1977

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Substantive Due Process And The Criminal Law

MARINA ANGEL*

INTRODUCTION

Although the phrase "substantive due process" is shrouded in mystery and has fallen into disrepute, this article will demonstrate that substantive due process is a method of analysis which is at the heart of the Supreme Court's constitutional review of state and federal enactments. Given the primacy of substantive due process analysis, it surprisingly has never been applied by name to criminal enactments and punishments despite recognition that the criminal sanction is the most severe sanction our society can impose. In recent years, however, the Supreme Court has increasingly emphasized substantive due process in its criminal law decisions. This article will first define substantive due process as a mode of constitutional analysis, and then review its application by the Supreme Court in three lines of cases: (1) cases dealing with the definition of crime; (2) cases dealing with the differences between criminal and civil proceedings; and, (3) cases dealing with our most severe criminal sanction, the death sentence.

SUBSTANTIVE DUE PROCESS AS CONSTITUTIONAL ANALYSIS

An understanding of substantive due process as a mode of analysis begins with an understanding of the Constitution's position in


1. This surprise was expressed as early as 1922 by Professors Laylin and Tuttle. A comparison of the criminal with the civil cases reveals the rather astonishing fact that the courts are much more inclined to apply the limitations of the due process of law clauses to legislative acts imposing civil than to those imposing criminal liability. It would seem that the opposite ought to be the rule, for surely the imposition of a criminal sentence is or may be far more oppressive upon the individual than the imposing of a civil liability. Laylin & Tuttle, Due Process and Punishment, 20 Mich. L. Rev. 614, 624 n.13 (1922). See also Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 127.
3. The late Professor Packer was one of the first to note the emergence of substantive due process analysis in the field of substantive criminal law. Packer, The Aims of the Criminal Law Revisited: A Plea for a New Look at 'Substantive Due Process,' 44 S. Cal. L. Rev. 490 (1971); Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071 (1964); Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107; see also Dubin, Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, 18 Stan. L. Rev. 322 (1966).
our political structure and of the role of the Supreme Court as the final interpreter of that Constitution. Grounded in natural law theory,4 the Constitution is itself a “higher law”5 which supersedes any legislative or executive actions found by the Court to conflict with its commands. Corollaries of positive6 and natural law theories are the doctrines of the police power and the due process clauses of the fifth and fourteenth amendments. These clauses have become repositories for a residuum of natural law theory within the Constitution. The Court has long held that the states, under the police power,7 have broad authority to enact laws necessary to protect the health, safety, welfare and morals8 of their citizens. The police power, however, is limited by the due process clause when it affects

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6. Positive law theory holds that a valid law is any command of the sovereign. In America today, given the changes in our constitutional structure such as the direct election of senators, U.S. Const. amend. XVII, and the requirement of one man one vote, Reynolds v. Sims, 377 U.S. 533 (1964), the sovereign is the majority of the populace. Thus, under positive law theory, any law passed by the representatives of the majority would be valid.

7. See, e.g., Corwin, The Basic Doctrine of American Constitutional Law, 12 MICH. L. REV. 247 (1914). Broad as the police power may seem, it still has internal limits. Basic to the framers’ notion of the Constitution as a higher law was the concept of the social compact. The power of any government is determined and limited by the purpose for which that government was created. Since the American government was created to preserve to individuals the enjoyment of life, liberty, and property, its ability to deprive an individual of these rights is limited. Howe, The Meaning of ‘Due Process of Law’ Prior to the Adoption of the Fourteenth Amendment, 18 CAL. L. REV. 583 (1930) [hereinafter cited as Howe]. As part of the nineteenth century development of economic substantive due process, the doctrine of vested rights came to the fore. Under that doctrine it was declared beyond the legislatures’ power to take from an individual rights which had vested under existing law. Id. at 590.

Under any circumstances, the doctrine of vested rights is a broad one, but under its broadest formulation, a vested right cannot be taken away at all by the state; under a narrower formulation, it cannot be taken away unless it is for the greater good of the body politic. Id. at 589; Ratner, supra note 4, at 1070-71. The first formulation can be seen as substantive due process ends analysis, the most intrusive type of substantive due process analysis, and the second as substantive due process means-ends analysis, whose intrusiveness depends on the degree of relationship required in order to sustain the legislative enactment. See text accompanying notes 13-18 infra.

8. It has been argued that it is never proper for a state to limit private sexual conduct between consenting adults. See, e.g., Packer, The Aims of the Criminal Law Revisited: A Plea for a New Look at Substantive Due Process, 44 S. CAL. L. REV. 490 (1971); Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, 72 MICH. L. REV. 1613 (1974). However, in Doe v. Commonwealth’s Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff’d mem., 425 U.S. 901 (1976), the Supreme Court affirmed without opinion a lower court finding that a Virginia statute making sodomy a crime was constitutional.
fundamental rights. Under the dictates of that clause, the Supreme Court seeks a reasonable basis for legislation,\(^9\) by balancing the needs of the individual against the needs of the majority of the populace (the sovereign).

Since the due process concept of fundamental rights is not static and evolves in the same way as the common law,\(^11\) legislative enactments may be considered evidence of what rights are fundamental in our society at any given time. Those legislative pronouncements are not final determinants, however, since there would then be no meaning left to the Constitution as a higher law. On the theory that individual rights may be infringed for the greater good, and presuming that a majoritarian legislature acts for the greater good, a balancing process that accords conclusive weight to legislative judgment would mean that there would be little chance of a statute being declared unconstitutional as violative of the higher law.\(^12\) Thus, the basic tension is political and surfaces when there is a disagreement between a legislature and the Court as to what constitutes a fundamental right.

The Court, consisting of judges appointed for life, has used two devices to relieve the political tension inherent in its position as the final arbiter of what the Constitution prohibits, and the position of the executive and legislative branches as the elected representatives of the sovereign. First, it accords a presumption of constitutionality, and therefore validity, to legislative enactments even if it is claimed that they conflict with a specific section of the Constitution. Second, it is reluctant to strike down legislation on the basis that it conflicts with fundamental rights not specified in the Constitution, but subsumed under the broad heading of due process of law.

State enactments, however, will fall under substantive due process analysis in two situations: first, if the state's purpose (end) is prohibited by a specific section of the Constitution, or, in the cases which have caused the greatest controversy and have traditionally been the only ones denominated substantive due process decisions, a fundamental right inherent in the guarantee of due process;\(^13\) and

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10. See Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975) [hereinafter cited as Limits on the Use of Interest Balancing].
11. See, e.g., Howe, supra note 7, at 609.
12. See Limits on the Use of Interest Balancing, supra note 10, at 1527 nn. 75, 76.
13. The controversy surrounding substantive due process was revived by the Court's decisions in Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down Connecticut's prohibition on the use of contraceptives), and Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton,
second, even if the state’s purpose (end) is not prohibited by the Constitution, if the state’s method (means) of achieving its purpose (end) does not bear a constitutionally permissible relationship to that end.\textsuperscript{14} Whichever aspect of substantive due process analysis is applied, an initial determination of legislative purpose must be made by the Court.\textsuperscript{15}

As part of the second type of substantive due process analysis (means-ends), the requirement of a “least restrictive alternative” is sometimes invoked.\textsuperscript{16} Under this approach, the scrutiny does not end with a determination that the state’s purpose may be proper and that the means chosen are related to achieving that purpose. A court using this type of analysis must determine whether there is an alternative avenue available to the state which would be less restrictive of individual rights. If it is found that such an avenue exists, the enactment will fall. The nexus required between means and ends depends on the importance of the interest affected by the legislation. Professor Tribe’s concept of “structural due process” typifies the most constraining approach to least restrictive analysis:\textsuperscript{17} not only must the legislative purpose be proper, and the rel-
tionship between means and ends be the least restrictive of individual freedom generally, but a determination must be made as to whether the legislative purpose is being furthered in each individual case.

An individualized determination of whether a specific case comes within the legislature's purpose may also be required by procedural due process. Realistically, however, procedural due process analysis may be identical to the second aspect of substantive due process analysis. It is a means-ends approach to determine whether the legislative purpose is being fulfilled in a specific case. The more fundamental the individual interest involved in a case, the closer the relationship between means and ends required and hence the greater degree of procedural due process required. Since the imposition of the criminal sanction may result in the greatest loss to the individual, i.e., stigmatization and involuntary loss of liberty, more procedural protections are required to surround the process by which criminality is determined in an individual case.18

Procedural due process, like means-ends analysis generally, presents a lesser interference with legislative judgment than the first type of substantive due process analysis. If a violation of procedural due process is found, the legislature's underlying purpose need not be permanently stifled. The legislature can choose to enact new procedures or establish a new means-end relationship which will enable it to achieve its purpose.

Judicial Application of Substantive Due Process Analysis in Criminal Cases

During the early history of our country, state and federal legislatures were primarily concerned with issues surrounding economic development and property rights. Therefore, it is not surprising that the Court first used substantive due process analysis in its review of legislation touching on these issues.19 However, the resultant pol-

18. See notes 28-34 infra and accompanying text.
itical clash between the Court and the legislatures (culminating in the Court-packing plan of 1937) compelled the Court to withdraw almost completely from overt application of such analysis. Yet the Court never actually repudiated substantive due process. In economic cases, it has accepted virtually any legislative purpose and found proper any relationship between means and ends.

Although substantive due process is a basic mode of constitutional analysis, the Supreme Court has never expressly applied it to criminal cases. It is only in recent years that the Court has even applied a de facto substantive due process approach to resolve constitutional questions arising in a criminal context. There are several reasons for the court's reluctance to utilize a substantive due process analysis in criminal cases. First, ascertaining legislative purpose can be quite difficult in criminal law. While the primary goal of the criminal law is the prevention of harmful conduct, it is achieved through the use of secondary purposes—retribution, deterrence (specific and general), rehabilitation, and isolation. This profusion of sometimes inconsistent legislative purposes presents both theoretical and practical conflicts.

Second, the Supreme Court historically had little opportunity to

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The decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that Congress exceeded its authority under the commerce clause and violated the Tenth Amendment when it extended the minimum wage and maximum hour provisions of the Fair Labor Standards Act to almost all state employees, may indicate a reemergence of economic substantive due process. Justice Brennan, in an opinion joined by two of the three other dissenters, stated:

We tend to forget that the Court invalidated legislation during the Great Depression, not solely under the Due Process Clause, but also and primarily under the Commerce Clause and the Tenth Amendment.

Id. at 868 (Brennan J., dissenting).

21. See note 76 infra and accompanying text.
deal with cases raising criminal law issues. Originally, Congress was perceived as having limited jurisdiction over crime; the definition of crime and the imposition of the criminal sanction were considered matters most within the states’ police power. Even over matters of criminal procedures, the Supreme Court’s jurisdiction has, until recently, been limited. The Bill of Rights was first interpreted to apply exclusively to the federal government. Not until the passage of the fourteenth amendment in 1868 was it argued that the rights granted in the first eight amendments were enforceable against the states. It was in 1932 that the Court finally held that state criminal procedures were limited by the due process clause of the fourteenth amendment. The vast expansion of individual procedural rights in criminal cases took place between 1932 and 1970. However, by the time state criminal cases began to be reviewed by the Supreme Court in the 1930’s, substantive due process had been discredited as a legitimate mode of constitutional analysis. Since the specific guarantees in the Bill of Rights are largely procedural in nature, and because of the “demise” of substantive due process analysis, the emphasis has been on the procedures required in criminal cases and not on the substance of the criminal laws being implemented.

At the same time that the Supreme Court was drawing back from the use of substantive due process analysis in the economic field, it was beginning to decide civil rights and civil liberties cases on two

24. In the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872), the Court rejected the argument that the privileges and immunities clause of the fourteenth amendment was meant to secure to individuals against encroachment by the state governments the protections which the first eight amendments guaranteed against encroachment by the federal government.
27. But see Skinner v. Oklahoma, 316 U.S. 535 (1942). Justice Douglas’ opinion for the Court held invalid, on equal protection grounds, an Oklahoma statute which provided for compulsory sterilization after a third conviction for a felony involving moral turpitude but which excluded certain white collar felonies such as embezzlement. Justice Douglas’ opinion is an example of substantive equal protection analysis. See note 35 infra and accompanying text. Justice Stone’s concurring opinion relied on a pure substantive due process analysis to hold the statute unconstitutional.
related grounds: first, as mentioned above, on procedural due process grounds, and second, on equal protection grounds. In recent years, a third ground has been successfully asserted—the right to privacy. On their faces, the first two grounds emphasize procedural and not substantive issues, and therefore appear to have no connection with substantive due process analysis as developed in the economic context. However, as will be seen, the form of constitutional analysis used in these cases, as well as in the later cases involving privacy, was actually one of substantive due process.

Procedural Due Process as Substantive Due Process

The process used by the Court to decide whether a procedural right guaranteed by the first eight amendments in federal criminal cases was enforceable against the states was substantive due process analysis. When the Supreme Court began to review state criminal cases, a basic split developed among its members with Justices Black and Frankfurter emerging as leaders of two different schools of thought.28 Black advocated the position that the due process clause of the fourteenth amendment was intended to incorporate the first eight amendments of the Constitution, making them applicable to the states in the same way they were applicable to the federal government. