CRIMINAL LAW AND THE SUPREME COURT: AN ESSAY ON THE JURISPRUDENCE OF BYRON WHITE

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When I mentioned to a fellow White law clerk that I was going to write an essay about the Justice's criminal law jurisprudence, he chuckled and responded, "Well, that can be awfully short: Lock 'em up!" But then he rubbed his chin and said—correctly, this time—"Actually, it's more complicated than that, isn't it?" Yes, it is.

Over the course of three decades, White wrote many opinions concerning criminal law and procedure—many more opinions than in most areas, because he was often in dissent. I shall not attempt to summarize all his opinions, or even the most important ones. Rather, I shall examine closely a few opinions that give us particular insight into the larger issues of White's constitutional jurisprudence and his understanding of his role as a Supreme Court Justice. I believe that White's opinions in the area of the substantive criminal law powerfully reveal three fundamental principles that generally underlay his understanding of our constitutional system of government. It is with these fundamental principles that I begin.

I. THE GENERAL PART

First, White believed that law is a good thing—not that every single enactment is necessarily good or wise, but that the *rule of law* is necessary if a society is to be free and if its citizens are to flourish. A basic obligation of government is to adopt and enforce a system of legal rights and obligations, including through the criminal law.

Second, White did not equate "law" with courts or the decisions of courts. Specifically, he understood our Constitution to invest the federal and state legislatures with primary authority

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for determining the specific content of the law—and this was emphatically true of the criminal law. White's understanding of the role of courts explains certain salient aspects of his decisional style. His opinions were, by and large, grounded in the factual record before the Court, because it was not the Court's role to proclaim law generally, but only the law needed to decide the case before it. I suspect that in whatever occupation he had chosen, Byron White would have been highly analytical in his reasoning and pragmatic in his concerns, and that he would have shown little interest in the elaboration of theory torn from factual setting. These characteristics of his decisions as a Supreme Court Justice are entirely consonant with his understanding of the role of courts in our constitutional system: securing rights and ensuring remedies enshrined in law, rather than creating new rights.

A third principle is of equal significance: that those who hold positions of public trust—including mayors, prosecutors, jurors, state judges—generally act in good faith and as the law prescribes. I do not think that this third principle—respect for government officials—is a necessary corollary of the first two. It would be logically possible, I suppose, to posit the first two principles (the necessity of the rule of law and the primacy of legislatures in giving content to the law) and still have courts could proceed on the presumption that government officials and employees are *not* properly applying the law. Such an approach would probably result in courts often displacing official determinations and subjecting government operations to judicial second-guessing or court orders, with the judiciary monitoring the day-to-day operations of governmental institutions and actions.

Justice White proceeded on the contrary presumption, that public employees and others holding positions of public trust, such as jurors and judges, generally act in good faith and as the law prescribes. This presumption could be overcome or destroyed on the basis of the factual record before him—as it surely was in the series of cases that came before him involving, as examples, voting rights, desegregation, and the rights of non-marital children and their parents, in which he insisted on forceful judicial intervention.[1] Still, as I have noted elsewhere,

1. The key voting rights cases are Shaw v. Reno, 509 U.S. 630 (1993) (White, J., dissenting); Bd. of Est. v. Morris, 489 U.S. 688 (1989); Davis v. Bandemer, 478

White "never expected or demanded perfection from government, for he well understood that neither human beings nor any institution they create can be flawless."[2]

White's confidence in public officials was not only a judgment about the limitations of the human condition. It was not merely the judgment of Byron R. White, the person and scholar, the athlete and lawyer, the public official and the citizen. It was, more importantly, a constitutional judgment, the judgment of Justice Byron R. White. In Justice White's understanding of our Constitution, legislatures must have primacy over *both* the content of law and the administration of the laws. For White, the presumption that public officials are acting properly and in good faith was, for him, an extension of the principle of democratic primacy. If a particular government function is not being properly or adequately performed, then, as a general matter, one can expect our democratic institutions to respond to popular complaint or mistrust. In the federal government specifically, the President and Congress have the primary obligation not only to determine the relative priorities of various possible government functions, but also to create structures for performance of these functions and to delegate and oversee enforcement authority.[3]

More fundamentally, White keenly understood that one cannot disentangle ends and means, or substance and procedure. He understood that procedural restrictions on the agencies and agents of government mean, as a practical matter,

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U.S. 109 (1986); Rogers v. Lodge, 458 U.S. 613 (1982); Mobile v. Bolden, 446 U.S. 55 (1980) (White, J., dissenting); Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964) (White, J., joining majority).

The key desegregation cases are Missouri v. Jenkins, 495 U.S. 33 (1990); Milliken v. Bradley, 418 U.S. 717 (1974) (White, J., dissenting); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979). *See also* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (White, J., dissenting).

The key cases involving the rights of non-marital children and their parents are Michael H. v. Gerald D., 491 U.S. 110 (1989) (White, J., dissenting); Lehr v. Robertson, 463 U.S. 248 (1983) (White, J., dissenting); Parham v. Hughes, 441 U.S. 347 (1979) (White, J., dissenting); Stanley v. Illinois, 405 U.S. 645 (1972).

2. Kate Stith, *Justice White and the Law*, 102 YALE L.J. 993, 993–94 (2003).

3. Justice White's opinions in separation of powers cases dramatically demonstrate this understanding. *See* Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting); INS v. Chadha, 462 U.S. 919, 972 (1983) (White, J., dissenting); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 94 (1982) (White, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 266 (1976) (White, J., concurring in part and dissenting in part).

substantive restrictions on what or how much government may do. White saw this deep connection between substance and procedure in criminal law as well as in other areas.

These three principles—which can be summed up as *respect for the law, respect for our democratic institutions, and respect for government and its officials*—radiate throughout White's opinions. Importantly, they are as evident in those opinions that ultimately come out *against* the government as they are in those that in the end defer to the government. The opinions of Justice White concluding that Congress (or a state legislature, or a school board, or the President, or a prosecutor, or a police officer) had transgressed a constitutional limit are themselves grounded in the three presumptions of respect to which I have referred. In these cases, relatively few that they are (though that adds up, over thirty-one years), White ultimately decides against the government in order to ensure that in future cases he, and courts more generally, will not be presented with similar records.

And, for Justice White, where do these three foundational principles of respect for law, for democratic institutions, and for government and its officials come from? Professor Dennis Hutchinson has done as able a job as anyone could hope to do in trying to answer that question.[4] I wonder if even Justice White knew whether his understanding of his constitutional role finds its roots in his self-reliant childhood, in his athletic efforts and success as a team member, in his wartime experience in the Navy, in his education at Yale Law School, in his roles as lawyer-citizen and government official—or if the answer may be found in all of these, or none of these, aspects of his experience. Perhaps it is more fundamental yet, part of his born character.

At the same time, we must acknowledge that in White's opinions there are striking reflections of the accepted wisdom of his time (and for many years thereafter) at Yale Law School, in particular the lesson to be derived from the decisions of the *Lochner*[5] era and the constitutional crisis that ensued. The lesson was two-fold. First, when a court—especially the Supreme Court—overreaches, it not only usurps constitutional authority that belongs to other institutions and actors, but also under-

4. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE (1998).

5. 198 U.S. 45 (1905).

mines its own legitimacy and authority into the future. A second (and countervailing) lesson is that constitutional law as propounded by the Court has changed, and in a dynamic and growing society must change, over time. The meaning of the Constitution is not static or fixed, ready to be "found" by the Court. Rather, to put it starkly: The Court decides the meaning of the Constitution.

Accordingly, White was not a constitutional textualist, and scorned also the notion that constitutional meaning could be found by examining the "original intent" of the framers of that text. He looked at text but also to constitutional structure and purpose, to changes in historical circumstance, and, importantly, to precedent.

White's commitment to stare decisis was striking, and his opinions cannot be understood without understanding this commitment. White seldom joined (or at least admitted to joining) an implicit or surreptitious overruling of precedent from which he had dissented, insisting that the previous decision was controlling until expressly overruled.[6] Those who did not share his commitment to stare decisis could on occasion be exasperated—they might have agreed with an initial dissent by White, only to find the Justice in later cases not only following the previous holding but reading it expansively.[7]

White's strong commitment to the principle of stare decisis derives, I suggest, from the confluence of the two *Lochner* lessons described above—that the Court should not overreach,

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6. *Cf.* South Carolina v. Gathers, 490 U.S. 805, 812 (1989) (White, J., concurring) (applying Booth v. Maryland, 482 U.S. 496 (1987), despite his own biting dissent in that case, noting that "[u]nless *Booth* is to be overruled, the judgment below must be affirmed") (citation omitted), *with* Payne v. Tennessee, 501 U.S. 808, 830 (1991) (Justice White joined the majority opinion which expressly overruled *Booth*). *See also* discussion of Powell v. Texas, 392 U.S. 514, 548 (1968) (White, J., concurring), *infra* Part II.A.1 and text accompanying notes 47–61.

7. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981). *See also* James v. Illinois, 493 U.S. 307 (1990) (White, J., providing fifth vote applying exclusionary rule); Minnesota v. Olson, 495 U.S. 91, 95 (1990) (applying Payton v. New York, 445 U.S. 573 (1980), from which he had strongly dissented); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993) (White, J., delivering the judgment, insisting he was bound by Lemon v. Kurtzman, 403 U.S. 602 (1971), from which he had strongly dissented, until it was overruled); Harmelin v. Michigan, 501 U.S. 957, 1017 (1991) (White, J., dissenting, applying rule of Solem v. Helm, 463 U.S. 277 (1983), in which he had dissented). *See also* Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring) (agreeing with majority that *Swain v. Alabama*, 380 U.S. 202 (1965), which he had written, had proved unworkable and should be overruled).

even as it applies the Constitution differently over time. As Caleb Nelson has recently noted, the rule of stare decisis may be understood as a rejection of "natural law" and a corollary of legal realism—for it acknowledges that there is no single "right" answer (if there were, the Court would not be hesitant to overrule past cases it now determines are "wrong").[8]

White saw the issue as this: In a regime of legal realism, stare decisis is necessary if the "rule of law" is to have any meaning. He wrote in the last decade of his career on the Court, in a case involving abortion-rights:

> The rule of *stare decisis* is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.[9]

Implicit in his reference to "case-by-case decisionmaking" is a subtle point by White: A general insistence upon fidelity to the principle of stare decisis will deter courts from overreaching—deciding broad questions now that may look different when they arise later in specific contexts. Stated most simply, "case-by-case decisionmaking" means narrow holdings.

White had followed the rule of stare decisis, or at least insisted that he had, in the thirteen years since *Roe v. Wade*[10] was decided over his strong dissent. While he dissented in whole or in part from early *Roe*'s progeny, he insisted he was doing so within the framework of *Roe* itself, narrowly interpreted to be sure.[11] But finally in 1986, he explicitly urged that *Roe* be overruled, explaining:

> In my view, the time has come to recognize that *Roe v. Wade*, no less than the cases overruled by the Court in the [New Deal] decisions I have just cited, "departs from a proper understanding" of the Constitution and to overrule

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8. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

9. Thornburgh v. Am. Coll. of Obst. & Gyn., 476 U.S. 747, 786–87 (1986) (White, J., dissenting).

10. 410 U.S. 113 (1973).

11. *See* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 452 (1983) (White, J., joining dissent); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 92 (1976) (White, J., dissenting in part).

> it. I do not claim that the arguments in support of this proposition are new ones .... But if an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner v. New York* and *Plessy v. Ferguson* would remain the law ....[12]

In sum, having come of age during the New Deal, and having been educated at Yale Law School in the afterglow of both that era and the Second World War, when legal realism was ascendant, White understood that applying the Constitution necessarily involves interpretive choices, lawmaking if you will. But White was not *only* a legal realist—an to the extent he was a realist, this was more a descriptive understanding than a normative principle. In this sense he was a "realist," but importantly he was also a judge committed to the idea of the rule of law. And he understood that while all interpretive choices may involve lawmaking, *some* interpretive choices involve a lot *more* lawmaking than others.

Thus, the second lesson of the New Deal and its aftermath—that of constitutional change—is framed and cabined by the first: The Court should seldom, if ever, lead the way in achieving fundamental social transformation. The federal and state legislatures, as well as juries, and federal, state and local agencies—all of these avenues of democratic participation—must also have room to play their roles.

Yet it would be misleading to characterize White's approach as leaving but a "modest" role for the courts, especially the federal courts. In the constitutional scheme just outlined, courts do not have the biggest role, in terms of the quantity of law-making in which they engage. But they do have perhaps the most *important* role, and certainly the most intellectually and politically difficult role. Neither in isolation nor together do the three principles of deference which I have noted provide talismatic solutions to the difficult issues that come before our courts. Sometimes particular enactments will *not* be consistent with the rule of law.[13] Sometimes democratic institutions create governmental structures or procedures that do *not* effec-

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12. *Thornburgh*, 476 U.S. at 788 (White, J., dissenting) (citations omitted).

13. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985), discussed *infra* Part II.C.

tively or fully implement legal rights and obligations.[14] Sometimes public officials do act in bad faith or otherwise fail to enforce the law.[15]

In all of these instances, courts must act forcefully to secure constitutional rights and provide remedies when those rights have been denied. The hardest task of a judge—of a Supreme Court Justice in particular—is to determine when not to indulge these presumptions of respect. The wisdom of the presumptions of respect—the general rule of deference to political institutions—is that courts, too, may sometimes make mistakes; and a mistake by a court in a constitutional case, unlike most mistakes by the political branches, may foreclose alternative means of democratic redress.

II. THE SPECIFIC PART–CRIMINAL LAW

A. Proscribed Conduct

Justice White made clear that he considered the criminal law to be a legitimate, even fundamental, aspect of any regime committed to the rule of law. In concurring in *Gregg v. Georgia,* he observed that "one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws

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14. See the procedural due process cases in which White rejected the argument of Justice Rehnquist (sometimes for a majority) that the only "process due" for denial of rights is the process specified in the statute creating the right. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Vitek v. Jones, 445 U.S. 480, 488 (1980); Bishop v. Wood, 426 U.S. 341, 359 (1976) (White, J., dissenting); Goss v. Lopez, 419 U.S. 565, 574 (1975); Arnett v. Kennedy, 416 U.S. 134, 171 (1974) (White, J., concurring in part and dissenting in part).

Nixon v. Fitzgerald, 457 U.S. 731, 789–90 (1982) (White, J., dissenting) sounds a similar theme:

> [I]t is not the exclusive prerogative of the Legislative Branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury.

15. *See* cases cited *supra* note 14. *See also* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (White, J., concurring) (acknowledging that stated premise of *Swain v. Alabama*, 380 U.S. 202 (1965)—that prosecutors would not use preemptory challenges in discriminatory manner—had not been vindicated); Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting from ruling restricting consideration of Fourth Amendment claims on federal collateral review).

against murder."[16] To be sure, White understood that a criminal prohibition or penalty that is irrational is thereby unconstitutional, but in his view it was entirely reasonable for a legislature to make the policy judgment that the criminal sanction is an effective deterrent.

While White thus considered criminal law (and its enforcement) to be fundamental obligations of the state, he understood the Constitution to say very little, if anything, concerning the activities and behaviors that should be subjected to the criminal sanction. For him, the *content* of the criminal law (putting aside, for now, murder laws)[17] is a matter that our constitutional regime calls upon states and the federal government to decide through democratic processes. This was hardly a novel or original position, of course; it had been the position of the Court since the founding era. Throughout its history, the Supreme Court has been exceedingly reluctant to interfere with legislative judgments concerning the substantive criminal law. Indeed, at one time it could be said that there was

> [a] general rule that constitutional limitations in the domain of criminal law "in the main, concern not restrictions upon the powers of the States to define crime, except in the restricted area where federal authority has pre-empted the field, but restrictions upon the manner in which the States may enforce their penal codes."[18]

At just around the time that White was appointed to the high court, a series of claims were pressed that challenged this understanding.

1. *Robinson v. California*

One of the first such cases was decided in 1962, White's first year on the Court. In *Robinson v. California,* the majority in that case held that California's criminal prohibition on narcotics addiction inflicted "cruel and unusual punishment" in

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16. 428 U.S. 153, 226 (1976) (White, J., concurring).

17. The matter of murder laws is taken up again at the end of this essay, in the discussion of White's decision for the Court in *Tennessee v. Garner*, 471 U.S. 1 (1985).

18. *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 75, 145 (1962) (quoting Rochin v. California, 342 U.S. 165, 168 (1952) (Frankfurter, J.)).

violation of the Eighth and Fourteenth Amendments.[19] The defendant had been convicted of this misdemeanor and sentenced to ninety days in the county jail.[20] White's dissent was powerful and revealing, but to understand its import, it is necessary first to consider the other opinions in the case and the context in which the case was decided.

The opinion for the majority, written by Justice Stewart, is famously ambiguous, suggesting three possible constitutional limitations on a state's power to criminalize. First, a state may not punish an illness ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").[21] Second, a state may not punish a status ("we deal with a statute which makes the 'status' of narcotic addiction a criminal offense . . . .").[22] Third, a state may not punish a person for conditions that are *involuntarily* contracted ("Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth.").[23] The majority opinion also pointedly noted that it *would* be within the constitutional power of a state to "establish a program of compulsory treatment for those addicted to narcotics,"[24] as in fact California had done, leading the majority to complain that "[t]he record contains no explanation of why the civil procedures authorized . . . were not utilized in the present case."[25]

Both Justice Douglas in concurrence and Justice Clark in dissent echoed the majority's suggestion that the United States Constitution prevents society from treating narcotics addiction as a crime because the condition is actually an illness. Justice Douglas, citing recent psychiatric and law reform efforts, concluded that addiction is a disease, and that the Eighth Amendment and "[t]his age of enlightenment" do not allow "sickness to be made a crime."[26] The somewhat disjointed dissent of Justice Clark insisted that the provisions under which the defendant had been convicted were in actuality part of a

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19. 370 U.S. 660 (1962).
20. *Id.* at 664.
21. *Id.* at 667.
22. *Id.* at 666.
23. *Id.* at 667 n.9.
24. *Id.* at 665.
25. *Id.* at 665 n.7.
26. *Id.* at 678 (Douglas, J., concurring).

progressive program in which the overall purpose was to "treat" rather than "punish" narcotics addicts. California had simply recognized, according to Justice Clark, that new ("incipient" and "volitional") narcotics addicts such as the defendant in the case before the Court were not necessarily best "treated" in hospitals; it was reasonable for the State to determine that those newly addicted could be treated by confinement in a place other than a hospital. "Properly construed, the statute provides a treatment rather than a punishment."[27]

Justice Harlan declined to hold as a matter of constitutional law either that narcotics addiction was an illness or that no manifestations of an illness could be punished. He concurred in the result, however, on the ground that the jury instructions "permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics," which Justice Harlan believed was equivalent to criminalizing "bare desire to commit a criminal act."[28]

The *Robinson* case was decided in the midst of great ferment among intellectual elites concerning the foundations of the criminal law, and in particular its application to behaviors considered "immoral." Great Britain had long since placed "addiction and the treatment of addicts squarely and exclusively into the hands of the medical profession."[29] The Wolfenden Report, published in 1957, had urged decriminalization not only of narcotics offenses, but also laws prohibiting consensual "homosexual behavior."[30] Even more fundamentally, many criminal activities, not just narcotics addiction and sexual conduct, may be caused by forces beyond the control of the individual wrong-doer. This line of thinking appeared to question the

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27. *Id.* at 685 (Clark, J., dissenting). Justice Clark went on to explain that even if considered "penal," confinement for three to twelve months of an addict who voluntarily incurred his condition is not "unreasonable." *Id.*

28. *Id.* at 678 (Harlan, J., concurring). Harlan said that he was not prepared "on the present state of medical knowledge" to hold that "it is completely irrational . . . for a State to conclude that narcotics addiction is something other than an illness . . . ." *Id.* at 648. Justice Frankfurter did not participate in the case.

29. *Id.* at 672–73 (Douglas, J., concurring) (citing Alfred R. Lindesmith, *The British System of Narcotics Control*, 22 LAW & CONTEMP. PROBS. 138 (1957)).

30. GREAT BRITAIN COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (THE WOLFENDEN REPORT) 9–10, 20–21, 79–80 (Her Majesty's Stationary Office, 1957) (1968) [hereinafter THE WOLFENDEN REPORT].

very foundational concepts of the criminal law: individual responsibility and the appropriateness of punishment.

Moreover, in the very year the *Robinson* case was decided, the influential American Law Institute published the final draft of its Model Penal Code, which throughout embraced the rehabilitative ideal, and, indeed, declined even to use the word "punishment." Rather, the Code sections on criminal penalties were entitled "Treatment and Correction" and "Disposition of Offenders." The Code also rejected any use of capital punishment and even prohibited incarceration unless, inter alia, the "defendant is in need of correctional treatment."[31] There were no provisions on drug trafficking in the Code, and the only mention of narcotics use appeared in a section entitled "Public Drunkenness; Drug Incapacitation," which made it a "violation" (below a misdemeanor) to appear in public "manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity."[32]

The majority opinion in *Robinson*—indeed, all the opinions except those of Justice White and Justice Harlan[33]—could be understood to put the Supreme Court and the Constitution squarely in the camp of the reformers. Narcotics use resulted from addiction, which was a disease to be treated, not punished: The Constitution itself would one day be interpreted to prohibit all "punishment" not in aid of "treatment," perhaps even displacing the criminal law with alternative civil processes, such as the majority wished California had employed in Robinson's case.

Justice White's opinion reveals amazement on many levels. The procedural posture of the case was disturbing enough. The majority appeared to have deliberately conjured up the specter of punishing an involuntarily addicted man who had not even recently used drugs, when no such claims had been made in the proceedings below and when the factual record belied the truth

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31. *See* MODEL PENAL CODE § 7.01(1)(b) (1962); § 1.02(2) ("The general purposes of the provisions governing the sentencing and treatment of offenders . . . ."); § 6 ("Authorized Disposition of Offenders"); § 7.01(1) ("Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation"); Part III ("Treatment and Correction").

32. MODEL PENAL CODE § 250.5.

33. *See supra* note 28 and accompanying text.

of such suggestions.[34] The majority also paid scant attention to the authoritative California judicial construction of the statute under which the defendant was convicted, seizing instead on the rambling jury instructions, which, when parsed carefully, did in one sentence permit conviction on the basis of "addiction" alone, without proof of a specific act of narcotics possession or use.[35] Yet even the majority acknowledged that the State had presented evidence of the defendant's recent narcotics use in Los Angeles (including the defendant's admission when he was arrested that he had recently used narcotics), and that the statute under which he was convicted required proof of "the actual use of narcotics."[36] To be sure, a sentence of the jury instructions in the case did erroneously advise the jury it could convict upon a finding of narcotics use "*or* [being] addicted to the use of narcotics."[37] But given the particulars of the proof in the case, it appears impossible for the jury to have found the latter except by finding the former.

Nor was there some other crying need to take the case, which had received no attention until the Court noted probable jurisdiction (the conviction had been affirmed in an unpublished opinion of the Appellate Department of the Los Angeles County Superior Court).[38] Even without knowing the inner deliberations at the Court while the application for appeal was pending, one can infer that the Supreme Court reached out to take the case, however weak the record below, in order to weigh in on broad policy questions relating to the purposes and role of the criminal law in this society. White thus understandably complained first that:

> [T]he Court has departed from its wise rule of not deciding constitutional questions except where necessary and from its equally sound practice of construing state states, where possible, in a manner saving their constitutionality.[39]

But White's major concern was with the decision in the case. On the basis of the record below, he explained, he did

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34. *Robinson*, 370 U.S. at 686 n.3 (White, J., dissenting).
35. *Id.* at 662–63.
36. *Id.* at 665; *see also id.* at 686 n.3 (White, J., dissenting).
37. *Id.* at 662 (emphasis added).
38. *Id.* at 664.
39. *Id.* at 685 (White, J., dissenting).

"not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of California law."[40] In White's view, the question whether to confine the defendant by means of criminal or civil process was a policy judgment.[41] For the Court to usurp the function of deciding how to deal with narcotics addicts was, for White, "imposing its own philosophical predilections upon state legislatures . . . ."[42] And here White invoked the fundamental principle of legislative primacy: The Court had no right to "write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding."[43]

In the same paragraph, White also revealed his own philosophical and historical basis for deference to democratic decisionmaking—the *Lochner* era during which the Court repeatedly struck down social legislation under the auspices of the Due Process Clause of the Fourteenth Amendment. The reason the majority implausibly relied on the Eighth Amendment's Cruel and Unusual Punishment clause to strike down a sentence of ninety days in the county jail[44] was, in my phrase, to avoid the ghost of Substantive-Due-Process-Past. White put it as follows: "If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute . . . ."[45] *Lochner* was clearly at the forefront of White's mind. (And perhaps of Justice Harlan's as well; his concurrence made no mention of the Eighth Amendment, nor of any other provision of the Constitution, concluding simply that under the instructions to the jury, the State had engaged in an "arbitrary imposition" exceeding its constitutional authority.)[46]

The story of *Robinson v. California* is not complete, however, without noting that in the end White was vindicated—

40. *Id.* at 686.

41. *Id.* at 688 ("He was an incipient addict, a redeemable user, and the State chose to send him to jail for 90 days rather than to attempt to confine him by civil proceedings . . . .").

42. *Id.* at 689.

43. *Id.*

44. *Id.* at 667.

45. *Id.* at 689 (White, J., dissenting).

46. *Id.* at 679 (Harlan, J., concurring).

despite his own commitment (even stubborn commitment, one is tempted to say) to stare decisis. Six years after *Robinson*, the Court in *Powell v. Texas*[47] upheld a conviction for public drunkenness despite the trial court's refusal to consider the defendant's chronic alcoholism as a defense, as *Robinson* apparently required. Yet because of White's insistence on adherence to precedent, his decision in *Powell* is neither important nor especially memorable.

The appellant Powell sought to fit his case within *Robinson*'s paradigm by asserting that alcoholism was an illness, and that being a chronic alcoholic—in public or private—was involuntary and amounted to a "status."[48] The plurality opinion for four justices, by Justice Marshall, focused on the discussion of "status" in *Robinson*, and held that Powell did not come within this holding since he "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."[49] Refusing to overrule *Robinson*, the plurality instead read that decision narrowly. Under the plurality's interpretation, *Robinson* forbade the criminalization of status, but did not forbid criminalization of actions that result from a status.[50]

The four dissenting justices scoffed at the plurality's distinction between status and acts, which made illusory any constitutional protection of those who are in the position of having the disfavored status.[51] In the view of the *Powell* dissenters, if one can punish what a particular person inevitably *does* because of his status (or his illness), that amounts to punishing the status (or illness) itself, which *Robinson* had forbidden.[52]

Justice White was the fifth and thus deciding vote for one side or the other. The first sentence of his opinion seems designed to needle the members of the *Powell* plurality who had disagreed with him in *Robinson*. In this first sentence White

47. 392 U.S. 514 (1968) (plurality opinion).

48. *Id.* at 532.

49. *Id.*

50. *Id.* at 532–34. The plurality opinion in *Powell* clearly constitutionalized the fundamental common-law rule that a criminal conviction requires an "actus reus"—a voluntary physical act. A concurring opinion by Justices Black and Harlan (who also joined Justice Marshall's opinion) suggests that this was all *Robinson* had done. 392 U.S. at 548 (Black, J., concurring). Justice Marshall's plurality opinion at points intimates that there may be additional constitutional strictures against punishing actions that correspond closely to a disease or status.

51. *Id.* at 567–68 (Fortas, J., dissenting).

52. *Id.* at 566–70 (Fortas, J., dissenting).

presented the essential argument of the *Powell* dissenters: "If it cannot be a crime to have an irresistible compulsion to use narcotics [citing *Robinson*], I do not see how it can constitutionally be a crime to yield to such a compulsion."[53] The logic of *Robinson* demanded as much, and White went on to urge that unless *Robinson* and its possibly far-reaching mischief were overruled, narcotics addicts could never be punished for using drugs, or alcoholics for being drunk.[54]

Nor was White prepared to accept the argument that Powell's conviction could be upheld because even if he had the status of being an alcoholic, his conviction was for *public* drunkenness, and the conduct of being in public was somehow less compelled than the drinking itself. White noted that "although many chronic [alcoholics] have homes, many others do not" and for these "avoiding public places when intoxicated is . . . impossible."[55] Under *Robinson*, people living on the street could not be prosecuted for public drunkenness.[56] (The notion that Justice White would actually hold large parts of the criminal law off-limits to those who are homeless is difficult to accept, but one must remember that Justice White knew he was not writing for the Court, but for himself, and he remained, six years later, appalled that the Court decided *Robinson* as it had.)

Having thus worried the plurality that he might jump ship, and having raised the hopes of the dissenters that he might make theirs the decision of the Court, White in the end voted with Justice Marshall—but, he said, only because in this particular case there was no evidence from which to conclude that the defendant was unable (due to homelessness or some other condition) to stay off the public streets in an intoxicated state.[57]

As a formal matter, then, *Powell* neither overruled nor even narrowed *Robinson*, because five members of the Court—the dissenters plus White—insisted on reading *Robinson* to prohibit punishing behaviors that are caused by status or disease.[58] White himself had insisted in the earlier case that the

53. *Id.* at 548 (White, J., concurring).
54. *Id.* at 548–49 (White, J., concurring).
55. *Id.* at 551 (White, J., concurring).
56. *Id.*
57. *Id.* at 552–53 (White, J., concurring).
58. *Id.* at 566 (Fortas, J., dissenting); *id.* at 548 (White, J., concurring).

majority erred in writing this rule into the Constitution, but White had been on the dissenting side in that case. Demonstrating his commitment to stare decisis, he insisted that he, and the rest of the Court, were bound by the rule of *Robinson* until and unless it was overruled.

Yet *Powell* is understood nonetheless to have put most of *Robinson*'s genies back into the bottle, leaving as a constitutional rule what was already a parallel common-law rule, the rule that had been invoked (with no constitutional reference) by Harlan in his *Robinson* concurrence: The criminal law may not prohibit mere thought; an act is required.[59]

Why is *Powell* understood this way? On one level, the answer is that everybody understood that Justice White was being stubborn, that he really agreed with most of the Marshall opinion for a plurality, and that when you count him in, *Robinson* was narrowed greatly.

