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TWO PERSPECTIVES ON STRUCTURING DISCRETION: JUSTICES STEWART AND WHITE ON THE DEATH PENALTY

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INTRODUCTION

In *Furman v. Georgia*,[1] both Justices Stewart and White joined the majority of the United States Supreme Court in holding discretionary death penalty statutes unconstitutional. In their separate concurring opinions, each Justice indicated that some methods of imposing the death penalty might be constitutional, even though discretionary imposition of the death penalty was not.[2] After *Furman*, both Justices Stewart and White agreed that statutes providing for the imposition of the death penalty in accordance with certain "standards" were constitutional.[3] They disagreed, however, over whether "mandatory" death penalty statutes were constitutional means of imposing death. Justice Stewart joined the Court's majority in declaring two slightly different mandatory death penalty statutes unconstitutional.[4] But, Justice White dissented in each of these cases maintaining that mandatory death penalty statutes are constitutional.[5] In essence, fundamental theoretical differences led each Justice to frame the issues differently in death penalty cases and accounted for the diverse outcomes. These fundamental differences are never fully articulated in the opinions, but nonetheless are of far ranging significance not only in capital cases, but in the criminal law in general.

This article illustrates that Justice Stewart's "punishment" theory relies heavily upon procedural devices to individualize the decision of imposing the death penalty. Under his theory, appellate courts must occupy a key policy-making role for a statute to meet the minimal requirements of the Constitution. Justice Stewart believes that under the Constitution, legislatures must pursue conflicting goals in drafting death penalty legislation. A death penalty must further retribution and general deterrence on the one hand, rehabilitation and reform on the other. For Stewart, the only solution is to adopt procedures which leave to the courts the responsibility of weighing these conflicting goals in individual cases. Thus, Justice Stewart's analysis relies upon his interpretation of the Due Process Clause of the fourteenth amendment and on the Cruel and Unusual Punishment Clause.

By contrast, Justice White's analysis focuses entirely on the eighth amendment. He is concerned primarily with the necessity for clearly articulated standards of culpability. For White, general deterrence is a sufficient goal for death penalty statutes and the issue is whether the state has identified who deserves to die with sufficient particularity to further this goal. Under this theory of "responsibility," there is little need for special procedural devices.

Both theories aim at the same substantive result—that only those who legitimately deserve to die are sentenced to death. In this sense, *both* theories are concerned with "individualizing" death penalty decisionmaking. But differences as to the constitutional source of this requirement and consequently as to the constitutionally mandated method of achieving this end, lead to contradictory results as in the mandatory death penalty cases.

Part I of this article develops the two theories through analysis of the Justices' positions in *Furman* and its major progeny in 1976.[6] Part II deals with

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[1] 408 U.S. 238 (1972).

[2] *Id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

[3] *See* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion by Justice Stewart); *id.* at 207 (White, J., concurring); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion by Justice Powell in which Justice Stewart joined); *id.* at 260 (White, J., concurring in the judgment); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion by Justice Stevens in which Justice Stewart joined); *id.* at 278 (White, J., concurring).

[4] *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion by Justice Stewart); Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion by Justice Stevens in which Justice Stewart joined).

[5] 428 U.S. at 306 (White, J., dissenting); 428 U.S. at 363 (White, J., dissenting).

[6] *See* notes 3-5 *supra*.

post-1976 death penalty litigation. In only one case[7] have Stewart and White been in complete agreement in their method of analysis. Rather than undermining the thesis of this article, this single point of convergence illustrates that concepts of "punishment" and "responsibility" have points in common in legal decisionmaking since the concepts are, in law as well as in common parlance, interrelated.[8]

Part III concludes the article by examining the implications of the two constitutional theories for future death penalty litigation and other sentencing issues. Even if the Court never actively enters the current debate over the sentencing process, the perspectives of Justices Stewart and White on how death should be imposed make a contribution to debate about our current sentencing practices. This article illustrates that the constitutional theories of Justices Stewart and White are differing normative perspectives on how the component parts of the criminal process ought to operate as a "system."[9]

I. Furman and the 1976 Death Penalty Litigation

In separate opinions, Justices Stewart and White joined the per curiam opinion declaring the administration of the death penalty unconstitutional in the three cases before the Court in *Furman v. Georgia*.[10] In those cases, the death penalty had been imposed for the crimes of rape and murder under the then prevailing legislative schemes that gave discretion to judges and juries to withhold or impose the death penalty.[11] Justice Stewart reasoned that the eighth and fourteenth amendments invalidated the imposition of the death penalty under "legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[12] Justice White, apparently relying solely upon the eighth amendment, reasoned that under the legislative schemes at issue the death penalty made only a marginal contribution to the deterrence of crime.[13] In his view, the legislative policy of allowing the jury to bring the "community judgment" to bear on sentence, as well as on guilt or innocence, had the practical effect of eliminating the rationale of the death penalty since legislative policy was not frustrated even if the death penalty were withheld for the most atrocious crimes.[14]

In their relatively short concurring opinions, both Justices distinguished their positions from those of the other three concurring Justices. In separate opinions and for different reasons, Justices Brennan and Marshall had found the infliction of the death penalty unconstitutional under all circumstances.[15] Justice Douglas had found the imposition of the death penalty unconstitutional because the record proved that the penalty had been inflicted against racial and other minority groups

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[7] *See* Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion by Justice White in which Justice Stewart joined). *Coker* held the imposition of the death penalty unconstitutional for rape of an adult woman. *Id.* at 592.

[8] The terminology of legal philosphers, "punishment and responsibility," is used to label the constitutional models of both Justice White and Justice Stewart. By using these labels, it is not meant to imply that their models correspond precisely with notions of punishment and responsibility used by a particular philosopher. *See generally* H. L. A. Hart, Punishment and Responsibility (1968). Punishment and responsibility are concepts whose interrelationship deserves to be treated at length in books, not footnotes. *See* E. Pincoffs, The Rationale of Legal Punishment (1966). *See also* J. Feinberg, Doing & Deserving: Essays in the Theory of Responsibility (1970). As labels, punishment and responsibility are descriptive of the complex moral problems that the Justices are trying to solve in the death penalty litigation. Further, use of the terminology alerts us that the problems facing legal decision makers in this area are replete with concepts that are changing over time. *See* Lasswell & Donnelly, *The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 Yale L. J. 869 (1959).

Since the two constructs are so often interwoven, it appears more appropriate in actual legal decision-making to focus on issues of adjudication or criminal liability and issues of disposition, to decide what to do with persons legally subject to state control. *See generally* Palmer, *A Model of Criminal Disposition: An Alternative to Official Discretion in Sentencing*, 62 Geo. L. J. 1 (1973).

[9] For a general discussion of the development of systematic views of the criminal process, see Goldstein, *Reflections On Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009, 1014–15 (1974). For a critique of the "systems view" of the criminal process, see, The Rule of Law: An Alternative to Violence; A Report to the National Commission on Law: An Alternative to Violence at 265–69 (1970).

[10] 408 U.S. 238 (1972). The Court considered two cases from Georgia and one from Texas. In the Georgia cases, one defendant had been convicted of murder and the other of rape. They had both been sentenced to death. In the Texas case, the defendant had been convicted of rape and sentenced to death. *Id.*

[11] *See, e.g.*, Ga. Code Ann. § 26-1005 (Supp. 1971); Tex. Penal Code Ann. art. 1189 (1961).

[12] 408 U.S. at 310 (Stewart, J., concurring).

[13] *Id.* at 312–13 (White, J., concurring).

[14] *Id.* at 313.

[15] *Id.* at 305 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring). Both Justices have continued to adhere to their views throughout the Court's death penalty litigation. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 230–31 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

in an impermissible manner.[16] Both Justices Stewart and White, however, indicated that the death penalty could be imposed in some circumstances.

Although Justice Stewart made reference to Justice White's opinion,[17] neither Justice analyzed their differences in approach. As already stated, Justice White relied solely upon the eighth amendment,[18] while Justice Stewart relied upon both the eighth amendment and the fourteenth amendment's Due Process Clause.[19] The Justices also differed as to what goals legislatures might legitimately pursue in death penalty schemes. In White's opinion, general deterrence could not only be a legitimate goal in using the death penalty, but could be labeled a "moral" goal as well.[20] On the other hand, Justice Stewart indicated that a legislature may pursue both retribution and deterrence.

According to Stewart, the state's pursuit of these goals had to be balanced against another important constitutional interest—the rehabilitation or reform of the offender—and it was the court's duty to strike this balance.[21]

A. Furman's Progeny

Five years after *Furman*, the Court decided five death penalty cases in which the differences between Justices Stewart and White became even more pronounced. Justice Stewart joined the three-man plurality in all five cases. He authored the plurality opinion in *Gregg v. Georgia*,[22] upholding a death penalty statute with constitutionally adequate "standards." He joined the plurality opinions upholding other statutes with similar standards in *Proffitt v. Florida*[23] and *Jurek v. Texas*.[24] Justice Stewart also authored the plurality opinion declaring North Carolina's mandatory death penalty statute unconstitutional in *Woodson v. North Carolina*.[25] Finally, he joined the plurality's invalidation of Louisiana's mandatory death penalty statute in *Roberts v. Louisiana*.[26]

Justice White wrote dissenting opinions in both *Woodson* and *Roberts* because he believed that a mandatory death penalty statute could be constitutional if it contained appropriate standards to determine culpability.[27] Although he joined the plurality in *Gregg, Proffitt* and *Jurek* in upholding those statutes, Justice White's concurring opinions in all three of these cases expressed disagreement with the reasoning of the plurality.[28] In White's view, none of these newly enacted statutes suffered from constitutional pitfalls like the statute in *Furman*. But, only three of those legislatures had managed to meet Justice Stewart's requirements that a death penalty statute contain both "standards" and flexibility in order to be constitutional.

Justice Stewart's Punishment Theory

Justice Stewart's opinions and voting patterns establish two closely related minimum criteria for a constitutional death penalty statute. First, a statute had to provide distinct proceedings for the determination of guilt or innocence and the decision to impose the death penalty or a lesser penalty. In *Gregg*, Justice Stewart thus upheld a statute that required a separate penalty hearing before judge and jury after a judgment that the offender had committed first degree murder. Under the Georgia statute at issue there, the judge was required to impose the jury's recommended sentence.[29] In *Proffitt*, the second case, Justice Stewart joined Justice Powell's plurality opinion upholding a Florida statute similar to Georgia's statute. In contrast to the Georgia statute, however, the Florida scheme permitted the trial judge to reject or accept the jury's recommendations on sentence since its role in the separate sentencing proceeding was merely advisory.[30] The Texas statute upheld by the same plurality in an opinion by Justice Stevens in *Jurek* was a variation on the Florida and Georgia statutes. As in the Georgia statute, the jury had ultimate authority to impose the death penalty. But unlike either the Florida or Georgia statutes, the Texas statute did not contain a list of "aggravating circumstances," although it did require the jury to answer three questions about the offender and his crime before the death penalty could be imposed.[31]

Justice Stewart's second minimal condition for the constitutionality of death penalty statutes was the requirement of appellate review of the decision to impose death. All three statutory schemes under

[16] 408 U.S. at 255–57 (Douglas, J., concurring).
[17] *Id.* at 309 (Stewart, J., concurring).
[18] *Id.* at 311 (White, J., concurring).
[19] *Id.* at 306 (Stewart, J., concurring).
[20] *Id.* at 312 (White, J., concurring).
[21] *Id.* at 307 (Stewart, J., concurring).
[22] 428 U.S. 153 (1976).
[23] 428 U.S. 242 (1976).
[24] 428 U.S. 262 (1976).
[25] 428 U.S. 280 (1976).
[26] 428 U.S. 325 (1976).
[27] 428 U.S. at 306 (White, J., dissenting); 428 U.S. at 363 (White, J., dissenting).
[28] 428 U.S. at 207 (White, J., concurring); 428 U.S. at 260 (White, J., concurring); 428 U.S. at 277 (White, J., concurring).
[29] GA. CODE ANN. §§ 26-3102, 27-2514 (Supp. 1975).
[30] FLA. STAT. ANN. § 921.141 (West Supp. 1976–1977).
[31] TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1975–1976).

consideration provided for some form of appellate review and approval of the imposition of the death penalty on any given individual. For example, Georgia's highest court was required to review the jury's decision on death to determine if three general standards had been met.[32] Moreover, the Florida statute required automatic appellate review in all cases where the death sentence was imposed, but, unlike the Georgia statute, it lacked specific criteria for the court to apply.[33] Justice Powell's opinion in *Proffitt* relied upon the fact that the trial judge, who had ultimate sentencing authority, was required to state his reasons for imposing the death penalty. Because of this requirement, Justice Powell reasoned that the appellate court could engage in meaningful review of the decision.[34] Finally, the Texas statute, like the Georgia statute, required expedited appeal of any death sentence, but did not formulate standards of review.[35] Justice Stevens' opinion in *Jurek* took the view that the high court in Texas had interpreted the legislative scheme so that the jury's answer to the three questions required it to consider the same aggravating and mitigating factors as the Florida statute.[36]

In the plurality's view, all three state high courts had assumed the role of ultimate supervisor of the administration of the death penalty.[37] Justice Stewart believed that this ensured the structuring of the decision in accordance with legislative standards.[38] His opinion in *Gregg* referred to the fact that state appellate courts had functioned as ultimate arbiter of the death penalties actually imposed and had invalidated the death penalty for some crimes.[39] Appellate review of the Florida, Texas and Georgia statutes then, had cured the "arbitrariness" and "freakishness" of the statutes that Justice Stewart had condemned in *Furman*.

On the other hand, mandatory death penalties failed to meet Justice Stewart's test of minimal standards. In *Woodson v. North Carolina*,[40] Stewart's plurality opinion held unconstitutional a statute requiring the imposition of the death penalty in every case of murder.[41] According to Stewart, the underlying purpose of the two criteria established in *Gregg, Proffitt* and *Jurek*, insuring structured "individualization" of the death penalty decision, could not be met by a statutory scheme that did not provide for bifurcated proceedings.[42] Without providing appellate review of the death penalty as a separate and distinct issue, the North Carolina statute in *Woodson* was thus held by Stewart to be lacking in "objective standards."[43]

In *Roberts v. Louisiana*,[44] Stewart joined Justice Stevens' plurality opinion which invalidated a mandatory death penalty for murder despite the changes in adjudicatory aspects of murder designed to guide the jury's determination of murder. Because death was automatic upon finding of first degree murder, the statute mandated that the jury must be instructed on all "lesser included offenses" in every unlawful homicide prosecution, regardless of the defendant's request or the evidence. The Louisiana statute also required the jury to return a "responsive verdict" as to which form of homicide it had found.[45] Justice Stevens believed that this

[32] The Georgia statute reads in part:

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

GA. CODE ANN. § 27-3537 (Supp. 1975).

[33] FLA. STAT. ANN. § 921.141(4) (West Supp. 1976-1977).

[34] 428 U.S. at 250-53 (plurality opinion by Justice Powell).

[35] TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1975-1976).

[36] 428 U.S. at 270-74 (plurality opinion by Justice Stevens).

[37] Gregg v. Georgia, 428 U.S. at 204-06 (plurality opinion by Justice Stewart); Proffitt v. Florida, 428 U.S. at 253 (plurality opinion by Justice Powell); Jurek v. Texas, 428 U.S. at 273-74 (plurality opinion by Justice Stevens).

[38] Justice Stewart's opinion in *Gregg* did not explicitly require appellate review of the decision to impose death. However, he did state that "to guard against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate." 428 U.S. at 198. Thus, if Justice Stewart's opinion in *Gregg* is read in light of his opinion in *Furman*, the failure of the state to provide for appellate review would mean every case would present a constitutional issue of "arbitrariness" for some federal court. In addition, since Justice Stewart's theory holds most mandatory schemes unconstitutional, the state's choices of methods for imposing death without federal review must include some form of appellate review.

[39] 428 U.S. at 203, 205-06 (plurality opinion by Justice Stewart).

[40] 428 U.S. 280 (1976).

[41] N.C. GEN. STAT. § 14-17 (1976).

[42] 428 U.S. at 303-05 (plurality opinion by Justice Stewart).

[43] *Id.* at 303.

[44] 428 U.S. 325 (1976).

[45] 428 U.S. at 332 (plurality opinion by Justice Stevens).

type of adjudication interfered with the constitutional policy of individualization.[46] Removing all sentencing authority regarding the death penalty from a jury or trial judge was not considered as curative of the *Furman* defects. As Stevens noted, the Constitution requires, at least for the imposition of the death penalty, a proceeding distinct from the determination of guilt.

In essence, Justice Stewart's constitutional theory requires a legislature to make a considered choice about the procedures for imposing the death penalty. If it decides that the death penalty is a necessary part of the criminal process, the legislature must be willing to expend the society's resources on the resolution of each and every case where the state seeks to impose the death penalty. Every accused offender must have not only the opportunity to defend against the finding of "capital murder," but also an opportunity to be heard on whether the death sentence should be imposed on him both at the trial and appellate levels. Thus, appellate courts occupy an important policy-making role under Justice Stewart's view.

Justice Stewart's theory is considered a theory of "punishment" because it focuses on the *methods* of imposing the death penalty. This theory requires that those methods further not only the goals of retribution or deterrence, but also the goal of "individualization." In determining whether a statutory scheme provides sufficient "individualization" of the sanction of death, Justice Stewart assumes that the sentencing stage is the appropriate point for individualization of the decision rather than the process of determining guilt.[47]

Justice White's "Responsibility" Theory

Taking a different viewpoint from Stewart, Justice White dissented from the invalidation of the Louisiana and North Carolina mandatory death penalty statutes. In *Roberts*, Justice White reasoned that the Louisiana mandatory death statute was constitutional because the legislature had removed the jury's discretion to bring in the verdict of "guilty without capital punishment" for the crime of first-degree murder.[48] This legislative change cured the major defect that White had seen in the *Furman* statute: it eliminated the potential for discriminatory and arbitrary infliction of the death penalty. Since the North Carolina legislature had also eliminated this traditional aspect of jury discretion in the administration of the death penalty, Justice White's dissenting opinion in *Woodson* was essentially a cross reference to his dissent in *Roberts*.[49] Thus, both of his dissents rejected the linchpin of Justice Stewart's analysis that a separation of guilt determination and the penalty infliction process is a precondition to a death penalty statute's constitutionality.

In concurring opinions, Justice White agreed with the plurality that the Georgia, Florida and Texas legislatures had chosen constitutionally permissible means of eliminating "wanton" and "freakish" imposition of the death penalty. In *Gregg*, White found the Georgia statute constitutional because the appellate court had exercised the authority granted to it by the legislature to review the infliction of the death penalty in the cases before the Court.[50] Similarly, White's concurrence in *Proffitt* argued that the Florida statute required the trial judge to impose the death penalty on all first degree murders meeting the statutory standards. He thus interpreted the Florida statute as "mandating" the death penalty.[51] Furthermore, in *Jurek*, White interpreted the Texas statute as requiring the imposition of the death penalty if the jury answered two of the three statutory questions affirmatively.[52]

Once adequate standards had been set, it was not relevant under White's theory whether the standards were applied by a jury, a trial judge or an appellate court. The setting of clear standards thus cured the *Furman* defects. For White, the essential problem for the Court was to determine if the state's system of decisionmaking can distinguish those murderers who deserve death from those who deserve a lesser punishment. The problem has two dimensions. First, Justice White looked for evidence that the legislature had established standards in sufficient detail describing the circumstances in which an offender is liable for the death penalty. All five statutes met this threshold requirement. For instance, affirmative answers to the following two questions:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that death of the deceased or another would result;

[46] *Id.* at 335–36.

[47] As will be discussed later, Justice Stewart's theory in the second round of death penalty litigation is part of his more general theory of the meaning of the Cruel and Unusual Punishment Clause. His theory of that clause focuses primarily on the decision to impose the sanction rather than the requirements of criminal liability. *See* text accompanying notes 181–200 *infra*.

[48] 428 U.S. at 346–50 (White, J., dissenting).

[49] 428 U.S. at 306–07 (White, J., dissenting).

[50] 428 U.S. at 222–24 (White, J., concurring).

[51] 428 U.S. at 260 (White, J., concurring).

[52] 428 U.S. at 277–78 (White, J., concurring).

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;[53]

would focus sufficiently on the offender's character and his crime to convince Justice White that any person so selected has committed an atrocity, punishable by death.[54]

Second, Justice White sought to determine if those designated to apply the standards were capable of doing so. In his view, a jury was capable of applying standards because of the "common sense core meaning" of the questions in the Texas statute.[55] Similarily, in the Louisiana case, Justice White suggested that the "lesser included offense provisions" criticized by the plurality[56] would not interfere with the jury's role as the conscience of the community in criminal cases.[57] In the Florida case, White asserted that the trial judge's sentencing, according to statutory provisions of aggravating and mitigating factors, would lead to regular, as opposed to freakish, imposition of the death penalty. As a result, in his view, the death penalty remained a credible deterrent to crime[58] because trial judges and juries could be expected to perform their function of applying definite standards. As a consequence of his confidence in appellate courts, Justice White simply reviewed the record in *Gregg* to determine if the state court had performed its statutorily assigned task of eliminating cases of discriminatory or arbitrary infliction of the death penalty. After these constitutionally impermissible factors were eliminated, Justice White assumed that the jury had found that the offender deserved the death penalty after weighing statutorily identified mitigating and aggravating circumstances.[59]

Justice White's analysis is labeled a theory of "criminal responsibility," despite the confusion engendered by the term,[60] because his focus requires the Court to balance social interest against the individual offender's interest in his life. White's overall analysis is concerned primarily with whether those who should die as a result of their crime are condemned. He is more concerned that these persons are condemned than with whether the system makes a "mistake" and condemns a murderer who does not deserve the penalty. In his analysis, the decision to condemn a murderer to die is a collective decision of legislatures and the administrators of the criminal process—prosecutors, juries, trial judges, probation officials, etc.

Justice White's theory does not assume, as does Justice Stewart's theory, that the Court's role is to impose particular procedures for administering the death penalty. Rather, in White's view, the Court's primary duty is to assess the overall system of decisionmaking to determine whether minimal criteria of criminal responsibility are met. Justice White's opinion in *Furman* and the second round of litigation over the death penalty indicates that the constitutionality of death penalty legislation is dependent upon the capacity of the criminal law process to effect a legislative mandate that the death penalty is a necessary part of the criminal justice system.[61]

B. Interpretations of Pre-Furman Precedents

In the second round of death penalty litigation, both Justices indicated that the Court's 1971 opinion in *McGautha v. California*,[62] in which they had both joined, offered support for their respective theories. *McGautha* upheld the constitutionality of the type of discretionary death penalty statutes under the fourteenth amendment[63] that *Furman* condemned as unconstitutional under the eighth and fourteenth amendments a year later. The differing interpretations of *McGautha* held by Justices Stewart and White illustrate their fundamental disagreement as to the requirements of the eighth amendment's Cruel and Unusual Punishment Clause and the fourteenth amendment's Due Process Clause. An examination of the Court's two pre-*McGautha* procedural due process cases involving the death penalty[64] reveals the fundamental difference as to how each Justice defines due process in a way that *McGautha* masks. Examination of the two non-death penalty eighth amendment cases[65]

[53] *Id.* at 277.

[54] *Id.* at 279.

[55] TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1975–1976).

[56] *Roberts*, 428 U.S. at 334–35 (plurality opinion by Justice Stevens).

[57] *Id.* at 347–48. (White, J., dissenting).

[58] *Profitt*, 428 U.S. at 260–61. (White, J., concurring).

[59] 428 U.S. at 224 (White, J., concurring).

[60] *See* Lasswell & Donnelly, *supra* note 8, at 875.

[61] As developed later, Justice White held these statutes that do not meet his minimal standards of criminal responsibility in the manner in which "capital murder" is defined unconstitutional on that ground alone. *See* Lockett v. Ohio, 98 S. Ct. 2981 (1978) (White, J., concurring in part and dissenting in part). *See* text accompanying notes 192–99 *infra*.

[62] 402 U.S. 183 (1971).

[63] *Id.* at 196.

[64] United States v. Jackson, 390 U.S. 570 (1968); Witherspoon v. Illinois, 391 U.S. 510 (1968). *See* text accompanying notes 88–109 *infra*.

[65] *Compare* Robinson v. California, 370 U.S. 660 (1962) *with* Powell v. Texas, 392 U.S. 514 (1968). *See* text accompanying notes 110–64 *infra*.

reveals a similar disagreement on the perimeters of the eighth amendment.

Differing Views of McGautha

In the Louisiana mandatory death penalty case, Justice White cited *McGautha* as support for his basic theory.[66] In *McGautha*, the Court upheld the constitutionality of statutes that allowed juries to impose the death penalty without any legislative standards setting permissible considerations for the making of that determination.[67] In a companion case, the Court also upheld the constitutionality of statutes that allowed juries to determine in one proceeding whether the defendant was guilty and whether the death penalty or life imprisonment should be imposed.[68] For Justice White, *McGautha* stood for the proposition that the Due Process Clause does not require bifurcation of trial and death penalty proceedings.[69] If bifurcation is the cornerstone of Justice Stewart's procedural analysis, Justice White's view of *McGautha* thus renders the case inconsistent with Justice Stewart's punishment theory.

Justice Stewart's opinion in *Woodson*, declaring mandatory death penalty unconstitutional, however, cited *McGautha* with approval.[70] There was nothing in any of his opinions indicating a *sub silentio* disapproval of *McGautha*. Nor did Justice Stewart indicate that he saw any fundamental conflict between his participation in the Court's opinion in *McGautha* and his plurality opinions in *Gregg* and *Woodson*.[71]

Justice Stewart's failure to perceive this conflict can be explained in terms of one of the key concepts in his constitutional theory of punishment. In contrast to traditional analysis that asserts punishment is a legislative function,[72] Justice Stewart's theory maintains that both appellate courts *and* legislatures are key policy makers in the administration of the death penalty.[73] Once this fundamental premise of Justice Stewart's theory is adopted, *McGautha* is not inconsistent with his reasoning in *Gregg* or *Woodson*. The petitioners in *McGautha* had argued that legislatures are required by the fourteenth amendment to impose standards for jury death penalty decisionmaking.[74] Justice Stewart's response to that argument based solely on the Due Process Clause was to join Justice Harlan's majority opinion in *McGautha*, rejecting the requirement on legislatures. Justice Stewart's constitutional theory of death penalty decisionmaking would have required the petitioners in *McGautha* to argue that *appellate courts* must supervise the legislative standards used by juries to impose the death penalty under the eighth and fourteenth amendments.[75] The argument was unavailable since the petition for certiorari in *McGautha* had limited consideration of the issues solely to the Due Process Clause.[76]

To make *McGautha* consistent with Justice Stew-

[66] Roberts v. Louisiana, 428 U.S. 325, 350–58 (1976) (White, J., dissenting).

[67] 402 U.S. 183, 196 (1971).

[68] The Ohio procedure which permitted the guilt and punishment determination to be made in a single unitary proceeding, *id.* at 192, was also upheld as constitutional. *Id.* at 196.

[69] *See* note 66 *supra.*

[70] Woodson v. North Carolina, 428 U.S. 280, 297–98 (1976) (plurality opinion by Justice Stewart) (where *McGautha* is used to demonstrate the nation's rejection of mandatory death penalty schemes).

[71] In a long footnote in *Gregg*, Justice Stewart does state:

> While *Furman* did not overrule *McGautha*, it is clearly in a substantial tension with a broad reading of *McGautha's* holding. In view of *Furman*, *McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause.

428 U.S. at 195-96 n.47.

[72] *See, e.g.*, Furman v. Georgia, 408 U.S. at 405 (Blackmun, J., dissenting) where Justice Blackmun expressed the view of who can determine punishment under the eighth amendment, in rather graphic terms: "Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners. . . . " *Id.* at 406.

Later in the opinion, he stated:

> I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges.

Id. at 410–11.

[73] *See* text accompanying notes 29–47 *supra.*

[74] *See* Brief for Petitioner, at 17–19, McGautha v. California, 402 U.S. 183 (1971).

[75] In the same footnote in *Gregg*, Justice Stewart went on to say:

> We note that *McGautha's* assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman's* determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

428 U.S. at 195–96 n.47.

[76] 398 U.S. 936 (1970).

art's more fully developed constitutional theory of punishment, it should be intepreted as supporting this particularly narrow proposition: For the death penalty to be constitutionally imposed under both the Due Process and Cruel and Unusual Punishment Clauses, appellate review of the decision to impose death must be part of the decisionmaking process. Although a statute without specific legislative standards for appellate courts to apply in deciding whether to impose death may be constitutional as in *Jurek*, Justice Stewart would permit only those death penalty schemes where appellate courts assume the role of supervising the standards for imposing death to be constitutional.[77] Stewart believed that appellate court supervision of legislative standards is in fact a necessary condition to the constitutionality of death penalty statutes. His analysis in *Gregg* and *Woodson* thus furthered what he perceived as the underlying goal of *McGautha*—individualization of punishment—by requiring procedures that ensure such individualized decisionmaking.

Justice White saw *McGautha* as defining the basic goals which the Consititution allows the state to seek in authorizing the death penalty. For him, *McGautha* did not alter what he referred to as an "axiom" of constitutional law: Some crimes are so serious that the legislature may exclude consideration of the character of the individual offender in deciding whether to impose the death penalty.[78] Justice White's axiom is explicitly derived from the Due Process Clause since *McGautha* was decided solely under the fourteenth amendment. As he asserted in his dissent in *Roberts*, even if the goal of Justice Stewart's theory—individualization—is required by the eighth amendment, the state's interest in deterring others from committing crimes outweighs the state's interest in individualization. Thus, under Justice White's interpretation, the Due Process Clause allows the state to use general deterrence as a goal to justify enacting a particular death penalty scheme.[79] The eighth amendment gives the Court the power to weigh various goals of the criminal justice system, but not to lose sight of the fact that legislatures have primary authority to determine the culpability of offenders under the Due Process Clause. Since the due process concerns are given primacy in Justice White's analysis, he interpreted *McGautha* as support for his theory of criminal responsibility.

Integrating *McGautha* into both Justices' theories creates a dilemma. *McGautha* can be explained in terms of Justice Stewart's theory only if we accept his assumption that the Due Process and Cruel and Unusual Punishment Clauses point in the same direction—towards the goal of individualizing punishment. In Justice White's view, the eighth amendment goal of individualization of punishment is subsumed under the due process goal of general deterrence. According to White, due process allows legislatures to authorize death penalty for "deserving murders" through any system that has enough regularity of imposition to insure that the death penalty has a general deterrent effect. Jury discretion to withhold the death penalty is not itself determinative of that issue if the legislature has properly structured the jury's decision. The question remains, however, as to how the Court should determine how much and what kind of discretion is allowable in the furtherance of general deterrence.

Justice White's opinion in *Roberts*, along with his opinions in other cases, provides some hints as to how he would answer this question. In *Roberts*, the jury's ability to ignore instructions in adjudicating the crime, that the plurality criticized, was not viewed by White as unconstitutional. This position rested on his interpretation of *McGautha* and the lack of any evidence of the jury's systematic refusal to follow instructions. Nor did the prosecutorial power to select persons for prosecution, the practice of plea bargaining or the practice of executive clemency, render the statutes infirm in Justice White's analysis.[80] Citing cases dealing with plea bargaining[81] and cases dealing with harsher sentences on retrial,[82] White asserted that due process also did not invalidate the challenged methods of discretion. Only those kinds of specific discretionary powers that interfere with legitimate goals of

[77] One possible exception to this statement might be the case of mandatory death penalty for a life prisoner. Justice Stewart has consistently indicated that the constitutionality of such a statute is still an open question in his view. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 292-93 n.25 (1976) (plurality opinion by Justice Stewart); Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam opinion invalidating statute mandating death for killing police officer in course of his duty).

[78] *Roberts*, 428 U.S. at 358. (White, J., dissenting).

[79] *Id.*

[80] *Id.* at 348. None of these practices violated the eighth amendment in his view because he had rejected the primacy of the goal of individualization of punishment in constitutional analysis.

[81] *Id.* at 349.

[82] *Id.*

the criminal process would render a death penalty statute unconstitutional.[83]

White's concurring opinion in *Gregg* and his dissent in *Roberts* are both replete with references to the adjudicative aspects of the trial.[84] His elaborate statement of the facts in both cases indicated an unexpressed concern about the "fairness" of the adjudication. In *Gregg*, Justice White even discussed the jury instructions on murder when no question of adjudication was even considered in the petition for certiorari.[85] Similarly in *Roberts*, he included in his opinon the jury charges as well as elaborate discussions of the witnesses' testimony.[86] Thus, Justice White appears to have invited discussion of these trial issues to assure himself that no constitutional issues of adjudication existed in the case.[87]

Procedural Due Process

Aside from their interpretations of *McGautha*, Justices White and Stewart generally differ in their beliefs as to the requirements for procedural due process in the sentencing context. In *United States v. Jackson*,[88] for example, the Court, in an opinion by Justice Stewart, invalidated a portion of the federal kidnapping statute that allowed juries, but not trial judges, to impose the death penalty.[89] Stewart reasoned that the statute burdened the exercise of the defendant's constitutional right to a jury trial because if the defendant waived the jury right, he could avoid the possibility of a death penalty. Thus, in Stewart's view, the statute encouraged a choice against exercising one's right to a full adversary adjudication.[90] The result reached by Justice Stewart was to sever the death penalty provision rather than declare the entire statutory scheme unconstitutional as the district court had done.[91]

What is significant about this opinion is that Stewart took what was a systematic constitutional attack on a statute and transformed it into an issue solely of sentencing authority. The petitioner in *Jackson* had moved for a dismissal of the indictment because of the statute's unconstitutionality.[92] Justice Stewart, however, eliminated the death penalty from the statute and simply allowed the petitioners to plead anew to the indictment without the risk of a death penalty.[93]

Justice White wrote the only dissent in *Jackson*, arguing that the statute should have been held constitutional.[94] According to White, if the vice of the statute was that some people's choice of seeking a jury trial was burdened, the solution existed in adhering to constitutional standards for the taking of guilty pleas and waivers of jury.[95] What was significant about Justice White's opinion was that he stated the constitutional issues in terms of adjudicative or pre-adjudicative issues. He was unable to adopt Justice Stewart's systematic view of the operation of the statutory scheme that assumed an interaction of legislative standards for imposing the death penalty with the defendant's actions at the pleading and adjudicative aspects of trial.[96]

A second case illustrating the same divergence in framing of an issue appeared in *Witherspoon v. Illinois*.[97] There, Justice Stewart, again writing for the Court, held that due process prevented the imposition of the death penalty by a jury which excluded all persons who opposed the death penalty.[98] The petitioners had argued that a "death qualified jury," resulting from a process when all persons professing a disbelief in capital punishment were successfully challenged for cause on *voir dire* by the prosecution, was unconstitutional.[99] Stewart

[83] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 364 (White, J., concurring). *See* text accompanying notes 181–88 *infra*.

[84] 428 U.S. at 212–20 (White, J., concurring); 428 U.S. at 339–44 (White, J., dissenting).

[85] 428 U.S. at 215–16 n.4 (White, J., concurring).

[86] 428 U.S. at 340–44 (White, J., dissenting).

[87] Interestingly, all five cases involved the taking of human life during the commission of another felony. Thus, lurking beneath the surface in all cases was the old and continuing debate surrounding the nature and purposes of the "felony murder" doctrine. *See, e.g.*, Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

[88] 390 U.S. 570 (1968).

[89] *Id.* at 570–72.

[90] *Id.* at 571–72.

[91] *Id.* at 591.

[92] *Id.* at 571.

[93] *Id.* at 591.

[94] 390 U.S. at 591 (White, J., dissenting) (joined by Justice Black).

[95] *Id.* at 592.

[96] Had the issue in *Jackson* solely been that of "voluntariness" of the waiver of right to trial, Justices Stewart and White apparently would have been in complete agreement. In Brady v. United States, 397 U.S. 742 (1970), Justice White wrote for the Court, holding the petitioner's plea of guilty to a federal kidnapping charge constitutional under the statute partially invalidated in *Jackson*. Justice White reasoned that the plea had been "voluntarily" received by the trial judge, *id.* at 749–51. Justice Stewart joined this opinion, apparently because the issue was solely that of the constitutional standard for "voluntariness."

[97] 391 U.S. 510 (1968).

[98] *Id.* at 522–23.

[99] *Id.* at 516.

agreed with this characterization of the results of the *voir dire* selection process since no inquiry was made as to whether the jurors could nonetheless return a death penalty verdict.[100] But Stewart rejected the petitioners argument that the "death qualified jury" was more likely to render a guilty verdict on the substantive offense. While rejecting the petitioners' due process-fair trial claim, Justice Stewart fashioned a new remedy. He reversed the death penalty as unconstitutional on the grounds that the jury, without the inclusion of any persons with religious or conscientious objections to the death penalty, was organized to impose death.[101] As a result of Stewart's framing and analyzing of the issue, the petitioners were granted a new sentence of life imprisonment rather than the death sentence.[102]

Justice White expressed disagreement with the Stewart approach in two ways. First, he joined Justice Black's dissent, which argued that the statute's process of jury selection produced an impartial jury on the issue of death.[103] Justice Black also attacked Stewart's implication of constitutional unfairness in the process by pointing out that the petitioners' own able counsel failed to attack the jury in the manner invalidated by Justice Stewart.[104]

Second, White wrote his own dissenting opinion,[105] which was in the form of a short essay defending the legislature's delegation of the death penalty decision to a certain kind of jury.[106] Justice White reasoned that the legislative vote to authorize a death penalty had included those opposed to the death penalty for whatever ground. Having decided to retain the death penalty by majority vote, the exclusion of the minority from the jury was a means of maintaining the traditional policy that jury verdicts be unanimous.[107] He considered the exclusion of those who could "hang a jury" as justifiable because one such citizen on a jury could prevent a decision to impose death and as a result the penalty would never be imposed. Although White generally agreed with Justice Black's analysis of the fairness of the particular jury in *Witherspoon*, he sought to preserve the possibility that some juries may be unconstitutionally composed.[108] He indicated that some legislative delegations of the death penalty decisonmaking powers were probably unconstitutional, but other delegations—such as to a non-unanimous jury—were probably constitutional.[109]

Cruel and Unusual Punishment

Prior to *Furman*, the Court, with Justices Stewart and White participating, decided two cases involving the application of the eighth amendment's Cruel and Unusual Punishment Clause to state cases. In *Robinson v. California*,[110] Justice Stewart wrote for a plurality of the Court and held the imposition of a jail term on an individual found to be a "narcotics addict" unconstitutional under the eighth and fourteenth amendments.[111] Justice White wrote one of the dissenting opinions, disagreeing with Stewart's interpretation of the Court's role under the eighth amendment.[112] In *Powell v. Texas*,[113] a plurality of the Court upheld the constitutionality of a Texas penal statute[114] prohibiting public drunkenness as it applied to a "chronic alcoholic." This time, Justice White wrote a concurring opinion[115] joining the plurality, relying on his interpretation of *Robinson* to indicate the circumstances when the Court could invalidate a conviction for public drunkenness. Justice Stewart joined in the dissenting opinion in *Powell*, which interpreted *Robinson* as prohibiting any "punishment" of "sick" individuals, be they "narcotic addicts" or "chronic alcoholics" under the eighth amendment.[116]

Justice Stewart viewed *Robinson* from a perspective that assumes a conflict between a "medical" and "punitive" model of social control over narcotic addiction.[117] There, a Los Angeles police officer had arrested the defendant Robinson after stopping a car in which he was a passenger for a traffic violation.[118] During the course of his investigation, the officer testified that he observed "scar

[100] *Id.* at 520-21.
[101] *Id.*
[102] *Id.* at 523-24 n.21.
[103] 391 U.S. at 532 (Black, J., dissenting, joined by Justice White).
[104] *Id.* at 533-34.
[105] 391 U.S. at 540 (White, J., dissenting).
[106] *Id.* at 541-42.
[107] *Id.*
[108] *Id.* at 541 n.1.
[109] *Id.* at 542 n.2.
[110] 370 U.S. 660 (1962).
[111] *Id.* at 667.
[112] *Id.* at 685 (White, J., dissenting).
[113] 392 U.S. 514 (1968).
[114] TEX. PENAL CODE ANN. art. 477 (Vernon 1952) (repealed 1973).
[115] 392 U.S. at 548 (White, J., concurring).
[116] *Id.* at 554 (Fortas, J., dissenting, joined by Stewart and Brennan, JJ.).
[117] *See, e.g.*, Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L. J. 413 (1975).
[118] 370 U.S. at 661.

tissue and discoloration" on Robinson's arms. The arresting officer also testified that Robinson admitted using narcotics. Following Robinson's arrest,[119] an officer from the narcotics bureau examined Robinson's arms. At trial this narcotics officer testified that, based on his ten years of experience in the field, in his opinion the marks were caused by the use of non-sterile hypodermic needles. Although the narcotics officer stated that Robinson was neither under the influence of drugs nor suffering from withdrawal symptoms at the time of the examination, he admitted having used narcotics recently. However, Robinson testified denying ever using narcotics and explained the condition of his arms as resulting from an allergic condition. Two witnesses corroborated his testimony.[120]

On the basis of these facts, Justice Stewart assumed that the jury had been asked to find Robinson addicted to heroin in a physiological sense. This assumption was made despite the fact that the state made no effort to prove physiological addiction through the presentation of the results of medical testing, nor did it offer any evidence of Robinson's physiological dependence on narcotics.[121] Despite this lack of evidence, Justice Stewart's opinion assumed and asserted that "narcotics addiction is an illness."[122] The assumption was necessary for his reasoning by analogy that any time in jail for the "patient," Larry Robinson, would have been similar to jailing a person for a "common cold."[123]

One of the operative effects of Justice Stewart's perspective of a conflict between methods of social control is that he arguably misanalyzed the purpose of the California legislative scheme that he declared unconstitutional. Without any discussion, Justice Stewart blissfully characterized the statute under consideration, a provision of the California Health and Safety Code, as imposing a "criminal offense"[124] and assumed that its purposes were totally punitive. Of course, the use of jails as a sanction and the police as invoking agents, under the statute, might have supported this characterization and his assumption of the statute's purpose.[125] But if we analyze the statute in the context of the total legislative scheme for dealing with "narcotic addiction," Justice Stewart's assumption about the purposes of the statute are at least seriously questioned.

At the time of *Robinson*, California had another statute permitting the involuntary committment of narcotics addicts.[126] That statute, a provision of the California Welfare and Institution Code, defined a narcotics addict as "any person who habitually takes or otherwise uses *to the extent of having lost the power of self-control* certain narcotic drugs."[127] The statute involved in *Robinson*, on the other hand, had no statutory definition of addiction but the trial judge had defined the term for the jury as follows:

> "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether *a person is addicted to the use of narcotics is in effect an inquiry as to his habit in* that regard."[128]

The distinction between these two definitions of addiction is between what might be called a "voluntary addict" and an "involuntary addict." The voluntary or habitual addict defined in *Robinson* in some sense *chooses* to use narcotics, whereas the involuntary addict of the Health Welfare and Institution Code uses the drugs because he has lost control of his ability to choose in this particular regard.[129]

Using the distinction between the two statutory definitions of addiction, it was possible for a judge to analyze the social control functions of the two statutes as congruent rather than conflicting. For example, as Justice Clark pointed out in his dissenting opinion in *Robinson*, the legislature sought to cure only the involuntary addict through involuntary confinement.[130] Under the involuntary commitment statute, a confined person was discharged after a minimum of three months if treat-

[119] Robinson was arrested for violating the California Health and Safety Code, which provided in part that: "No person shall use, or be under the influence of, or be addicted to the use of narcotics. . . . " CAL. HEALTH & SAFETY CODE § 1172 (repealed in 1972). For violating this statute, Robinson was subject to 90 days in jail and two years of subsequent parole.

[120] 370 U.S. at 662.

[121] The major issue in the trial below concerned the constitutionality of the "search" by the arresting officer. The Court declined to consider this issue. *Id.* at 661 n.2. The testimony in the trial below in *Robinson* is reprinted in J. GOLDSTEIN, A. DERSHOWTIZ & R. SCHWARTZ, CRIMINAL LAW: THEORY AND PRACTICE 229-42 (1974).

[122] 370 U.S. at 667.

[123] *Id.*

[124] *Id.*

[125] *See* note 121 *supra*.

[126] *See* CAL. WELF. & INST. CODE § 5350 (repealed 1965).

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

[128] 370 U.S. at 680 (Clark, J., dissenting) (emphasis added).

[129] *Id.* at 681.

[130] *Id.* at 681-83.

ment was not deemed possible and the person was considered "not dangerous."[131] The significant feature of this statute's means of effectuating "treatment" through coercive means was a recognition that treatment may not be possible. Such a view of achieving treatment also was a recognition that treatment is sought for social ends or as a means of social control.

If the involuntary confinement process for treatment and social protection was thus viewed as a social control mechanism, a judge perhaps could also have analyzed the social control purposes of the "voluntary addiction" statute involved in *Robinson*. Justice Clark engaged in such an analysis and suggested that the underlying social control purpose of the statute was to encourage persons to exercise self-control in choosing not to use drugs.[132] He justified the use of a minimum jail term as a sanction upon a person like the defendant Robinson on the view that the negative sanction could modify his *choice* to use drugs. The two-year parole period that followed the jail term also involved tests to determine if he had changed his habits regarding heroin use.[133] This view of the purpose of the statute explained the lack of reliance on expert medical testimony by the state in *Robinson*, as well as the state's use of negative sanctions plus surveillance.

Whether or not one agrees with his answer, Justice Clark, at least, perceived the questions of legislative purpose in *Robinson*. On the other hand, Justice Stewart failed even to acknowledge this question because of the clear dichotomy in his analysis between "medical" and "punitive" methods of social control. Stewart even intimated in a footnote that the civil procedures should have been utilized in Robinson's case[134] without any discussion of the constitutionality of those procedures.[135] Furthermore, any use of criminal disposition apparently leads him to characterize the process as "punishment" and thus in conflict with his preferred goal of rehabilitation.[136]

The tentative term "apparent" is used here to explain Justice Stewart's result in *Robinson*, because his precise holding has never been clarified. Through his use of the term "punishment," there exist numerous questions concerning when the Constitution permits the use of the criminal process. Although Justice Stewart found constitutional fault with the addiction portion of the statute, he explicitly asserted without explanation that the state can use the criminal process to prohibit "the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics."[137] Moreover, one wonders what Stewart meant by "punishment" when, by the way of dictum in *Robinson*, he gave a constitutional blessing to the involuntary commitment of narcotics addicts. Simple deprivation of an individual's liberty by the state was apparently not the equivalent of punishment in Justice Stewart's view. Finally, the precise nature of the constitutional defect in the statute in *Robinson* was unclear. Was the infirmity in the use of criminal process in "convicting" a person of "addiction" or in the use of jail as a place of confinement? State courts interpreted the statute's constitutional defect as the use of penal facilities for addicts.[138] On the other hand, other Supreme Court justices have interpreted the defect in the California statutory scheme to be in the labelling of the addicted person a "criminal" by the legal process.[139] To answer the question one way as opposed to the other has significant impact on whether one thinks the primary impact of the eighth amendment will be on the "adjudicative" or "dispositive" aspects of criminal process.[140]

[131] CAL WELF. & INST. CODE § 5355.1 (repealed 1965).

[132] 370 U.S. at 680–81 (Clark, J., dissenting). *See also* J. WILSON, THINKING ABOUT CRIME 126–33 (1975).

[133] Robinson's actual sentence included a ninety day jail term and a two year period of parole. One of the conditions of his parole was that he submit to a Nalline test. *See* J. GOLDSTEIN, A. DERSHOWITZ, & R. SCHWARTZ *supra* note 121, at 242.

[134] 370 U.S. at 665 n.7.

[135] The Court has never directly decided on the constitutionality of narcotic civil commitment proceedings. State courts have considered constitutional challenges to schemes and generally upheld them. *See, e.g.*, In the Matter of Narcotics Addiction Control Commission v. James, 22 N.Y.2d 545, 551, 293 N.Y.S.2d 531, 535–36, 240 N.E.2d 29, 32 (1968).

[136] 370 U.S. at 667 n.8.

[137] *Id.* at 664–65.

[138] *See, e.g., In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489, *cert. denied*, 374 U.S. 856 (1963).

[139] *See, e.g.*, Robinson v. California, 370 U.S. at 678 (Harlan, J., concurring).

[140] The adjudicative parts of the criminal process include all issues decided at trial and in appellate review of the trial process. The dispositive aspects of the criminal process include any decision where the legal system authorizes an official to exercise direct control over individuals. Under this definition, trial judge sentencing is essentially part of a larger category of legal decisions that include decisions by prison and parole officials and even decisions by officials in a civil commitment process. For a discussion of the implications of the distinction between dispositive and adjudicative decision making, see Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 GEO. L. J. 1 (1973); Palmer, *The*

Despite assertions by Justice Stewart to the contrary, Justice White's dissent in *Robinson* interpreted Stewart's opinion as raising serious doubts about the state's ability to prohibit the use of narcotics as opposed to the purchase, possession or sale. White believed that voluntary use was a necessary precondition to addiction, except in the rare instance of legitimate medical addiction.[141] Thus, if addiction failed the constitutional test, a criminal statute punishing use must also fail the constitutional test. Neither statute would be unconstitutional under White's analysis, however, because he interpreted the issue in *Robinson* in terms of "responsibility." For Justice White, the essential question in *Robinson* was whether the state convicted a person of addiction who had not lost his power of self-control.[142]

By framing the issue in this manner, Justice White adopted Justice Clark's interpretation of the statute and then looked for actual evidence of lack of self-control. Finding no such evidence in the record, he consequently concluded that the Court should have affirmed the conviction.[143] According to White, the ultimate issue of responsibility was a Court, and not a legislative, problem. His view of the Cruel and Unusual Punishment Clause in *Robinson* was thus very similar to the common law requirement of "voluntariness" before criminal conviction.[144]

White's constitutional theory of responsibility under the eighth amendment was made even clearer by his statement in *Powell v. Texas*.[145] There, the Court, in a plurality opinion written by Justice Marshall, upheld the imposition of a criminal fine[146] on a "chronic alcoholic" under the Texas Penal Code prohibiting public drunkenness.[147] The defendant in *Powell* had been arrested and jailed pending trial the next morning for being intoxicated in a public place. At the trial, the defense presented an expert witness whose testimony was the basis of the trial judge's finding of the fact that: "'(1) That chronic alcoholism is a disease. . .;' (2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease. . .; '(3) That Leroy Powell, defendant herein, . . .is afflicted with the disease of chronic alcoholism.'"[148] The defendant also testified as to the history of his drinking problems and his numerous arrests for drunkenness.[149]

The state offered no contradictory expert testimony. On cross-examination of the defendant's expert witness, the state elicited an opinion that when the defendant was sober, he knew "the difference between right and wrong" and that the first drink was a voluntary exercise of his will.[150] The state's cross-examination of the defendant elicited an admission that he had one drink on the morning of trial, and had discontinued after one drink. The state's argument was simply that no defense had been presented since the defendant was "legally sane" under the state's test for insanity.[151] Despite its findings of fact, the trial judge accepted the state's view and ruled as a matter of law that there was no defense. The trial judge found the defendant guilty and imposed a $50 fine.[152]

Justice Marshall, for the plurality of the Court, affirmed the conviction. In doing so, Marshall interpreted *Robinson* only as prohibiting the use of criminal sanctions where no act had been proven.[153] Since, in *Powell*, the state elicited evidence of voluntary drinking during its cross-examination, this was held sufficient to meet the act requirement for criminal liability. Thus, Justice Marshall took *Robinson* as standing for the proposition that the eighth amendment requires a distinction between an "Act" and a "Status" in criminal adjudication.[154] For the former, the criminal process can be used, but the Constitution prohibits a conviction solely on the basis of the latter.

Adopting a similar view that *Robinson* had dealt with limitations on the adjudication of criminal liability, Justice White's concurring opinion in *Powell* pointed out specifically the constitutional

Appellate Court Role in Mandatory Sentencing, 26 U.C.L.A. L. Rev. 301 (1979).

Using this distinction, Justice White's theory of the eighth amendment could be characterized as primarily concerned with adjudicative issues in relation to the disposition of death. *See* text accompanying notes 48-61 *supra*. Justice Stewart's theory of the eighth amendment could be characterized as primarily concerned with the dispositive issues of the death penalty. *See* text accompanying notes 29-47 *supra*.

[141] 370 U.S. at 688-89 (White, J., dissenting).

[142] *Id.* at 688.

[143] *Id.* at 687-88.

[144] *Id.*

[145] 392 U.S. 514 (1968).

[146] Petitioner had been fined $50 upon conviction. *Id.* at 517 (plurality opinion by Justice Marshall).

[147] TEX. PENAL CODE ANN. art. 477 (Vernon 1952) (repealed 1973).

[148] 392 U.S. at 521.

[149] *Id.* at 519.

[150] *Id.* at 519-20.

[151] *Id.* at 520.

[152] *Id.* at 517.

[153] *Id.* at 532.

[154] *Id.* at 532-34.

perimeters of voluntariness,[155] perhaps on the belief that Justice Marshall had failed to do so.[156] Under Justice White's theory of constitutional "voluntariness," if the record demonstrated the existence of chronic disease and compulsion to drink, *as well as the inability to avoid public places*, a conviction under the Texas statute would be unconstitutional.[157] He recognized that a conviction for being drunk in a public place would depend more often on economic status than on the nature of the disease, but this use of the Court's power to invalidate a conviction of an "unfortunate" in a hypothetical case did not trouble him.[158] He voted for affirmance because the record in *Powell* failed to include evidence that the defendant could not have gotten drunk at home—conduct not prohibited by the statute.[159]

In giving *Robinson* precedential effect through his concurring opinion in *Powell*, Justice White made clear what was only implicit in his dissent in *Robinson*. As he stated in the opening paragraph of his opinion:

> If it cannot be a crime to have an irresistable compulsion to use narcotics, *Robinson v. California*, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs, convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistable urge to consume alcohol should not be punishable for drinking or for being drunk.[160]

Even though Justice White went on to distinguish Powell's conviction from a conviction of a chronic alcoholic with a compulsion to drink, he indicated that when he does give operative effect to the eighth amendment, it will be in terms of imposing restraints on state's processes of criminal adjudication rather than on its criminal dispositional process.[161]

Not surprisingly, Justice Stewart, whose focus under the eighth amendment is on the formal sanctioning process, joined Justice Fortas' dissent in *Powell*.[162] For Fortas, as for Justice Stewart, *Robinson* stood for principles of punishment. As Fortas argued, "[c]riminal *penalties* may not be inflicted upon a person for being in a condition he is powerless to change."[163] By this statement of *Robinson*'s principle, Justice Fortas, with Justice Stewart's full concurrence, centered upon the actual infliction of the sanction on a person deemed unable to change the condition for which he is being "punished."

Unlike Justices Marshall and White, Justices Fortas and Stewart accepted the trial court's "finding of facts" that alcoholism is a disease and the individual defendant was suffering from this disease.[164] However, the Fortas-Stewart analysis must get past these questions of the nature of criminal liability in order to engage in meaningful constitutional discussion of imposing criminal sanctions. The White-Marshall theory, on the other hand, avoided acceptance of the trial court's findings. According to them, discussion of formal sanctioning or the dispositive processes presupposes a clarification of the constitutional limits on defining criminal liability.

As a result of their participation in *Powell* and *Robinson*, both Justices Stewart and White had an opportunity to give different interpretations of the impact of the ever-elusive term "punishment" prior to the specific litigation over the death penalty. Justice White defined the issues in *Powell* and *Robinson* in terms of the limitations on adjudicative processes because of his standards of constitutional responsibility. In those same cases, Justice Stewart defined the issues in terms of the constitutional limits on the state's imposition of a particular sanction. This difference in defining issues indicates a fundamental differing concept of the Court's role under the eighth amendment.

II. Death Penalty Cases Since 1976

Since 1976, the Court has decided three major cases involving the death penalty. In *Coker v. Georgia*,[165] the Court invalidated a statute authorizing the death penalty for the crime of rape. During the same term, the Court found the procedures used to impose the death penalty on a particular individ-

[155] 392 U.S. at 550–52 (White, J., concurring); *see also* 3 Rutgers-Camden L.J. 361 (1971).
[156] 392 U.S. at 535 (plurality opinion by Justice Marshall).
[157] 392 U.S. at 551–52 (White, J., concurring).
[158] *Id.* at 551.
[159] *Id.* at 552–54.
[160] *Id.* at 548–49.
[161] *Id.*
[162] 392 U.S. at 554 (Fortas, J., dissenting).
[163] *Id.* at 567 (emphasis added).
[164] *Id.* at 557 n.1.
[165] 433 U.S. 584 (1977).

ual unconstitutional in *Gardner v. Florida*.[166] Last term, in *Lockett v. Ohio*,[167] the Court invalidated a death penalty statute because its definition of "mitigating circumstances" was incompatible with the standards for individualization set forth in *Gregg*, *Proffitt* and *Jurek*.

In all three of these new cases, Justices Stewart and White agreed with the Court's judgments declaring the death penalty unconstitutional, but continued to demonstrate through their voting behavior and opinions fundamental difference in their analytical approaches. In *Lockett* and *Gardner*, Justice White wrote concurring opinions disagreeing with the reasoning of the plurality opinion that Justice Stewart had joined. In *Coker*, however, Justice Stewart joined the plurality opinion of Justice White. This basic agreement in *Coker* simply indicates that there is common ground between the two constitutional analyses.

Coker and the Balancing of Eighth Amendment Interests

In *Coker*, Justice White's plurality opinion held that a statute authorizing the death penalty for the crime of rape violated the eighth amendment, because in such an instance death would be a "grossly disproportionate" penalty in relationship to the crime.[168] This conclusion was reached by both Justice White and Justice Stewart despite the fact that the death penalty had been imposed in accordance with the same statutory procedures they both had approved the previous term in *Gregg*.

In the factual circumstances of the case, the jury found that two of the three statutory aggravating circumstances justified imposing the death penalty on the defendant, Coker. First, he had previously been convicted of a "capital felony."[169] Coker had been convicted of murder, rape, kidnapping and aggravated assault. While serving sentences for these crimes, he escaped and committed the crimes involved in the instant case. Second, the jury found that Coker had committed the rape while engaged in another "capital felony or aggravated felony."[170] The record indicated that when he entered the victim's house brandishing a board, he tied up her husband and took his money and the keys to the family car, prior to raping the victim.[171] Thus, the jury found he had committed armed robbery, an aggravated felony, while committing rape. The third aggravating circumstance, that the rape was committed "outrageously or wantonly" was not alleged to be present because the record indicated that the victim of Coker's rape was "unharmed." For Justice White, "unharmed," in this context, meant only that she was not further physically brutalized by Coker after the rape.[172]

If the primary focus of Justice White's analysis were whether the defendant deserved the death penalty, the state's decision to put Coker to death was hardly unreasonable. Justice White's theory of the Court's authority under the eighth amendment, however, required more than a judgment that the particular defendant deserves a severe penalty, for he admitted in his opinion that Coker deserved a severe sanction.[173] Under his constitutional analysis, since the legislature had authorized the death penalty as opposed to another penalty, it was the Court's function to balance the legislative judgment against constitutional standards in determining whether "the punishment fits the crime." Thus, history, the fact that other legislatures had rejected the death penalty for rape,[174] and the fact that Georgia juries and trial judges seldom imposed the death penalty for rape were considered significant in Justice White's conclusion[175] that the death penalty was "disproportionate" punishment for the crime of rape.

Justice White's proportionality analysis was essentially a comparison of competing interests served by the criminal law. He acknowledged that by sanctioning rape as a crime, the community protects its interest in "personal integrity" and "autonomy" as well as its interest in sexual integrity.[176] By invalidating the death penalty for rape, White asserted that those interests do not justify taking the life of the rapist because of the community's general interest in protecting life. Only the community's interest in life as exemplified in the crime of murder, in his view, justified taking the life of the offender. While the death penalty for murder serves legitimate goals for the criminal justice system, Justice White viewed the death penalty as an "excessive" furtherance of those goals if imposed for rape.[177]

Justice Stewart fully concurred in White's analysis in *Coker*, because Stewart's constitutional analysis of punishment involved in effect the same type

[166] 430 U.S. 349 (1977).
[167] 98 S. Ct. 2954(1978).
[168] 433 U.S. at 592.
[169] *Id.* at 587–91.
[170] *Id.* at 589.
[171] *Id.* at 587.
[172] *Id.*
[173] *Id.* at 598.
[174] *Id.* at 593–96.
[175] *Id.* at 596–97.
[176] *Id.* at 597.
[177] *Id.* at 598.

of analysis of competing goals with a slightly different emphasis. At the heart of Justice Stewart's analysis was an unarticulated equation about the relationship of the goals of the criminal process. The underlying purposes of his *Gregg* standards for individualization were to preserve the hope of "rehabilitation" that he had mentioned in *Furman*.[178] Justice Stewart's emphasis on rehabilitation did not necessarily mean that he thought a recidivist like Coker could be rehabilitated. Rather, his use of rehabilitation referred to the goals of the system and not to the specific treatability of an individual.[179] For Stewart, rehabilitation is a code name for preserving the value of "human dignity" within the process of state control.[180] By preserving the life of a rapist, Justice Stewart indicated that the social control goals of the criminal law are limited by constitutional norms or values. Although Stewart sought to further those norms by first asking questions about the procedures for sanctions, he would enforce those norms when they are challenged directly by state legislatures and courts. Thus the issue in *Coker*, where the state had adopted procedures he had already approved in *Gregg*, was whether the state can justify taking the life of the offender for the crime of rape. In answering the question posed, Justice Stewart's theory required the same kind of balancing process as Justice White's analysis.

Gardner and Constitutional Procedures For Imposing Death

In *Gardner*, Justice Stewart joined Justice Stevens' plurality opinion invalidating the particular procedures used to impose the death penalty on the defendant.[181] Under the separate sentencing proceedings for the death penalty required by Florida law and upheld in *Proffitt*, the jury had advised the judge to impose life imprisonment in Gardner's case because of the mitigating circumstances. The trial judge had ordered a pre-sentence report shortly after the jury retired to deliberate on the penalty. Several weeks after the jury's advisory recommendation of life imprisonment, the judge received the pre-sentence report. He then entered findings of fact and concluded that the murder had been committed under one of the statutory "aggravating circumstances" to wit, in "an especially heinous and cruel manner."[182] The trial judge relied in part on the confidential portions of the pre-sentence report that had not been disclosed to defense counsel. On appeal, the Florida court affirmed the death sentence after "carefully reviewing the record." The record on appeal, however, did not contain the confidential portion of the pre-sentence report.[183]

Justice Stevens reasoned that the imposition of the death penalty on Gardner violated due process because the constitutionality of the death penalty was dependent upon its fair administration.[184] In his view, due process required the trial judge to disclose fully the contents of the report to ensure its accuracy in an adversary context.[185] By implication, due process also required the appellate court to consider the pre-sentence report in its assessment of the "entire record." This analysis fit well with Justice Stewart's constitutional theory of punishment.

Justice White had one major disagreement with Justice Stevens' analysis. White believed that the procedures used to sentence Gardner to death violated the eighth amendment rather than the fourteenth amendment.[186] Justice White reasoned that the use of secret information about the individual's character in imposing the death penalty would decrease the reliability of the death penalty decision-making required by *Woodson*. Using the Due Process Clause as a basis for the Court's decision implied for Justice White the possibility of applying the Court's standards for sentencing in death penalty cases to other sentencing issues.[187] As indicated by the analysis of his pre-*Furman* due process cases, Justice White was generally reluctant to concede that the Due Process Clause authorizes the

[178] *See* 408 U.S. at 306 (Stewart, J., concurring).

[179] *Id.*

[180] For example in concluding his *Woodson* opinion, Justice Stewart had stated:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

428 U.S. at 304. (plurality opinion by Justice Stewart) (citations omitted).

[181] 430 U.S. 349 (1977).

[182] *Id.* at 353 (plurality opinion by Justice Stevens).

[183] *Id.* at 354.

[184] *Id.* at 361.

[185] *Id.* at 359-60.

[186] 430 U.S. at 364 (White, J., concurring).

[187] *Id.*

Court to impose procedures on sentencing decisions.[188]

Lockett and the Crime Unfit for Punishment

Just last term, in *Lockett*, Justice Stewart joined the plurality opinion of Chief Justice Burger interpreting *Gregg* to invalidate the Ohio statute because the mitigating circumstances were too narrowly defined.[189] The Ohio statute authorizing the death penalty for "aggravated murder"[190] failed this test because the trial judge was asked to consider only three circumstances as mitigating factors in determining whether to impose death.[191] Justice Stewart concurred in the Chief Justice's analysis that the statutory standards of whether the victim induced or facilitated the offense, whether the offense was committed under duress, or whether the offense was primarily the result of a psychosis, were too narrow to permit proper "individualization" of the decision to impose death.

Justice White, in his concurring and dissenting opinion,[192] reasoned however that the statute was unconstitutional on a ground ignored by the Chief Justice, and by implication Justice Stewart. Justice White interpreted the statute as authorizing the death penalty without a finding that the defendant had a "purpose" to cause the victim's death.[193] Petitioner Lockett was convicted of "aggravated murder" on the basis of her participation in a robbery-murder with three other persons. One of her co-felons actually shot and killed the robbery victim. The homicide was alleged to be aggravated because it had been committed for the purpose of escaping detection for "aggravated robbery" and during the course of aggravated robbery.[194]

White pointed out that in Lockett's separate trial, the judge had instructed the jury that if she engaged in a "common design with others to rob by force" she was presumed to have acquiesced in the means chosen by her co-conspirators.[195] In addition, her liability for the resulting death was determined by the following standard:

> If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider or abettor in the homicide. . . . *An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances.*[196]

This definition of intent alone made the imposition of death unconstitutional in Justice White's view. He argued that without a finding of fact that Lockett had a purpose to bring about death, the state's imposition of the death penalty was unconstitutional. At best, in his opinion, Lockett was convicted on the basis of "recklessness."[197]

White went on to assert in his *Lockett* concurrence that the society had made a judgment that the "culpability" of those who act with the "purpose to take life" is distinguishable from the individual who acts without such purpose. Thus, if the death penalty is imposed, the distinction can be ignored.[198] The clear implication in his theory in *Lockett* is that imposing the death penalty as a sanction put limitations on the adjudicative aspects of the criminal law. Furthermore, Justice White's *Lockett* analysis raised questions about the applicability of the death penalty to the "felony murder doctrine," since Ohio's aggravated murder statute is similar to the common law felony murder rule. But this concern with the adjudicative aspect of the process by which death is inflicted was previously noticeable in his opinions in *Gregg* and *Roberts*.[199]

The post-1976 death penalty cases thus demonstrate two things about the two Justices' judicial philosophy. First, viewing the death penalty from

[188] If Justice White conceded that due process applied to the *Gardner* case, he would have been forced to address the continued viability of Williams v. New York, 337 U.S. 241 (1949), which had upheld the constitutionality of non-disclosure of pre-sentence reports in a death penalty case under the fourteenth amendment Due Process Clause. Justice Stevens distinguished *Williams* in his plurality opinion in *Gardner*, but his distinction relied on the assumption that particular procedures are prerequisite to the constitutionality of a death penalty statute under the eighth and fourteenth amendments. 430 U.S. at 357–58 (plurality opinion by Justice Stevens). Justice White rejected that basic assumption in his concurring opinion in *Gregg* and his dissenting opinion in *Roberts*.

By insisting on a different doctrinal basis for his decision, Justice White's position indicated that the continuing debates about "selective" incorporation of the Bill of Rights is still a part of the Court's debates about the criminal process.

[189] 98 S. Ct. at 2965–67.

[190] The Ohio statute is reprinted in the appendix of the Court's opinion. *Id.* at 2967.

[191] *Id.*

[192] *Id.* at 2982 (White, J., concurring and dissenting).

[193] *Id.* at 2983.

[194] *Id.* at 2957.

[195] *Id.* at 2984 (White, J., concurring and dissenting).

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

[197] *Id.* at —, 98 S. Ct. at 2984–85.

[198] *Id.*

[199] *See* text accompanying notes 48–61, *supra*.

either Justice Stewart's punishment perspective or Justice White's responsibility perspective leads to the same type of analysis when the question is the "disproportionality" of the death penalty to a particular crime. The proportionality analysis necessarily requires an analysis that connects the legislative judgment about what is crime and what sanction should be authorized for a proven crime.[200] Both Justice Stewart's and Justice White's analysis permits the Court to embark upon this judicial "second guessing" of legislative policy judgment about the death penalty.

Second, Justice White's eighth amendment analysis of the death penalty may have implications for problems not presently viewed as problems in sentencing. As he stated in his concurrence in *Lockett*, the constitution has minimal standards for criminal liability that must be met before the death penalty can be imposed. There is a constitutional doctrine of *mens rea* that must be met before the state is justified in using the death penalty under the Constitution.

III. Some Future Issues Surrounding the Death Penalty

In analyzing the Stewart and White approaches to the death penalty, it is interesting to hypothesize how the two Justices would respond to the application of the penalty to various other offenses and issues. For instance, were the issue of the constitutionality of the death penalty for armed robbery before the Court, we should expect a basic agreement between Justices Stewart and White as to the method of reasoning and the result because of their agreement about proportionality in *Coker*. But such a rather simple application of *Coker* is unlikely since even state appellate courts have declared the death penalty for armed robbery unconstitutional in those few states where the legislature authorizes the death penalty for armed robbery.[201]

On the other hand, there do exist other issues that may come before the Court that would likely rekindle the basic Stewart-White disagreement. For example, the constitutionality of a statute authorizing a mandatory death penalty for a prisoner serving a life term who kills a prison guard while trying to escape,[202] should drive their alliance on "proportionality" apart. The Court has yet to decide upon the constitutionality of such a statute.[203] But, since there is enough political pressure favoring the death penalty[204] and unrest in prison,[205] at some point the question is likely to come before the Court. At that point, Justices White and Stewart should define the issue in their own individual terms—either punishment or responsibility—even if they agree on the result in the case.

Another basis of disagreement may arise in the context of defendant requests for the death penalty to be imposed. At the time of this writing only Gary Gilmore has been executed since the Court's decision in *Gregg* in 1976. Gilmore's execution was in many senses at "his request" and over the objection of institutional litigants.[206] The attempts "to save" Gilmore's life represents a more general problem that the Court may have to address: Under what circumstances can an offender "waive" avenues available to avoid the death penalty and "consent" to his execution? Justice White, in his dissent to the vacating of a stay in *Gilmore v. Utah*[207] declared that a defendant cannot consent to an unconstitutional imposition of the death penalty under the eighth amendment.[208] Of course, this view is consonant with his general theory that the state or the criminal process, but not the offender, must determine whether the offender deserves the death penalty.

Interestingly, Justice Stewart joined the majority in vacating the stay in *Gilmore*. The *per curiam* judgment considered evidence of Gilmore's individual capacity to waive his right to appeal. A finding that Gilmore had this individual capacity was thought by the majority to be the compelling reason needed for allowing the execution.[209] Justice Stewart's analysis of the requirement of "individualization" in the death penalty's administration thus allowed him to view individual waiver as a sufficient moral justification for imposing the death penalty.

[200] *See* text accompanying notes 168–80 *supra*.

[201] The Georgia Supreme Court vacated the death penalty for armed robbery in *Gregg* even though the Georgia statute permitted the death penalty for armed robbery. Ga. Code Ann. § 26-1902 (1972 Supp.). *See* Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974).

[202] *See* R. I. Gen. Law § 11-23-2 (1977 Supp.)

[203] Roberts v. Louisiana, 431 U.S. 633, 637 n.5 (1977) (Blackmun, J., dissenting).

[204] *See* N.Y. Times, April 7, 1978, § 2, at 3, col. 2. (where the New York gubernatorial candidate indicates that his opponent's opposition to the death penalty was a major issue in the recent campaign).

[205] N.Y. Times, July 23, 1978, at 1, col. 1 (reporting a prison disturbance in Illinois in which three prison guards were killed).

[206] See generally Bedau, *The Right to Die by Firing Squad—The Death Penalty and Gary Gilmore*, 7 Hastings Center Rep. 5 (1977).

[207] 429 U.S. 1012 (1976).

[208] *Id.* at 1018 (White, J., dissenting).

[209] *Id.* at 1013.

As the *Gilmore* circumstances indicate, the legal capacity of the offender might become the subject of future death penalty litigation. Almost all death penalty statutes list the defendant's "mental capacity" in some form as a mitigating factor.[210] However, the Court has thus far avoided deciding anything on this issue even though the companion case to *Lockett, Bell v. Ohio,*[211] had lurking the question concerning the effect of mental capacity on the impositon of the death penalty. The defendant in *Bell* was a 16-year-old boy who had been transferred from juvenile to adult criminal court court for trial for aggravated murder.[212] One question arising from *Bell*, not resolved by the Court's decisions, is wheter extreme youth in and of itself constitutes incapacity, short of insanity, so as to mitigate the death penalty.[213] Even though the Court's handling of *Lockett* made it unnecessary to address this issue, it is likely to reappear.[214] If the issue does reappear, we should expect Justices White and Stewart to respond in terms of their respective theories of responsibility and punishment.

A final point for distinguishing Justices White and Stewart could arise from the application of their two constitutional theories to emerging issues of sentencing. So far the Court has managed to avoid entering the general debate about the inadequacy of our prevailing sentencing practices and policies.[215] Lower courts, however, have begun to struggle with the implications of the Court's death penalty doctrine outside of the death penalty context. For instance, whether a mandatory life sentence for certain drug offenders complies with the *Coker* proportionality analysis has been addressed and answered in the affirmative by state and federal appellate courts.[216] Were such a case before the Supreme Court, we can anticipate some basic disagreement between Justices Stewart and White in the way they would approach the issues. A sentencing issue for drug offenses should rekindle the fundamental debate between Stewart and White about the role of the "rehabilitative ideal" in criminal law illustrated by the previous analysis of *Robinson*. Resolution of issues such as these should feel the effect of these two theories.[217]

Juvenile sentencing is another problem of sentencing that will also feel the influence of the two competing theories, even if it never reaches the Court. At the heart of the debate over juvenile sentencing is the question of the viability of the juvenile process of adjudication as a means of determining the need for social control of an individual.[218] If policy makers view this problem solely from Justice Stewart's perspective, they might try to insure that the procedures provide for sufficient "individualization" at the dispositional phase of the process.[219] If, on the other hand, the policy makers adopt Justice White's perspective, they would be concerned with whether the processes of adjudication are capable of establishing the youth's culpability in a manner that would justify the new harsher penalty.[220] Asking either question about juvenile sentencing illustrates that legislators have not yet considered these approaches in their recent attempts to reform juvenile sentencing procedures.[221]

Deciding any sentencing issue requires all of us to think systematically about a range of interrelated problems and to utilize both Justices' theories. For instance, sentencing reform may require consideration of the extent to which "plea bargaining" is permissible and the degree of "discretion" that a prosecutor should be given.[222] Formulating and asking questions of this nature as we debate sentencing reform should force us to consider the criminal law as a process with component parts that ought, in a normative sense, function together in a certain matter. If a court decides that due process has or has not been violated in sentencing, we should now be aware that the court has embarked upon a process of telling us how the crimi-

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[210] *See generally* Liebman & Shepart, *Guiding Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor,* 66 GEO. L.J. 757 (1978).

[211] 98 S. Ct. 2977 (1978).

[212] State v. Bell, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976).

[213] *Id.*

[214] Public concern about "violent" youthful offenders is beginning to influence sentencing policy recommendations. *See,* Zimring, *Pursuing Juvenile Justice: Comments on Some Recent Reform Proposals,* 55 U. DET. J. URB. L. 631, 637–40 (1978).

[215] In *Lockett*, Chief Justice Burger pointed the inapplicability of his analysis to the problem of mandatory sentencing. He emphasized "that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes." 98 S. Ct. at 2965 n.13.

[216] People v. Broadie, 37 N.Y.2d 100, 371, N.Y.S.2d 471, 332 N.E. 2d 338, *cert. denied* 423 U.S. 950 (1975); Ward v. Carmona, 576 F.2d 405 (2d Cir. 1978).

[217] *See* discussion in Part I of text *supra.*

[218] *See* Hazard, *The Jurisprudence of Juvenile Deviance,* in PURSUING JUSTICE FOR THE CHILD 1976).

[219] *Id.* at 13–14.

[220] Id. at 14.

[221] *See* Zimring, note 214 *supra.*

[222] *See, e.g.,* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (Court upheld the prosecutors right to re-indict the defendant as a habitual offender after his refusal to

nal process functions as a system.[223] This type of systematic analysis ought to influence the thinking of legislators who are currently trying to reform sentencing without reference to problems of substantive criminal law.[224]

Conclusion

This article has attempted to articulate more fully than the Justices themselves the fundamental differences between Justices Stewart and White. Their conflicting positions in particular death penalty cases are logical outgrowths of their primary disagreement over the reach of the eighth and fourteenth amendments. Yet, when considering the proportionality of punishment to offense in a case considered only under the eighth amendment, like *Coker*, the two Justices are able to agree without repudiating their basic theories. Only when Justice Stewart begins to frame the issue in terms of procedural due process—"individualization"—does disagreement arise. For Justice White, once the issues of proportionality and adequacy of legislative criteria are settled, the usual procedural safeguards in criminal cases are adequate. In his view, the concept of appellate courts as central policy making bodies, a central tenet of Stewart's theory, is untenable.

Future death penalty litigation may reflect the fundamental differences between the two Justices. Even if the Court never formally enters the debate, the perspectives of Justices Stewart and White are useful in analyzing the issues raised by the reforms of our present discretionary sentencing practices. It is to be hoped that by clarifying the nature and source of these competing theories, the past and future development of the administration of the death penalty will seem more rational.

accept a plea bargain.)

[223] *See* note 9 *supra.*

[224] *See* note 215 *supra.*