id.* at 301 (Wilkinson, J., dissenting).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 280–81 (majority opinion) (citing Powell v. Texas, 392 U.S. 514, 551 (1968)).

as applied to the plaintiffs.[131] The scheme "would, in effect, 'ban[ ] a single act for which [homeless alcoholics] may not be convicted under the Eighth Amendment—the act of getting drunk.' "[132]

Just as the majority found support in *Powell* for its opinion, so too did Judge Wilkinson in his dissent. He argued that "*Powell* neither extended [n]or contracted *Robinson*, which was left undisturbed."[133] After a review of post-*Powell* cases, the dissent concluded that the majority opinion was "at odds with the Supreme Court's understanding of its own decision."[134] According to the dissent, the majority's opinion introduced a "nebulous 'nonvolitional conduct' defense," which could "metastasize and absolve individuals from personal responsibility for all forms and manners of criminal acts."[135]

II. ANALYSIS

A. The En Banc Court's Void-for-Vagueness Rationale Is Inapposite

1. The Court Should Not Have Considered the Plaintiffs' Waived Claims

Waiver and forfeiture are distinct under the law. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' "[136] In *Manning II*, the en banc court cited *United States v. Simms* for the proposition that "waiver, in a technical sense, concerns a party's relinquishment of rights before a *district court*."[137] *Simms* in turn cited to *United States v. Olano* for the proposition that, "where a party raises and then knowingly withdraws a claim before the *district court*, there is no error for [an appellate court] to review."[138] In other words, if the plaintiffs had raised *and dropped* their vagueness claim in *Hendrick*, the

---

[131] *Id.* at 281 (quoting Complaint, *supra* note 1, ¶ 25).

[132] *Id.* at 280–81 (alterations in original) (quoting *Powell*, 392 U.S. at 551).

[133] *Id.* at 289 (Wilkinson, J., dissenting).

[134] *Id.*

[135] *Id.* at 304.

[136] United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[137] *Manning II*, 930 F.3d at 271 n.6 (quoting United States v. Simms, 914 F.3d 229, 238 n.4 (4th Cir.), *cert. denied*, 140 S. Ct. 304 (2019) (mem.)).

[138] *Simms*, 914 F.3d at 238 n.4 (emphasis added) (citing *Olano*, 507 U.S. at 733).

en banc court would have been compelled to deem it waived and could not have considered it in *Manning II*.

Although that may be true, circuit courts also routinely reject claims that parties have litigated at trial but have neglected, omitted, or declined to raise at the outset of an appeal.[139] For example, in *United States v. Washington*, a panel of the Fourth Circuit held that an appellant had waived the claims and defenses he had "failed to raise in his opening [appellate] brief."[140] In his dissent, Judge Wilkinson posited that, prior to this case, the Fourth Circuit had been "*especially* reluctant to consider waived arguments"[141]

Judge Wilkinson argued further that the "open-endedness" of the majority's opinion may threaten "the neutrality of procedure" that "protects litigants . . . against arbitrary courts and ambush by adversaries."[142] Having "provided no standard under which an en banc court can resolve a claim affirmatively waived before a panel," the majority's decision to do so in this case may "significantly degrade[ ] the place of panel process in federal appellate review."[143] More to the point, under the majority's rule, no waiver is ever final: "Future litigants will rely on this case endlessly to excuse inexcusable carelessness, or worse, calculated litigation strategy that in hindsight proved unsuccessful."[144]

Judge Wilkinson's arguments are not unpersuasive. The en banc court placed a particular emphasis on the "exceptional importance" of the vagueness issue and expressed a willingness to

---

[139] *See, e.g.*, McCarthy v. SEC, 406 F.3d 179, 186 (2d Cir. 2005) ("We think it reasonable to hold appellate counsel to a standard that obliges a lawyer to include his most cogent arguments in his opening brief, upon pain of otherwise finding them waived."); United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal."), *aff'd*, 487 Fed App'x 1 (3d Cir. 2012); United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991) (collecting cases) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)."), *aff'd*, 972 F.2d 352 (7th Cir. 1992) (unpublished table decision).

[140] United States v. Washington, 743 F.3d 938, 941 n.1 (4th Cir. 2014) (collecting cases) ("[W]e do not countenance a litigant's use of [Federal Rule of Appellate Procedure] 28(j) as a means to advance new arguments couched as supplemental authorities." (second alteration in original) (quoting United States v. Ashford, 718 F.3d 377, 381 (4th Cir. 2013))).

[141] *Manning II*, 930 F.3d at 300 (Wilkinson, J., dissenting) (emphasis added).

[142] *Id.*

[143] *Id.*

[144] *Id.* at 301.

consider "alternative legal theor[ies]" that it "deemed necessary to reach the correct result."[145] Reaching back to a Fourth Circuit case decided in 1971 and a Supreme Court case decided thirty years earlier, the majority asserted that the Courts of Appeal may "*sua sponte* consider points not presented to the district court *and not even raised on appeal by any party*."[146]

It appears that the en banc court was willing to resurrect the plaintiffs' vagueness claim under nearly any circumstances. That it chose to do so in a way that undermines the efficiency and comity of the appellate process[147] is all the more unfortunate, given that the en banc court's holding is likely incorrect on the merits.

2. The Term "Habitual Drunkard" Is Not Unconstitutionally Vague

Vagueness doctrine exists to provide "fair notice" so that "citizens [can] conform their conduct to the proscriptions of the law."[148] Some imprecision is tolerable, but the more severe the consequences of violating a statute, the more precise its terms are expected to be.[149] Given that "civil laws" may "impose penalties far more severe" than their criminal counterparts, vagueness doctrine is not applicable solely to criminal statutes.[150] Courts have applied " 'relatively strict test[s]' for vagueness" to civil laws with "quasi-criminal" and "stigmatizing effect[s]."[151]

Nevertheless, even in cases where the Supreme Court has applied "the most exacting vagueness standard"[152] and "the most rigorous scrutiny," it has found that "open-ended" and "imprecise" terms are "perfectly constitutional."[153] In *Jordan v. De*

---

[145] *Id.* at 271–72 (majority opinion) (first quoting United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019); and then quoting Wash. Gas Light Co. v. Va. Elec. & Power Co., 438 F.2d 248, 251 (4th Cir. 1971)).

[146] *Id.* at 271 (quoting *Wash. Gas Light Co.*, 438 F.2d at 251) (citing Hormel v. Helvering, 312 U.S. 552, 557 (1941)).

[147] *Id.* at 300 (Wilkinson, J., dissenting) ("[A] panel of three remains our basic unit of decision, three being a more efficient and more collaborative number than a conclave of fifteen.").

[148] *Id.* at 274 (majority opinion).

[149] *Id.* at 272–73.

[150] *Id.* at 272 (quoting Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment)).

[151] *Id.* at 273 (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 499 (1982)).

[152] *Id.* (quoting *Dimaya*, 138 S. Ct. at 1213).

[153] *Id.* at 301–02 (Wilkinson, J., dissenting) (quoting *Dimaya*, 138 S. Ct. at 1214).

George, for example, the Supreme Court upheld the respondent's deportation order, although it was predicated on his conviction for a "crime involving moral turpitude."[154] The Court held that whatever shades of meaning the phrase might acquire "in peripheral cases," its meaning was sufficiently clear in the respondent's case.[155] Similarly, just a few months before a panel of the Fourth Circuit decided *Manning I*, the Supreme Court noted in *Sessions v. Dimaya* that "[m]any perfectly constitutional statutes use imprecise terms like 'serious potential risk' . . . or 'substantial risk.' "[156] The *Dimaya* Court ultimately held the statute in question to be vague—but not because the Court had any reason to "doubt the constitutionality of laws that call for the application of a qualitative standard . . . to real-world conduct."[157] Rather, the issue was that the statute, by its terms, required the Court to estimate the risk of an "idealized ordinary case of [a] crime," not any particular criminal act that the respondent had committed.[158]

Here, there is no such issue. As the Ninth Circuit noted in *Ledezma-Cosino v. Sessions*, "the term 'habitual drunkard' readily lends itself to an objective factual inquiry."[159] Moreover, while it is no doubt true that "habitual drunkard" is an archaic and even a stigmatizing term, it is also true that many laws retain the use of such terms without offending the Constitution. As noted above, for example, the Supreme Court in *Jordan* found that the phrase "crime involving moral turpitude" was not unconstitutionally vague.[160]

As Judge Wilkinson noted in his dissent, Virginia courts have had no difficulty supplying definitions for the term "habitual drunkard."[161] In *Jackson v. Commonwealth*, for example, the Virginia Court of Appeals held that the term applies to "one who . . . is admittedly in the continual habit of being intoxicated

---

[154] Jordan v. De George, 341 U.S. 223, 231–32 (1951).

[155] *Id.* at 232 ("[T]he decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.").

[156] *Dimaya*, 138 S. Ct. at 1214.

[157] *Id.* (quoting Johnson v. United States, 135 S. Ct. 2551, 2561 (2015)) ("[T]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." (second alteration in original) (quoting Nash v. United States, 229 U.S. 373, 377 (1913))).

[158] *Id.* at 1213–14 (quoting *Johnson*, 135 S. Ct. at 2561).

[159] Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1047 (9th Cir. 2017).

[160] Jordan v. De George, 341 U.S. 223, 232 (1951).

[161] Manning v. Caldwell (*Manning II*), 930 F.3d 264, 302 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting).

from alcohol."[162] Other courts have described with even more specificity the patterns of conduct that characterize a "habitual drunkard": "a repeated course of consuming alcohol to excess, excess being the impairment of judgment, the loss of motor function, the lessening of impulse control, and other commonly recognized effects."[163]

As the plaintiffs' own pleadings show, they exhibited many of these effects and frequently consumed alcohol to excess. Although the term "habitual drunkard" may create some uncertainty as applied in borderline cases, it clearly applied to the plaintiffs, who admitted in their own pleadings that their alcoholism rendered them "unable to maintain sobriety."[164] The Fourth Circuit should have found, as the district court found in *Hendrick*,[165] that because the statute clearly applied to the plaintiffs, they lacked standing to challenge the interdiction scheme on vagueness grounds.

B. The En Banc Court Overextended Itself in Relying on Powell

1. Both the Majority and Dissent Relied on *Powell*

The correct interpretation of *Powell* hinges at least in part on a separate pair of cases, *Marks v. United States*[166] and *Hughes v. United States*.[167] In *Marks*, the Supreme Court held that, where a case is decided by a plurality, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[168] Judge Wilkinson and Judge Motz read *Hughes* very differently. The Court in *Hughes* found either "that it was 'unnecessary to *consider*' its holding in *Marks*,"[169] as Judge Wilkinson would have it, or that it was " 'unnecessary' to *reconsider* the reasoning of the *Marks* rule,"[170] as Judge Motz put it.

---

[162] Jackson v. Commonwealth, 604 S.E.2d 122, 125 (Va. Ct. App. 2004).

[163] *Manning II*, 930 F.3d at 302 (Wilkinson, J., dissenting).

[164] Complaint, *supra* note 1, ¶¶ 120–21.

[165] *See supra* note 99 and accompanying text.

[166] 430 U.S. 188 (1977).

[167] 138 S. Ct. 1765 (2018).

[168] *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[169] Manning v. Caldwell (*Manning I*), 900 F.3d 139, 146 (4th Cir. 2018) (emphasis added), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019).

[170] *Id.* at 156 (Motz, J., concurring) (emphasis added).

The Supreme Court granted certiorari in *Hughes* on three questions, two of which concerned the proper application of *Marks* to the Court's fragmented decision in *Freeman v. United States*.[171] The Court received "extensive briefing" and heard "careful argument" on two questions related to *Marks*:

> (1) "Whether [the Supreme] Court's decision in *Marks* means that the concurring opinion in a 4–1–4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other"; and (2) "Whether, under *Marks*, the lower courts are bound by [a] four-Justice plurality opinion . . . , or, instead, by [a] separate concurring opinion with which all eight other Justices disagreed."[172]

Both of these questions went unanswered. The makeup of the Court had changed between 2011, when a fractured Court decided *Freeman*, and 2018, when the Court heard arguments in *Hughes*.[173] Lower courts had also had occasion to apply and interpret the Court's decision in *Freeman*, and in the process had uncovered "systemic concerns" with its rationale.[174] After careful reconsideration of the underlying question presented in *Freeman*, the Court in *Hughes* was able to resolve it on the merits with a majority of six justices.[175]

Under these circumstances, it is not precisely correct to say that the Court in *Hughes* found it *either* "unnecessary to consider" *or* "unnecessary to reconsider" *Marks*. Rather, as Justice Kennedy wrote in his opinion for the majority in *Hughes*, the Court found it "unnecessary to consider *questions one and two*"—the questions *pertaining* to *Marks*.[176] Even so, *Hughes* is not entirely a red herring. It may serve as a preview of things to come if the Supreme Court has occasion to reconsider its decision in *Powell*.

To be sure, *Powell* is ripe for reconsideration. The appellant in that case, Leroy Powell, challenged his conviction for public

---

[171] *See Hughes*, 138 S. Ct. at 1771–72; Freeman v. United States, 564 U.S. 522 (2011).

[172] *Hughes*, 138 S. Ct. at 1772 (quoting Petition for a Writ of Certiorari at i, *Hughes*, 138 S. Ct. 1765 (No. 17-155)).

[173] In *Freeman*, Justice Scalia joined Chief Justice Roberts's dissent. *Freeman*, 564 U.S. at 544 (Roberts, C.J., dissenting). In *Hughes*, Justice Gorsuch joined the majority. *Hughes*, 138 S. Ct. at 1770 (majority opinion).

[174] *Hughes*, 138 S. Ct. at 1772.

[175] *Id.*

[176] *Id.* (emphasis added).

intoxication on the ground that his "chronic alcoholism" compelled him to drink and "his appearance in public [while drunk was] . . . not of his own volition."[177] Although Justice Marshall, in his opinion for the plurality, relied on the best science available at the time, he found no evidence that Leroy Powell's alcohol addiction had compelled his behavior, or even that Powell "could in fact properly be diagnosed as [an] alcoholic" at all.[178]

At trial, Powell testified that he had had a single drink before coming to court.[179] On cross-examination, the prosecution elicited testimony that Powell had "exercised [his] will power and kept from drinking anything . . . except that one drink."[180] Powell testified on redirect, however, that once he began drinking he ordinarily had no "control over how many drinks [he could] take."[181] The record does not disclose whether Powell routinely suffered from withdrawal symptoms, or if he drank on the morning of trial because he hoped to forestall such symptoms.[182]

Because Powell had been able, at least on the day of his trial, to stop after a single drink, and because he had reported no withdrawal symptoms, Justice Marshall refused to conclude that Powell suffered a "compulsion" to drink.[183] To Justice Marshall and the plurality, it seems to have been quite clear that Powell drank of his own "free will," and his conviction for public intoxication was justified.[184] In fact, the plurality leaned into the notion that criminal sanctions may serve as a "powerful deterrent" against public drunkenness: "Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo."[185]

Justice White, concurring in the plurality's judgment, wrote that, "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics," then it could not "constitutionally be a crime to yield to such a compulsion."[186] Nevertheless, he recognized that

---

[177] Powell v. Texas, 392 U.S. 514, 517 (1968) (alterations in original).
[178] *Id.* at 524.
[179] *Id.* at 519–20.
[180] *Id.* at 519.
[181] *Id.* at 520.
[182] *See id.* at 525.
[183] *Id.* at 535.
[184] *Id.* at 526, 535.
[185] *Id.* at 530–31.
[186] *Id.* at 548 (White, J., concurring).

Powell had been convicted of "being drunk *in a public place*."[187] For a homeless alcoholic who lived on the public streets and had "no place else to go and no place else to be [while] drinking," Justice White accepted that "a showing could be made that . . . avoiding public places when intoxicated" would be "impossible."[188] "As applied" to such individuals, a public intoxication statute would be "in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[189] Because the record did not show that Powell lacked the capacity "to stay off the streets" while drinking, however, Justice White concluded that Powell's conviction did not offend the Constitution.[190]

The dissenters in *Powell* saw addiction generally, and alcoholism specifically, as a disease, rather than as a moral failing. They argued that Powell's alcoholism rendered him unable to "resist the 'constant excessive consumption of alcohol.' "[191] Because "he could not prevent himself from appearing in public places" when he drank,[192] the dissenters would have held that his public intoxication was "symptomatic of [his] disease."[193] Under these circumstances, the dissenters would have followed the Court's decision in *Robinson* and concluded that subjecting Powell to criminal penalties for public intoxication constituted " 'cruel and inhuman punishment' within the prohibition of the Eighth Amendment."[194] "[T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick."[195]

2. Now More Than Ever, It Is Unclear Whether *Powell* Is Still Good Law

As the Supreme Court itself has recognized, the *Marks* rule is relatively simple to explain, but difficult to apply in practice.[196]

---

[187] *Id.* at 553 (emphasis added).
[188] *Id.* at 551.
[189] *Id.*
[190] *Id.* at 553–54.
[191] *Id.* at 570 (Fortas, J., dissenting).
[192] *Id.* at 568.
[193] *Id.* at 569.
[194] *Id.* at 569–70.
[195] *Id.* at 569 (quoting Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring)).
[196] *See, e.g.*, Nichols v. United States, 511 U.S. 738, 745 (1994) (noting that the rule "is more easily stated than applied").

Manning II is a quintessential example of the rule's difficulty of application. Judge Motz, writing for the majority, concluded that Justice White's concurrence constituted "the narrowest ground supporting the Court's judgment" in *Powell*.[197] In his dissent, Judge Wilkinson argued instead that neither the plurality in *Powell*, nor Justice White's concurrence, nor any other holding has "overturn[ed] or in any way disrupt[ed] *Robinson*."[198]

In similar cases, the Court has declined "to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."[199] Instead, the Court has reexamined its fragmented decisions and, where possible, has issued clear precedents. In *Nichols v. United States*, for example, the Court reconsidered its "splintered decision" in *Baldasar v. Illinois*[200] rather than attempting to apply the *Marks* rule.[201] Although the Court had occasion in *Grutter v. Bollinger* to revisit its "fractured decision" in *Regents of the University of California v. Bakke*,[202] it again found it unnecessary to apply *Marks*.[203] Rather than rummaging through the six opinions produced in *Bakke* and declaring under *Marks* that the narrowest of them was binding, the Court instead "endorse[d]" the reasoning of Justice Powell's concurrence and built upon it to forge a workable set of standards that commanded a five-justice majority.[204] And as discussed above, the Court in *Hughes* reconsidered the underlying issue in *Freeman* rather than applying the *Marks* rule.[205]

Half a century ago, when Justice Marshall was writing for the plurality in *Powell*, there were "tremendous gaps" in the scientific understanding of addiction.[206] At that time, E.M. Jellinek was among "the outstanding authorities on the subject" of alcoholism.[207] Jellinek was in fact a pioneer in the area of

---

[197] Manning v. Caldwell (*Manning II*), 930 F.3d 264, 280 & n.13 (4th Cir. 2019) (en banc).

[198] *Id.* at 290 (Wilkinson, J., dissenting).

[199] *Nichols*, 511 U.S. at 745–46.

[200] 446 U.S. 222 (1980).

[201] *Nichols*, 511 U.S. at 745–46.

[202] 438 U.S. 265 (1978).

[203] Grutter v. Bollinger, 539 U.S. 306, 325, *aff'd*, 539 U.S. 244 (2003).

[204] *Id.*

[205] *See supra* notes 171–176 and accompanying text.

[206] Powell v. Texas, 392 U.S. 514, 524 (1968).

[207] *Id.* at 522.

addiction research and "helped orient the field at its inception."[208] Nevertheless, Justice Marshall found himself baffled by Jellinek's work: "In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is reduced to unintelligible distinctions between a 'compulsion' . . . and an 'impulse.' "[209] It does not seem to have occurred to Justice Marshall that Leroy Powell drank wine at eight o'clock in the morning not because he sought some hedonistic thrill or because he was in thrall to some moral infirmity but rather because he *had* to drink to avoid withdrawal symptoms.

It is unlikely that a modern court would be so unaware—or so heedless—of the workings of addiction. Addiction is now commonly spoken of as a disease rather than as a moral failing. The "disease model" of alcoholism "construes alcoholism as an incurable all-or-none unitary disorder caused solely by hereditary physical abnormalities."[210] "According to [this] model, addiction is a brain disease . . . characterized by changes in specific brain systems, especially those that process rewards . . . ."[211] The National Institute of Alcohol Abuse and Alcoholism has funded biomedical research into "the neurotransmitter systems on which alcohol acts."[212] Underlying this work is a "policy mantra . . . that alcoholism is a 'chronic brain disease.' "[213]

Although early addiction researchers, including Jellinek, proposed the disease model at least in part to remove the moral stigma of addiction,[214] the stigma remains. Even recovering alcoholics, for whom the disease model is the very foundation of their treatment efforts, often speak of addiction in terms of "moral inventory,"[215] "spiritual disease,"[216] and "character defects."[217]

---

[208] Judit H. Ward et al., *Re-Introducing Bunky at 125: E.M. Jellinek's Life and Contributions to Alcohol Studies*, 77 J. STUD. ON ALCOHOL & DRUGS 375, 375 (2016).

[209] *Powell*, 392 U.S. at 525–26.

[210] William R. Miller, *Alcoholism: Toward a Better Disease Model*, 7 PSYCH. ADDICTIVE BEHAVS. 129, 133 (1993). From its earliest days, Alcoholics Anonymous has espoused the disease model of addiction. *See* BILL W., ALCOHOLICS ANONYMOUS: THE BIG BOOK: THE ORIGINAL 1939 EDITION 65, 183, 282 (Ixia Press 2019) (1939).

[211] MARC LEWIS, THE BIOLOGY OF DESIRE: WHY ADDICTION IS NOT A DISEASE 1 (2016).

[212] Wayne Hall, *Biomedicalization of Alcohol Studies: Ideological Shifts and Institutional Challenges*, 102 ADDICTION 494, 494 (2007) (book review).

[213] *Id.*

[214] E.M. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 69 (1960).

[215] ALCOHOLICS ANONYMOUS WORLD SERVS., INC., ALCOHOLICS ANONYMOUS 264–65 (4th ed. 2001) (An alcoholic cannot "take the moral inventory and then file it away; . . . the alcoholic has to continue to take inventory every day if he expects to get well and stay well.").

A tone of moral disapprobation also suffuses both of Judge Wilkinson's *Manning* opinions. In *Manning I*, for example, he compared the compulsive drinking of an alcoholic to a child molester's "uncontrollable pedophilic urges."[218] And in his dissent in *Manning II*, he argued that, because "irresponsible alcohol consumption increases the likelihood of more grave offenses," Virginia's lawmakers "surely had good reason to think that the population of prior abusers posed a greater risk to the community than others who lack such a history."[219] True, Judge Wilkinson's argument does not go quite so far as Justice Marshall's opinion in *Powell* in suggesting that criminal penalties and the concomitant moral stigma may "reinforce [a] cultural taboo" forbidding alcoholism, just as they "reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct."[220] But at bottom, Judge Wilkinson's argument is the same as Justice Marshall's: criminal penalties are valid exercises of state police power because they may effect general and specific deterrence and discourage addicts from giving into their moral weaknesses and succumbing to their addictions.

The Supreme Court justices who issued the fractured opinions in *Powell*, no less than the Fourth Circuit judges who heard *Manning I* and *II*, approached their decisions with moral judgments and "strong feelings" about alcoholism and addiction. If the current Court were to reconsider *Powell*, the outcome would largely depend on whether at least five justices believe that, as Judge Wilkinson put it, "consuming alcohol, even by those with a documented history of alcohol abuse, is just not the sort of conduct that warrants criminal sanctions."[221] It is unlikely that a

---

[216] *Id.* at 64 ("From [resentment] stem all forms of spiritual disease, for we have been not only mentally and physically ill, we have been spiritually sick. When the spiritual malady is overcome, we straighten out mentally and physically.").

[217] *Id.* at 355 ("Dishonest thinking, prejudice, ego, antagonism . . . , vanity, and a critical attitude are character defects that gradually creep in and become a part of [the alcoholic's] life. Living with fear and tension inevitably results in wanting to ease that tension, which alcohol seems to do temporarily.").

[218] Manning v. Caldwell (*Manning I*), 900 F.3d 139, 148 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019); *see also* Manning v. Caldwell (*Manning II*), 930 F.3d 264, 292–93 (4th Cir. 2019) (Wilkinson, J., dissenting) (arguing that "the principle espoused by the appellants and the majority" could allow "child molesters [to] challenge their convictions on the basis that their criminal acts were the product of uncontrollable pedophilic urges and therefore beyond the purview of criminal law").

[219] *Manning II*, 930 F.3d at 295 (Wilkinson, J., dissenting).

[220] Powell v. Texas, 392 U.S. 514, 531 (1968).

[221] *Manning II*, 930 F.3d at 296 (Wilkinson, J., dissenting).

majority of the modern Court would agree with that proposition. On the contrary, were the Court to take up, for example, a challenge to Utah's interdiction scheme, a majority may well accept that alcoholism is a disease even as it upholds the interdiction scheme as constitutionally sound. For that reason, the en banc court should not have "overextended" itself in basing its decision on Justice White's concurrence in *Powell*.

C. Constantineau *Should Have Controlled the Outcome of* Manning

In *Manning I*, the Fourth Circuit dismissed the plaintiffs' Fourteenth Amendment Due Process claims, noting that, in *Paul v. Davis*, "the Supreme Court ha[d] been careful" to establish that the "redress of reputational injuries" is the province of "state law."[222] In *Manning II*, the en banc court declined to pass on the plaintiffs' due process claims.[223] The majority may have been satisfied that the Eighth Amendment and the Vagueness Doctrine provided all the relief that the plaintiffs required—or it may have agreed with the finding of the panel that *Paul* precludes the "redress" of injuries to a litigant's reputation.

In *Paul*, the Supreme Court clarified its earlier decision in *Wisconsin v. Constantineau*,[224] in which it held that cases "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him" could properly be heard in the federal courts.[225] At issue in *Constantineau* was a Wisconsin statute that authorized "designated persons" to "cause[ ] to be posted a notice" prohibiting "the sale or gift" of alcoholic beverages to anyone whose "excessive drinking" threatened to reduce her family to penury or jeopardized "the peace of any community."[226] Although the Wisconsin statute required any such "posting" to be in writing, and further that a "copy of [the]

---

[222] *Manning I*, 900 F.3d at 152 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)).

[223] *Manning II*, 930 F.3d at 272. In Judge Wilkinson's dissent, however, a citation to *Paul* served as the centerpiece of a *cri de cœur* against what he perceived as the majority's judicial overreach: "[T]he states are the primary expositors of the common law. The risk of having our Constitution resemble more and more a common law document, where meaningful restraints on judicial preferences are minimal, is all too real." *Id.* at 298 (Wilkinson, J., dissenting) (citing *Paul*, 424 U.S. at 701).

[224] 400 U.S. 433 (1971).

[225] *Paul*, 424 U.S. at 708 (quoting *Constantineau*, 400 U.S. at 437).

[226] *Constantineau*, 400 U.S. at 434–35, 434 n.2. "[D]esignated persons" included government actors such as town supervisors, aldermen, mayors, chiefs of police, and district attorneys, among others. *Id.* at 434 & n.2.

writing . . . be personally served upon the person" to whom it pertained, the statute did not provide for either notice or a hearing.[227] The Court held that "posting" constituted "such a stigma or badge of disgrace that procedural due process require[d] notice and an opportunity to be heard."[228]

The Court in *Paul* held that, even where a state's tort law protects an individual's "interest in reputation," governmental action that inflicts some "harm or injury to that interest," without more, is insufficient to support a claim that the government has deprived the individual of "liberty" or "property."[229] In so doing, however, the Court was careful to leave *Constantineau* intact. *Constantineau* rooted the right to relief under the Due Process Clause not solely in the "defamatory character of the posting" and the resulting "stigma" but also in "the governmental action" that "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry."[230]

In essence, though not in nomenclature, the Wisconsin statute at issue in *Constantineau* provided for the interdiction of habitual drunkards. Although *Constantineau* thus appears to be directly on point, it is all but absent from the pleadings and opinions generated in this case.[231] Had the Fourth Circuit founded its *Manning II* decision on *Constantineau*, it could have reached the same outcome and provided the same relief to the plaintiffs. But in doing so it would have relied on a case that, unlike *Powell*, was decided by a six-justice majority and manifestly remains good law.

CONCLUSION

Virginia was nearly alone in maintaining a two-phase interdiction scheme that branded alcoholics "habitual drunkards" and subjected them to criminal penalties for the possession of alcohol. Such punitive solutions are manifestly cruel and generally ineffective.[232] In March 2020, after the Virginia General Assem-

---

[227] *Id.* at 434–35, 434 n.2.

[228] *Id.* at 436.

[229] *Paul*, 424 U.S. at 712.

[230] *Id.* at 708–09.

[231] In the memorandum supporting their motion to dismiss *Hendrick*, the defendants argued that *Constantineau* was distinguishable from the instant case. *See* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 71, at 34.

[232] One study suggests, for example, that when policing "focuses on a subset of social incivilities, such as drunken people . . . and street vagrants, and seeks to

bly approved a bill repealing the interdiction scheme as it applied to "habitual drunkards," both the bill's sponsor and the governor acknowledged how inapt the scheme had become.[233] Delegate Jennifer Carroll Foy characterized the interdiction of "habitual drunkards" as "draconian" and "arbitrary."[234] Governor Ralph S. Northam noted that the Commonwealth's "archaic" law "criminalize[d] people for being homeless or suffering from addiction" and "punished [them] without helping them."[235]

To the extent that *Manning II* declared the interdiction scheme unconstitutional and all but signed its death warrant, there can be little doubt that the Fourth Circuit reached a correct and sensible result. But in its apparent eagerness to redress an injustice, the en banc court founded its opinion on *Powell*, a precedent that, for all its longevity, may be vulnerable to supersession or reversal. Had the court decided the case based on the plaintiffs' due process claims, its decision would stand on firmer ground, and it would not have deepened an existing split of authority among the circuit courts.[236]

---

remove them from the street via arrest," it exacerbates distrust between police and communities of color. Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RSCH. CRIME & DELINQ. 567, 581 (2015).

[233] Press Release, Governor Ralph S. Northam, Commonwealth of Virginia, Governor Northam Signs 49 Bills into Law (Mar. 5, 2020) (on file with the author).

[234] *Id.*

[235] *Id.*

[236] *See supra* notes 19–21 and accompanying text.