At another level, though, the reason *Powell* is understood to have all-but-overruled *Robinson* is the persuasiveness of the original White dissent in *Robinson* combined with the directness of part of Justice Marshall's opinion. Marshall frankly recognized that to read *Robinson* in the syllogistic way urged by appellant Powell could end up constitutionalizing all of the criminal law. Invoking "[t]raditional common-law concepts of personal accountability and essential considerations of federalism" and "the centuries-long evolution of the . . . concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds,"[60] Justice Marshall, surely joined in spirit by Justice White (but not joined in fact), declined to allow "this Court [to] become[], under the aegis of the Cruel and Unusual Punishment clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[61]

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59. Robinson v. California, 370 U.S. 660, 678–79 (1962) (Harlan, J., concurring).

60. *Powell*, 392 U.S. at 535–36 (plurality opinion).

61. *Id.* at 533 (plurality opinion). The year after *Powell*, the Court, in an opinion by Justice Marshall, struck down a conviction for possession of pornography, holding that a person has the right to possess this material within his own home. Stanley v. Georgia, 394 U.S. 557 (1969). Later decisions made clear that *Stanley* did not reach far. White never expressed a view on the issue decided by Justice Marshall and the majority; instead, he (with Justice Black) joined Justice Stewart's concurring opinion which concluded that the warrantless search and seizure of the pornographic materials violated the Fourth Amendment. *Id.* at 569

2. From *Roe v. Wade* to *Bowers v. Hardwick*

I have explored White's opinions in *Robinson* and *Powell* at length not because they are the most important of his opinions, but because they tell us much about his understanding of the Court's role in explicating the Constitution. Moreover, they are of a piece with the more famous—and much more controversial—opinions that he wrote concerning the substantive content of the criminal law. I refer, of course, to White's dissents in abortion-rights cases,[62] and to his opinion for the Court in *Bowers v. Hardwick*.[63]

Like the statutes at issue in *Robinson* and *Powell*, anti-abortion statutes and the anti-sodomy statute at issue in *Bowers* were present-day versions of long-standing criminal prohibitions.[64] Moreover, at the time the Court considered abortion and sodomy, there were considerable reform efforts to decriminalize such conduct; the reform efforts were parallel and related.[65] The Model Penal Code, in fact, had been at the forefront of the movement to liberalize abortion laws in this country. Its final draft, published in 1962, was a deliberate effort to decriminalize abortions where a doctor had certified there would be "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother . . . ."[66] In the decade since the Code was published, Georgia, California, New York and other states had liberalized their abortion laws. But under the rules enunciated in *Roe v. Wade*,[67] these efforts did not go far enough; *Roe*'s companion

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(Stewart, J., concurring) ("[T]he Court today disregards this preliminary issue [the search and seizure] in its hurry to move on to newer constitutional frontiers.").

62. *See* Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting in both *Doe* and *Roe v. Wade*); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 92 (1976) (White, J., dissenting in part); Thornburgh v. Am. Coll. of Obst. & Gyn., 476 U.S. 747 (1986) (White, J., dissenting).

63. 478 U.S. 186 (1986).

64. GA. CODE ANN. § 16–6–2 (1984); TEX. PENAL CODE ANN. §§ 1191–1194, 1196 (Vernon 1973). *See generally*, RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS (1996) (cataloging the development of sexual prohibitions in the American states).

65. *See, e.g.*, THE WOLFENDEN REPORT, *supra* note 30.

66. MODEL PENAL CODE § 230.2 (1962). Additionally, the Model Penal Code would permit abortions resulting from rape or incest, or where a physician certified "that the child would be born with grave physical or mental defect . . . ." *Id.*

67. 410 U.S. 113 (1973).

case, *Doe v. Bolton*,[68] held that the Georgia statute, though far less restrictive than the Texas statute at issue in *Roe*, was unconstitutional in several respects.[69]

White saw the issue in *Roe* much as he had in *Robinson*: whether criminalization of certain conduct should be determined by the political branches or by a majority of the Supreme Court. For him the answer was clear: "This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."[70] White explained that the question was not whether he agreed with the balance of values that the Court majority had marshaled, because "[w]hether or not I might agree . . . I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States."[71] Just as he was, in *Robinson*, "not at all ready to place the use of narcotics beyond the reach of the States' criminal laws,"[72] so also he was not ready to place abortion beyond that reach. Whereas in *Robinson* he had directly accused the majority of imposing its policy judgments on the country, in the abortion cases he made the accusation implicitly: "The Court simply fashions and announces a new constitutional right . . . [with] nothing in the language or history of the Constitution to support the Court's judgment."[73] In subsequent abortion cases, he sounded the same themes with even more vehemence:

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. . . .[74] [D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's author-

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68. 410 U.S. 179 (1973).

69. *Id.* The Court held several aspects of the Georgia statute unconstitutional, including the requirement that even first-term abortions be performed in accredited hospitals, the requirement of advance approval by a hospital committee, and the requirement that an abortion patient be a resident of the State of Georgia. *Id.*

70. *Doe*, 410 U.S. at 222 (White, J., dissenting).

71. *Id.*

72. Robinson v. California, 370 U.S. 660, 686 (White, J., dissenting).

73. *Doe*, 410 U.S. at 221 (White, J., dissenting).

74. Thornburgh v. Am. Coll. of Obst. & Gyn., 476 U.S. 747, 796 (1986) (White, J., dissenting).

> ity, for such decisions represent choices that the people have never made *and that they cannot disavow through corrective legislation.*[75]

The Model Penal Code also contained no prohibition on sodomy.[76] Moreover, between 1961 and 1986, the year that the Court decided *Bowers v. Hardwick*,[77] half of the states had decriminalized consensual sodomy; Illinois had been the first such state, explicitly following the draft Model Penal Code.[78] Despite the greater democratic consensus against sodomy proscriptions in 1986 than against abortion proscriptions in 1973 (the year of *Roe v. Wade*), *Bowers* was for White a replay of the abortion rights cases—especially the 1986 *Thornburgh* case in which he urged that *Roe* be overruled.[79] And it was a replay of *Robinson*. From White's perspective the Court was again being asked to bypass the political branches in order to achieve a new social order on a controversial issue.

There was one big difference, however: This time, White was writing the majority opinion, an opinion that strongly evoked the dissenting opinion he had issued a few weeks earlier in *Thornburgh*. The first four sentences of his opinion, explaining White's perspective on the issues in the case, reveal his commitment to the principles of deference noted at the outset of this essay:

> This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the *Federal Constitution* confers a fundamental right upon homosexuals to engage in sodomy and hence in-

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75. *Id.* at 787 (emphasis added).

76. It did contain a provision prohibiting "deviate sexual intercourse," including sodomy not between a husband and wife, "by force or imposition." MODEL PENAL CODE §§ 213.0 ("Definitions"); 213.2 ("Deviate Sexual Intercourse by Force or Imposition") (1962).

77. 478 U.S. 186 (1986).

78. *See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986); *Bowers*, 478 U.S. at 193 n.7.

79. Thornburgh v. Am. Coll. of Obst. & Gyn., 476 U.S. 747, 786–87 (1986) (White, J., dissenting).

> validates the laws of the many States that still make such conduct illegal and have done so for a very long time. *The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.*[80]

In addressing these issues, White again made reference to that chapter of the Court's history which I have suggested played such an important role in his understanding of the appropriate role of the Supreme Court. This time, he did not cite *Lochner* but instead its sequel, referring to the "painful[] . . . face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments."[81]

And, again, the lesson White learned from that "painful face-off" was two-fold: that the Supreme Court has power to interpret the Constitution in new ways over time, but that in doing so it must not simply assert the will of the Court's majority in defiance of democratic processes. In *Bowers*, White was, to be sure, cryptic in acknowledging the first of these lessons, but acknowledge it he did—noting that "the cases are legion" [82] in which the Court had given substantive content to the due-process clause, despite the obvious procedural nature of that clause; moreover, he expressly acknowledged that in several of these cases, including *Roe* and its progeny but also including previous cases such as *Prince v. Massachusetts*[83] and *Griswold v. Connecticut*,[84] there was "little or no textual support in the constitutional language."[85] The import was clear: White made no claim that the lack of textual support alone made such decisions an illegitimate or unwise exercise of judicial power.

But with the abortion-rights cases in clearly in mind, White was especially concerned with the second lesson of the "painful face-off" of the 1930s: the problem of judicial overreaching. It was necessary for the Justices to explain the bases and limits of their non-textual decisionmaking not only to reas-

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80. *Bowers*, 478 U.S. at 190 (emphasis added).
81. *Id.* at 194–95.
82. *Id.* at 191.
83. 321 U.S. 158 (1944).
84. 381 U.S. 479 (1965).
85. *Bowers*, 478 U.S. at 191.

sure the political branches and the public, but also for the Justices to reassure *one another* that they were not simply imposing on the polity the will of the Justices in the majority. In White's words:

> Striving to assure *itself and the public* that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.[86]

In White's view, the long history in this country of criminal penalties for homosexual sodomy made it obvious that such a right was neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty," the two criteria that had emerged from recent cases for recognition of a new fundamental right.[87] Regrettably, his opinion did not engage at any length the argument that prohibitions on homosexual sodomy derived from deep invidious motivation against homosexuals as a group, and were part of a pervasive set of deprivations, and for these reasons might indeed be inconsistent with the fundamental requirements of "ordered liberty."[88]

Having concluded that the two previously-established criteria for non-textual fundamental rights had not been demonstrated in *Bowers*, that was the end of the matter as far as White was concerned. He explained that, in his understanding, there is no constitutional warrant to engage in philosophical or moral reasoning that is not related to constitutional text or to purpose and structure:

> Nor are we inclined to take a [yet] more expansive view of our authority to discover new fundamental rights imbedded

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86. *Id.* at 190 (emphasis added).

87. *Id.* at 191–92 (citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) and Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J.)). White used the term "facetious" to refer to the claim that sodomy is "deeply rooted" in our nation's history or "implicit in the concept of ordered liberty." *Bowers*, 478 U.S. at 194. Dennis Hutchinson has suggested that this word contributed greatly to the scorn many heaped upon the *Bowers* decision. *See* HUTCHINSON, *supra* note 4, at 451.

88. Alternatively, White might have considered the ban on homosexual sodomy to violate his muscular application of the "rational basis" test of the Equal Protection Clause. See *Bowers*, 478 U.S. at 194.

> in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.[89]

This sentence succinctly and powerfully articulated one of the two over-arching lessons White had derived from the *Lochner* debacle, and echoes almost word-for-word a sentence from a previous dissent in which he had declined to find a general right of "privacy" in the Constitution.[90]

3. The Exception: *Griswold v. Connecticut*.

I am aware of only one case (outside of a few First Amendment cases)[91] during his years on the Court in which White concluded that the government was without constitutional authority to pursue social policies by means of a criminal prohibition. That case, *Griswold v. Connecticut*,[92] involved a challenge to a statute making it a misdemeanor to use or assist others in using contraceptive drugs or devices, as it applied to married persons seeking birth control. The majority opinion by Justice Douglas held the statute unconstitutional insofar as it interfered with the right of "marital privacy," a right said to be

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89. *Bowers*, 478 U.S. at 194.

90. See Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).

91. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476 (1993) (Rehnquist, C.J. for a unanimous Court); R.A.V. v. City of St. Paul, 505 U.S. 377, 397 (1992) (White, J., concurring in judgment); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 587 (1991) (White, J., dissenting from Court's decision upholding Indiana's public indecency statute which prohibited nude dancing clubs); *cf.* Police Dept. of Chi. v. Mosley, 408 U.S. 92 (1972) (equal protection and first amendment analysis striking down ordinance prohibiting picketing near school building) (Marshall, J., joined by White, J.)

In most First Amendment challenges to criminal proscriptions, however, White sided with the government. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 318 (1990) (White, J., and two others joining dissent by Justice Stevens from decision striking down federal Flag Protection Act of 1989); Texas v. Johnson, 491 U.S. 397, 421 (1989) (White, J., dissenting with three others from Court's holding striking down Texas's proscription on flag burning); New York v. Ferber, 458 U.S. 747 (1982) (White, J., for a unanimous court upholding child pornography conviction); Miller v. California, 413 U.S. 15 (1973) (White, J., joining majority opinion of Burger, C.J., upholding obscenity conviction); United States v. O'Brien, 391 U.S. 367 (1968) (White, J., joining majority upholding conviction for draft card burning). *See also* Branzburg v. Hayes, 408 U.S. 665 (1972) (White, J., holding that reporters may be required to appear and testify before grand juries).

92. 381 U.S. 479 (1965).

within "the penumbras, formed by emanations from" specific guarantees of the Bill of Rights.[93] White declined to join the majority opinion or to find a general constitutional right of "privacy," and his opinion joining the judgment of the Court was relatively short and cryptic.

Indeed, the main basis for White's concurrence was the very limited defense of the statute that the State of Connecticut had pressed. Abjuring any claim that the State's birth control ban reflected a legislative judgment that use of birth control is "immoral or unwise in itself," Connecticut allowed that its only interest was to discourage "promiscuous or illicit sexual relationships," both premarital and extramarital.[94] Clearly banning use of birth control *by married individuals* was, in White's words, "of marginal utility" in furthering this particular goal,[95] and White came close to suggesting that the ban was simply irrational.[96]

Yet White stopped short of such a conclusion, and his ultimate judgment that the Connecticut statute as applied was unconstitutional was based on a more complicated calculus. To be sure, in a series of other cases, White famously did apply the "rational basis" test with bite, concluding that a variety of distinctions and discriminations in the law—usually against disfavored groups—were so ill-suited to their avowed purpose that they violated the guarantee of equal protection of the laws.[97] In *Griswold*, however, White did something more. He specifically recognized that use of birth control drugs or devices by married persons was a form "liberty" protected by the Due Process Clause of the Fourteenth Amendment. He went on to conclude that Connecticut's criminalization of such conduct was unconstitutional because the "marginal" furtherance of the State's alleged goal was outweighed by "its telling effect on the freedoms of married persons."[98]

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93. *Id.* at 484.

94. *Id.* at 505 (White, J., concurring in judgment).

95. *Id.* at 507.

96. *Id.* at 505–07.

97. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 643 (1986) (White, J., dissenting); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); New York City Transit Auth. v. Beazer, 440 U.S. 568, 597 (1979) (White, J., dissenting); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (White, J., dissenting); Palmer v. Thompson, 403 U.S. 217, 240 (1971) (White, J., dissenting).

98. 381 U.S. at 507 (White, J., concurring in judgment).

One strongly senses that had "the intimacies of the marriage relationship"[99] not been involved, White would have come to a different conclusion. As indeed he did a decade later in *Eisenstadt v. Baird*,[100] where the majority extended *Griswold* to unmarried persons through a notoriously bootstrapping equal protection analysis.[101] White didn't join that opinion, instead concurring on the narrow ground that there as no proof that the persons in the *Baird* case were unmarried![102] In other words, he went no farther than he had gone in *Griswold*–that married people that the right to use birth control.

It is important to understand that White likewise acknowledged in cases after *Roe v. Wade* that availability of abortion is a "species of liberty" protected by the Fourteenth Amendment.[103] Yet this was not reason enough for abortion laws to be unconstitutional. One infers that for White, the biggest difference between *Griswold* and the abortion-rights cases was not so much the nature of the "liberty" interest involved, as it was the other side of the balance sheet— the state's interest. And his abortion rights opinions made clear that he recognized the interest in fetal life to be far weightier than any interest a state might have in discouraging illicit sex.[104]

In the end, then, the content of the criminal law *was* constitutionally significant for White. It was significant not because the Constitution either demanded or forbid specific criminal prohibitions, but because the Constitution ultimately required the Court to balance the social purposes of a challenged enactment against the impact of that enactment upon liberty interests of individuals.

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99. *Id.* at 502–03 (White, J., concurring in judgment).

100. 405 U.S. 438 (1972).

101. *Id.*

102. *Id.* at 462 (White, J., joined by Blackmun, J., concurring).

103. *Thornburgh*, 476 U.S. at 790 (White, J., dissenting) ("I can certainly agree with the proposition—which I deem indisputable—that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause.").

104. *Doe v. Bolton*, 410 U.S. 179, 222 (White, J., dissenting) ("The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand"); *Thornburgh*, 476 U.S. at 795–96 n.4 ("[I]n other words, if a state legislature asserts an interest in protecting fetal life, I can see no satisfactory basis for *denying* that it is compelling.").

Let me suggest then, that for White the biggest sin of *Lochner* was not that the Court gave substantive content to the due process clause—White himself did so in a very few cases involving the criminal law and in a larger category of cases involving civil restrictions, such as restrictions on the rights of unwed fathers and on the rights of illegitimate children.[105] From his perspective, the mistake in that earlier era *and* in his own was that the Court so callously disregarded the values that the democratic institutions of government were in good faith seeking to pursue and protect.

B. Punishment

While the Constitution places very few limits on what a state may criminalize,[106] it imposes several checks on the nature of the penalty that may be imposed. The reason for the different approaches is revealed by examining White's opinions in the key death penalty cases that came before the him—from *Witherspoon* in 1968, to *Furman* in 1972, to *Jurek, Gregg,* and *Roberts* in 1976, to *Coker* in 1978 and *Enmund* in 1982—and in other cases raising challenges under the Eighth Amendment.[107]

Like the cases previously canvassed, these cases attest to White's belief in the constitutionality of criminal punishment generally and his confidence that democratic institutions can generally be entrusted to determine the appropriate uses of the criminal law. Nonetheless, he believed that the political branches and agencies could not, under the Constitution, be accorded unlimited deference on the issue of punishment. This is not surprising, for the Cruel and Unusual Punishment Clause of the Eighth Amendment expressly speaks to the issue of criminal punishment (while it does *not*, at least directly, speak to the issue of criminalization).

In the first of the Court's cases to cast doubt on the constitutionality of the death penalty, *Witherspoon v. Illinois,* the majority reversed the death sentence on the ground that the State's "death qualified" jury system could have resulted in a biased jury.[108] White and Harlan joined Justice Black's dissent,

105. See *supra* note 1.

106. In addition to *Griswold v. Connecticut*, 381 U.S. 479 (1965), see the First Amendment cases cited *supra* note 87.

107. See cases discussed *infra* notes 108–140.

108. 391 U.S. 510 (1968).

which argued that, on the contrary, the State should not be required to accept jurors who were biased as to one of the fundamental issues before it.[109] Additionally, however, White wrote a dissent urging that the weakness of the majority's argument suggested that it was simply attempting to impose its abolitionist views on the nation as a whole:

> If the Court can offer no better constitutional grounds for today's decision than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision about appropriate penalties to branches of government whose members, selected by popular vote, have an authority not extended to this Court.[110]

One senses that throughout his time on the Court, White retained a concern that many particularistic arguments in death penalty cases were simply cover for the more fundamental argument—which in his view the words of the Constitution, explicitly referencing capital punishment, belied—that the penalty was always extra-legal.

Four years after *Witherspoon*, in *Furman v. Georgia*,[111] White again expressed confidence in the rationality and morality of criminal punishment generally, and in the concept of general deterrence in particular. He wrote, "For present purposes, I accept the morality and utility of punishing one person to influence another . . . [and accept] the death penalty as a more effective deterrent than a lesser punishment."[112] But he also recognized that even if criminal punishment, based on the concept of deterrence, is generally within the power of the state, this did not mean that every criminal punishment the state might wish to impose would necessarily comport with the Constitution. The Eighth Amendment was a clear constitutional proscription on certain punishments and thus, in White's words, "imposes some *obligations* on the judiciary to judge the constitutionality of punishment . . . whether legislatively approved or not."[113]

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109. *Id.* at 532 (Black, J., dissenting).
110. *Id.* at 542 (White, J., dissenting).
111. 408 U.S. 238 (1972).
112. *Id.* at 312 (White, J., concurring).
113. *Id.* at 313–14 (White, J., concurring) (emphasis added).

The *Furman* case presented the situation of capital punishment being wielded infrequently and arbitrarily, thus greatly diluting its deterrent effect. In White's view, this state of affairs meant that "a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others."[114]

While White thus joined a majority of the Court in *Furman* in effectively declaring a moratorium on capital punishment in this country, he went out of his way in his concurring opinion to make clear that he did not do so out of disrespect either for state legislatures or for judges and juries in capital cases. He emphasized that both the legislature and juries in Georgia appeared to be exercising their powers in good faith. The wide discretion that the State had granted to sentencing juries was adopted out of a "desire to mitigate the harshness"[115] of capital punishment laws. Moreover, it was a feature of the law in Georgia that "a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime."[116] For White, it was the confluence of these two institutional determinations—legislative authorization of capital punishment, but with absolute discretion in the jury—that rendered the capital punishment regime unconstitutional.

Once the states provided structured guidance to juries, however, White refused to continue the constitutional ban. In 1976, four years after *Furman* he rejected the claim that juries "disobey or nullify their instructions"[117] and the claim that "the system of justice [cannot] operate in a fundamentally fair manner."[118] White recognized that juries, prosecutors, and judges are fallible, and that "mistakes will be made and discriminations will occur which will be difficult to explain."[119] But the concept of "fundamental fairness" did not mean perfection, and

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114. *Id.* at 312 (White, J., concurring).

115. *Id.* at 313 (White, J., concurring).

116. *Id.* at 314 (White, J., concurring).

117. Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring in judgment).

118. Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring in judgment).

119. *Id.*

so White refused to accept "as a proposition of constitutional law" that "no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it."[120] As long as the system in place provided the means to guide and review the question of the death penalty, the Constitution was satisfied.

Opponents of the death penalty might fundamentally disagree, urging that while perfection is not generally constitutionally required, it should be in the case of capital punishment because of the significance of the individual's interest in avoiding death.[121] White did not dispute the individual's interest; however, he clearly considered the government's interest in such cases to be equally significant—punishing murder. Showing frustration with Justices and others who appeared determined that no death penalty regime could pass constitutional muster, or who would denigrate legislative provision for capital punishment "as some form of vestigial savagery,"[122] he responded caustically

> Apparently the State of Georgia wishes to supply a substantial incentive to those engaged in robbery to leave their guns at home and to persuade their co-conspirators to do the same in the hope that few victims of robberies will be killed. . . .
>
> . . . .
>
> . . .[O]ne of society's most basic tasks is that of protecting the lives of its citizens . [123]

Far from seeing state legislatures as demonstrating "vestigial savagery," White expressed a faith that the relevant legislatures had acted in the understanding "that capital punishment better serves the ends of criminal justice than would life

120. *Id.*

121. *Cf.* United States v. Quinones, 317 F.3d 86 (2d Cir., Jan. 31, 2003), *petition for cert. filed* (Aug. 27, 2003) (No. 03-6148).

122. Roberts v. Louisiana, 428 U.S. 325, 355 (1976) (White, J., dissenting).

123. Gregg. v. Georgia, 428 U.S. at 221–22 n.10, 226 (White, J., concurring).

imprisonment,"[124] and he concluded that "[t]his concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere."[125] For the Court to interfere with the judgment of Congress and the thirty-five states that had enacted structured death penalty systems after the decision in *Furman* "would be neither a proper or wise exercise of the power of judicial review,"[126] and he urged the Court not to "surrender . . . to the temptation to make policy or attempt to govern the country through a misuse of the powers given this Court under the Constitution."[127] Yet in subsequent cases, in 1977 and 1982 respectively, White wrote for a majority in striking down the death penalty as an available punishment for a rapist in *Coker v. Georgia*,[128] or for an accomplice in a felony-murder case in *Enmund v. Florida*.[129] Had White himself "surrendered to the temptation to make policy" through "misuse of the powers" of judicial review?[130] White surely realized this question would be asked, for his opinions in these two cases can be aptly characterized as "[s]triving to assure" that the Court was not simply "impos[ing] . . . the Justices' own choice of values on the States and the Federal Government."[131]

In both cases, he canvassed the actions of all fifty states and concluded that legislatures, prosecutors, and juries throughout the nation were in near unanimous agreement that the death penalty was excessive or otherwise not appropriate for crimes other than murder. In fact, Georgia was the only state authorizing capital punishment for the rape of an adult

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124. *Roberts*, 428 U.S. at 353 (White, J., dissenting).

125. *Id.* at 355 (White, J., dissenting).

126. *Id.*

127. *Id.* at 363.

128. 433 U.S. 584 (1977) (holding no capital punishment for rape of an adult woman).

White's opinion in *Coker* was joined by three other Justices—Stewart, Blackmun, and Stevens. Justices Brennan and Marshall wrote concurrences expressing their view that the death penalty is unconstitutional in all circumstances.

129. 458 U.S. 782 (1982) (holding no capital punishment for accomplice in deadly felony who neither killed nor intended death or use of deadly force). White's opinion was joined by Justices Blackmun, Marshall and Stevens, and also by Justice Brennan, who wrote an additional opinion expressing the view that the death penalty is unconstitutional in all circumstances.

130. *Roberts*, 428 U.S. at 363 (1976) (White, J., dissenting).

131. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

woman, and that even in that state ninety percent of jury decisions in rape cases had declined to impose a sentence of death.[132] The judgments of legislatures and juries in the matter of accomplice felony-murder, at issue in *Enmund*, was less overwhelming, but still powerful. Only eight of the thirty-six jurisdictions in the country which provided for the death penalty allowed it to be imposed on a robbery participant who neither killed himself nor intended to take life or even intended that lethal force be used in the crime.[133] Moreover, not since 1955 had any such accomplice been executed, and only three of the nearly 800 persons on death row in 1981 met these criteria.[134] In White's view, juries' rejection of the death penalty in rape and accomplice cases was constitutionally relevant; he saw the jury as "a significant and reliable objective index of contemporary values because it is so directly involved."[135]

But the judgments of legislatures and juries were not determinative, White said. The question whether the penalty was unconstitutional for particular crimes could not be answered by these institutions and actors; "it is for us [the Court] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."[136] In the case of rape, White focused on the issue of proportionality, concluding that as serious as rape is, it is excessive where the rape does not result in death of the victim.[137] In other words, the death penalty for rape was disproportional as a *retributive* matter. White's decisions in death penalty murder cases, discussed above, had stressed the *deterrent* rationale for the penalty. In *Coker*, White addressed that issue only in a footnote, briefly explaining that even if the death penalty for rape would be proportional in terms of the greater deterrence it would afford, its lack of retributive proportionality made it unconstitutional.[138]

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132. *Coker*, 433 U.S. at 593–97.

133. *Enmund*, 458 U.S. at 788–96.

134. *Id.*

135. *Id.* at 794 (quoting Coker v. Georgia, 433 U.S. 584, 596 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976))).

136. *Id.* at 797.

137. *Coker*, 433 U.S. at 598–99.

138. *Id.* at 592 n.4 ("Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so.").

The proportionality analysis was similar in *Enmund.* First, the Eighth Amendment required (at least where a death sentence is involved) that punishment be based on the defendant's *personal* culpability for the harm caused. Second, the Amendment also required that the purposes of deterrence and retribution would measurably be furthered by imposing the death sentence rather than a sentence of life imprisonment.[139] Neither of these requirements was met where the defendant neither killed nor intended that killing possibly occur. Tellingly, White at the end of the *Enmund* opinion returned to the state-by-state analysis with which he began the opinion, stressing that our society as a whole considered the death penalty excessive for the crime at issue:

> Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just desserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing the applying the Eighth Amendment.[140]

The Eighth Amendment is not addressed only to capital punishment, of course, and White understood the Constitution to impose a broad principle of "proportionality" on criminal punishments—both those imposed in the exercise of discretion by the sentencing authority and those legislatively mandated, for "the fact that a punishment has been legislatively mandated does not automatically render it 'legal' or 'usual' in the constitutional sense."[141] Thus, in a dissenting opinion near the end of his tenure on the Court, he urged that Michigan's statute imposing a mandatory life sentence without parole for possession of 650 grams of narcotics was unconstitutionally disproportionate. He noted that Michigan provided less harsh sentences for rape, for second-degree murder, and for armed robbery.[142] Repeatedly citing *Coker* and *Enmund,* he stressed that *no* other jurisdiction in the country imposed a penalty

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139. *Enmund*, 458 U.S. at 797–800.

140. *Id.* at 801.

141. Harmelin v. Michigan, 501 U.S. 957, 1016–17 (1991) (White, J., dissenting).

142. *Id.* at 1025–27.

nearly as severe for the crime at issue—which was itself enough to establish a "national consensus" that the punishment was Cruel and Unusual within the meaning of the Constitution.[143] While thus citing and finding great support in such "national consensus," White in each of these cases insisted that any such consensus was not determinative, but only of great relevance to the determination the Court ultimately had to make.[144]

Of course, in each of the cases in which White concluded that a criminal penalty was excessive for the crime being punished, he was prepared to strike down the legislative enactment of a particular state, and in this limited sense he demonstrated a lack of "deference" to democratic institutions. But in each case—*Coker*, *Enmund*, and *Harmelin*—White's judgment was in accord with the nearly unanimous judgment of every other state, a point he repeatedly stressed. These judgments are thus examples of White following both lessons from the *Lochner* era and the constitutional crisis that ensued. First, the Constitution must change over time, and it is the obligation of the Court to enunciate these changes. But, second, the Court should not exercise this power without a foundation in the text or structure of the Constitution and where doing so would place the will of the Court majority against the consensus of the nation as a whole.

C. Proscription, Punishment, and Procedure

Not surprisingly, not every decision by White can be so neatly explained. In particular, it is interesting to examine White's 1986 opinion for the Court in *Tennessee v. Garner*, striking down a provision of Tennessee's self-defense law that permitted a police officer to use deadly force to effectuate an arrest even where the fleeing felon posed no risk of violence.[145] Tennessee's rule had been the common-law rule for centuries,

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143. *Id.* at 1026–27 (quoting Stanford v. Kentucky, 492 U.S. 361, 371 (1989)).

144. In other non-capital proportionality cases, White would have sustained the legislative judgment. *See* Solem v. Helm, 463 U.S. 277, 304 (1983) (White, J., joining dissenting opinion); Hutto v. Davis, 454 U.S. 370 (1982) (White, J., joining majority); Rummel v. Estelle, 445 U.S. 263 (1980) (White, J., joining majority). Indeed, his vote with the majority in *Harmelin* appears to be due largely to his commitment to stare decisis, *see* discussion *supra* Part I.

145. 471 U.S. 1 (1986).

but the Model Penal Code had explicitly rejected the common-law approach and instead prohibited the use of deadly force where there was no risk of violence by the suspect.[146] When *Garner* was decided, a quarter century later, some twenty-two states had adopted, by statute or court decision, the approach of the Model Penal Code, but nearly half the states still retained the common law rule (with the law in the remaining states unclear).[147]

Given White's general deference to the democratic consensus, his cautionary stance toward over-reaching by the Court, his rejection of a similar split among the states as a basis for striking down sodomy laws, and his rejection of the Model Penal Code approach as a constitutional rule in *Robinson v. California*[148] and in the abortion and sodomy cases, his decision in *Garner* might initially seem surprising.

But for White, the issue in none of these cases was about the Model Penal Code, or law reform generally. The issue was the proper role of the Supreme Court in constitutional interpretation. In his view, the Fourth Amendment's requirement of "reasonable" searches and seizures, like the Eighth Amendment's prohibition on "cruel and unusual punishments," placed a textually driven obligation on the Court to exercise ultimate judgment as to whether the particular practice at issue is presently unconstitutional. In *Harmelin v. Michigan*, for instance, that meant that the Court, including Justice White, ultimately had to make a value judgment as to whether life imprisonment for narcotics possession was "excessive."[149] In *Tennessee v. Garner* it meant that the Court, and White, had to make an analogous value judgment in determining whether the Tennessee deadly-force statute was "reasonable." And so he did. At the core of White's opinion for the Court in *Garner* was this stark value judgment: "The use of deadly force to prevent the escape of all felony suspects . . . is constitutionally unreason-

146. *Id.* at 6 n.7 (citing MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft (1962))). The Court of Appeals for the Sixth Circuit, in finding the Tennessee statute constitutionally invalid, had said that the Model Penal Code "accurately states" the Fourth Amendment rule. *Id* at 6.

147. *Id.* at 16–17.

148. 370 U.S. 660, 685 (1961) (White, J., dissenting). *See* discussion *supra* Part II.A.

149. *See* 501 U.S. 957 (1991); *see supra* Part II.A.

able [because it] *is not better that all felony suspects die than that they escape.*"[150]

As in *Harmelin*,[151] *Coker*,[152] and *Enmund*,[153] White examined the national consensus before arriving at this constitutional value judgment. As in those cases, it was surely not unimportant that even though the common-law rule remained in the books in twenty-three states, twenty-two other states had adopted restrictions.[154] Moreover, just as White had looked beyond the statute-books in the Eighth Amendment cases (to examine how juries exercised their lawful discretion), likewise in *Garner* he looked beyond state laws concerning police use of deadly force—to examine the policies of police departments. Urban departments, even in states whose deadly force statutes adopted the common-law approach, had in recent years chosen to impose more restrictive firearm policies: "Overall, only 7.5% of departmental and municipal policies permit the use deadly force against any felon; 86.8% explicitly do not."[155]

But this apparent consensus did not necessarily mean that shooting a non-dangerous fleeing felon was "unreasonable" constitutionally. A final portion of his opinion in *Garner* considered whether restricting use of deadly force against nonviolent felons would "severely hamper effective law enforcement."[156] This was important for White, who explained that "[w]e would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement."[157] As I briefly note in the Conclusion of this essay, this basic intuition—that the Constitution cannot be understood to require policies that would "severely hamper effective law enforcement"—is a signal theme in Justice White's opinions in the area of criminal procedure.

Indeed, as a formal matter, the reader might have expected discussion of *Garner* in an essay discussing White's criminal procedure jurisprudence, rather than his opinions

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150. 471 U.S. 1, 11 (1986) (emphasis added).
151. 501 U.S. 957. *See supra* Part II.B.
152. 433 U.S. 584 (1977). *See supra* Part II.B.
153. 458 U.S. 782 (1982). *See supra* Part II.B.
154. *Garner*, 471 U.S. at 16–17. *See* Steven L. Winter, Tennessee v. Garner *and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 680 (1986).
155. *Garner*, 471 U.S. at 19.
156. *Id.*
157. *Id.*

about the substantive criminal law. After all, the holding of the case is about a Fourth Amendment "seizure"—specifically, the seizure by gunshot of a non-violent fleeing felon. [158] The most direct significance of *Garner* is to claims of illegal search and seizure, both in suppression hearings in criminal prosecutions and in civil actions such as suits seeking damages against a municipality for use of deadly force by one of its police officers. [159] And, in fact, nearly all the cases in the federal courts that rely on *Garner* involve either suppression motions or actions brought under 42 U.S.C. § 1983.[160]

But *Garner* might also be understood to implicate the substantive criminal law. A provision of Tennessee's criminal code, in the title on "defenses," authorized police to use "all the necessary means to effect the arrest" after a suspect flees notice of arrest or forcibly resists arrest.[161] In declaring that this provision "is unconstitutional insofar as it authorizes the use of deadly force"[162] against non-armed, non-dangerous suspects, the Court, in the opinion by Justice White, thus invalidated a portion of Tennessee's self-defense law, that is, a portion of its substantive *criminal law*. Thus, at least on its face, *Garner* may be read as purporting to place a constitutional limitation on the criminal law itself—what a state (or the federal government) may criminalize, or, more precisely, what it may *not decriminalize*. This reading of the decision suggests that in a future criminal prosecution of a police officer for killing a fleeing felon, the officer cannot raise as a defense a statutory justification permitting use of "all the means necessary" to seize the felon, for *Garner* held that kind of provision unconstitutional.[163]

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158. *Id.* at 11.

159. *Id.*

160. As of Dec. 18, 2002, a LEXIS search revealed that in the lower federal courts there were 890 cases citing to *Garner*. An examination of these citations revealed that the great majority were actions brought under 42 U.S.C. § 1983, and nearly all the rest involved Fourth Amendment claims in suppression hearings.

161. TENN. CODE ANN. § 40–7–108 (1982).

162. 471 U.S. at 11. *See also id.* at 22 ("We hold that the statute is invalid insofar as it purported to give [the police officer] the authority to act as he did.").

163. My LEXIS search did not reveal any such case, though one case did consider application of *Garner* to the substantive criminal law. *See* United States v. Span, 970 F.2d 573 (9the Cir. 1992). In this case, the defendants were convicted of assaulting a police officer. On appeal, they argued that the efforts to arrest them were excessive, under *Garner* and its progeny, and hence that they had a constitutional right to resist. The Ninth Circuit agreed that an instruction based upon the defendants' right to use reasonable force to repel excessive force by a law enforcement officer would be appropriate if the defendants' theory of the

Such a reading would imply, however, that the Court in *Garner* held as a matter of federal constitutional law that states must enact laws against murder (or at least against assault), and, further, that they cannot provide a criminal defense of justification or self-defense for conduct by state actors that would be "unreasonable" as a matter of Fourth Amendment law.[164] This would mean that Justice White in the *Garner* case traveled farther into the criminal law than the Court did even in *Robinson v. California*, which he had so powerfully criticized.[165]

A more plausible reading is that *Garner* states only a Fourth Amendment standard for civil cases and for purposes of admitting evidence in a criminal case, not a standard that states must import into their substantive criminal law. In other words, after *Garner* a legislature may continue to excuse certain state action from the criminal sanction, even though in a civil damage action (or on a motion to suppress evidence pursuant to the Fourth Amendment's exclusionary rule) the same state action would be held "unconstitutional." There is nothing unusual about this situation. Much state action that is unconstitutional under the First Amendment or under the Equal Protection Clause, for instance, is not criminalized as a matter

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case was self defense against excessive force. However, because the defendants did not rely upon an excessive force theory at trial, issuing an instruction that precluded such a defense was not plain error. *Id.*

164. One way to understand *Garner* to extend its holding beyond the Fourth Amendment, to the reach of the criminal law itself, would begin with the proposition that the Constitution is generally understood to require, whether as a matter of equal protection or substantive due process, that all laws be "rational" or at least not "arbitrary" and "irrational." This was the basis for White's concurrence in *Furman v. Georgia* halting use of the death penalty. 408 U.S. 238 (1972); *see* discussion *supra* Part II.B. This was also a major part of the basis for White's concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *see* discussion *supra* Part II.A, and the basis for Harlan's concurrence in *Robinson v. California*, 370 U.S. 660 (1962), *see* discussion *supra* Part II.A. One might argue that *Garner* stands not only for the proposition that the seizure there was "unreasonable" under the Fourth Amendment, but also for the proposition that permitting a justification defense to criminal prosecution of that seizure would be "irrational." This interpretation is fleetingly suggested, with even less elaboration than here provided, in H. Richard Uviller, *Seizure by Gunshot: The Riddle of the Fleeing Felon*, 14 N.Y.U. REV. L. & SOC. CHANGE 705, 716–77 (1986). But, as noted in the text, such an approach would ultimately mean that every Fourth Amendment rule must be made part of a jurisdiction's criminal code, a proposition that White was not likely to have entertained.

165. 370 U.S. 660 (1962). *See* discussion of Robinson v. California, *supra* Part II.A.

of state or federal law.[166] The same is true with respect to most Fourth Amendment rules, for the Court has never suggested that the states and the federal government must make every Fourth Amendment violation a criminal offense.

In sum, then, it seems fair to conclude that White's criminal law jurisprudence reveals few constitutional limitations on the State's power to criminalize *or* on its power to decide *not* to criminalize.[167] For White, the content of criminal proscriptions was virtually outside the purview of the Supreme Court; only the question of criminal punishment was appropriately considered by the Court, and even here the Constitution would be satisfied if the penalty comported with the democratic consensus of the nation as a whole.

III. CONCLUSION: CRIMINAL PROCEDURE AND ITS RELATION TO THE CRIMINAL LAW

Justice White is less famous for his decisions involving the criminal *law* than he is for cases involving criminal *procedure*, especially his dissent in *Miranda* and his opinions (sometimes for the Court, sometimes in dissent) on the Fourth Amendment. In part, this is simply because the Court has taken many more cases—and thus White wrote many more opinions—about constitutional limitations on investigation, prosecution, and proof of crimes than about the content of the criminal law.

As Byron White well understood, however, there is no logical demarcation between "substance" and "procedure" in the law of crimes any more than there is in other parts of the law. Just as he was not disposed to impose "decriminalization" directly (by holding certain behaviors off-limits to the criminal prohibition), he likewise was not disposed to read the procedural provisions of the Constitution to impose "decriminalization" indirectly—by imposing burdens on state and federal au-

166. For instance, it is unconstitutional for a state to discriminate on the basis of viewpoint or on the basis of race, but no state treats all, or even most, such conduct as criminal.

167. In addition to the cases discussed *supra* Part II, see *Patterson v. New York*, in which Justice White for a 5–3 majority (with Justice Rehnquist not participating), declined to extend *Mullaney v. Wilbur*, 421 U.S. 684 (1975), so as to constitutionalize which aspects of crime states must treat as "elements" and which they may treat as affirmative defenses. 432 U.S. 197 (1977).

thorities that, in his view, would substantially interfere with their good faith efforts to enforce the criminal law.

Justice White's decisions in the area of criminal procedure are thus of a piece with his decisions in the area of the substantive criminal law, and like those decisions reflect his respect for law itself, for democratic processes, and for government actors. The previously-discussed argument that he made in the death penalty case *Gregg v. Georgia* ("[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws . . . .")[168] restated a theme from his dissent in *Miranda v. Arizona*, that "[t]he most basic function of any government is to provide for the security of the individual and of his property. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime."[169]

His dissents in *Massiah v. United States*,[170] *Escobedo v. Illinois*,[171] and *Miranda*[172]—all involving station-house confessions, like his substantive criminal law opinions, reject the argument that the criminal law is generally ineffective as a deterrent.[173] Given the fundamental societal importance of the criminal law in White's view, it was surely necessary for "society [to] maintain its capacity to discover transgressions of the law and to identify those who flout it."[174] This statement from White's dissent in *Massiah v. United States* in 1964 is a theme that reappears throughout his opinions dealing with constitutional limits on law enforcement—including *Tennessee v. Garner,* as noted above.[175] A signal point of continuity between White's criminal law and his criminal procedure opinions was White's insistence on examining both sides of the deterrent formula on which the criminal law is based: on the "inviolability of the accused[],"on the one hand, but also on the "human

168. 428 U.S. 153, 226 (1976) (White, J., concurring in the judgment). *See supra* note 93.

169. 384 U.S. 436, 539 (1966) (White, J., dissenting) (citation omitted).

170. 377 U.S. 201, 207 (1964) (White, J., dissenting).

171. 378 U.S. 479, 495 (1964) (White, J., dissenting).

172. 384 U.S. 436, 526 (1966) (White, J., dissenting).

173. *Id.* at 540–41; *Massiah*, 377 U.S. at 207 (White, J., dissenting); *Escobedo*, 378 U.S. at 495 (1964) (White, J., dissenting).

174. *Massiah*, 377 U.S. 201, 207 (White, J., dissenting).

175. *See Garner*, 471 U.S. 1, 19–20 (1985) and discussion *supra* Part II.C.

dignity" of those whom society tries to protect through the criminal law.[176]

His dissents in the confession cases also evince the same amazement as had his dissent in *Robinson v. California* at the apparent lack of constitutional basis on which the majority boldly stepped out to make new law. He wrote in *Escobedo* that

> Neither . . . the constitutional language, a century of decisions of this Court, nor Professor Wigmore provides an iota of support for the idea that an accused has an absolute constitutional right not to answer even in the absence of compulsion—the constitutional right not to incriminate himself by making voluntary disclosures.[177]

Similarly, he insisted in *Miranda* that "the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent. . . ."[178]

But as he had in *Robinson* and would do in the abortion-rights cases, White did not claim that the lack of textual and historical basis ipso facto meant that he Court had exceeded its proper role, for he recognized that the meaning and application of the Constitution's language must change over time. In *Miranda* he explained that the lack of textual and historical support:

> does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy. . . . This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fun-

176. *Miranda*, 384 U.S. at 538 (giving weight to "the value of respect for the inviolability of the accused's individual personality"); *but see id.* at 542 (result of *Miranda* will be "not a gain, but a loss, in human dignity" because it will result in new victims of crime).

177. 378 U.S. at 497.

178. 384 U.S. at 531.

damental change in the constitutional distribution of governmental powers.[179]

White never again stated this legal realist perspective so strongly. But even with this perspective—even recognizing that the Supreme Court has been constitutionally granted power to make law—in the end he believed that the decision in *Miranda* was *constitutionally* wrong because it insensibly disregarded the importance and legitimacy of the public values the government was pursuing.

Specifically, White said that the requirements of *Miranda* would greatly "weaken the ability of the criminal law" and were "a deliberate calculus to prevent interrogations [and] to reduce the incidence of confessions."[180] The Justice was right in the latter claim, but proved wrong on the former. It is true that the majority in *Miranda* (and in *Escobedo*) sought to reduce the incidence of station-house confessions (and station-house statements more generally). Ironically, given the vehemence of their dispute, both the *Miranda* majority and White were wrong in thinking that giving *Miranda* warnings would significantly reduce the willingness of those in custody to try to talk their way out of their predicament. (Ironically, the *Miranda* warnings have become such an accepted part of our culture[181] that persons subject to arrest may understand them simply as part of the formalities of the arrest; the significance of the content of the "warnings" may have become obscured or ignored, simply due to repetition—as with the instruction given by flight attendants before takeoff, or the warnings on cigarette packages.)

Finally, White's decisions in the area of criminal procedure reflect his basic presumption that government officials would proceed reasonably in invoking the criminal process. He was for many years the most persistent proponent on the Court of the understanding that the Fourth Amendment's first clause (requiring "reasonable searches and seizures") is its dominant

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179. *Id. Cf.* White's similar statement in *Thornburgh v. Am. Coll. of Obst. & Gyn.* dissent twenty years later. 476 U.S. 747, 786–87 (1986). *See* discussion *supra* Part II.A. *But see* Berger v. New York, 388 U.S. 41, 111 (1967) (White, J., dissenting) ("The Court appears intent upon creating out of whole cloth new constitutionally mandated warrant procedures carefully tailored to make eavesdrop warrants unobtainable. That is not a judicial function.").

180. *Miranda*, 384 U.S. at 541.

181. *See* Dickerson v. United States, 530 U.S. 428 (2000).

command, with the second clause (prohibiting warrants except on probable cause and with particularity) operating not as a definition of what constitutes "reasonableness" but as a deliberate limitation on the use of warrants.[182] In particular, warrants were not required for felony arrests upon probable cause.[183] In making this argument, White extensively cited to sources from the colonial era, from the framers, and from subsequent common-law development. He stressed additionally that Congress had made the judgment that federal officers could make warrantless arrests.[184] But his position also reflects a fundamental understanding that police officers themselves would, most of the time, act in good faith; that they would abide by the constitutional requirement of probable cause without prior screening by a magistrate.[185]

Of course, Justice White recognized that police officers and prosecutors—like school boards and legislatures—might sometimes proceed in bad faith, and that when they did, the Court had a constitutional obligation to step in.[186] Thus even though he was critical of many of the Court's exclusionary rule decisions,[187] he objected when the Court effectively denied defendants standing to exclude evidence resulting from the illegal search or seizure of *third parties*. [188] If criminal defendants could not test the lawfulness of such searches, they would probably never be tested. Hence, in White's view:

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182. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967). *See also supra* note 164.

183. *See* Payton v. New York, 445 U.S. 573, 620 (1980) (White, J., dissenting); United States v. Watson, 423 U.S. 411, 423 (1976); Chimel v. California, 395 U.S. 752, 772–73 (1969) (White, J., dissenting).

184. White's most extensive "brief" is found in his dissenting opinion in *Payton*, 445 U.S. 573.

185. *Id.* at 618 ("A rule permitting warrantless arrest entries would not pose a danger that officers would use their entry power as pretext to justify an otherwise invalid warrantless search). *See also id.* at 619 (arguing that requirement of warrant for home arrests where "practicable" will require that police officers make difficult determination of "exigency"). White had similarly urged that prosecutors could be entrusted not to exercise preemptory challenges on a racially discriminatory basis. Swain v. Alabama, 380 U.S. 202, 222 (1965).

186. *See* Batson v. Kentucky, 476 U.S. 79, 101 (White, J., concurring), discussed *supra* note 7; *supra* note 15.

187. *See* Illinois v. Gates, 462 U.S. 213, 246 (1983) (White, J., concurring in judgment); Stone v. Powell, 428 U.S. 465, 537 (1976) (White, J., dissenting).

188. *See* Rakas v. Illinois, 439 U.S. 128 (1978).

> [T]he ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterrence of bad-faith violations of the Fourth Amendment. . . .
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> . . . .
>
> Of course, most police officers will decline the Court's invitation . . . [But] [s]ome policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed.[189]

More generally, White seemed to be proposing that exclusion of evidence is appropriate when the evidence was obtained through a "bad faith" violation of the Fourth Amendment. He also argued the converse: that probative evidence of guilt should not be suppressed if it was obtained in "good faith." He was never able to convince the Court of this approach, though he did write the opinion for the Court in 1984 adopting a limited "good faith" exception to the exclusionary rule.[190]

These decisions reflect White's broader and more fundamental judgment that the criminal law and its enforcement are too important to society to impose standards of perfection on those who are charged with serving society. They also reflect his confidence, born of the *Lochner* era and the crisis that ensued, that democratic processes (and in the area of criminal procedure the lower courts) are generally willing and able to protect against unwarranted or abusive government exercise of power, without the need for the Supreme Court to erect new, broadly applicable limitations on how the government may pursue the public's interest in crime control and prevention. When the Supreme Court erected such limitations—as, in White's understanding, it did in requiring *Miranda* warnings, in extending the warrant requirement, and in establishing a broad Fourth Amendment exclusionary rule—this constituted the Supreme Court abusing *its* powers, as it had done in that earlier era. The following passage from in *Escobedo v. Illinois* in 1964 captures these sentiments rather pointedly:

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189. *Id.* at 168–69 (White, J., dissenting) (citation omitted).
190. United States v. Leon, 468 U.S. 897 (1985).

> Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.[191]

191. 378 U.S. 478, 499 (1964) (White, J., dissenting).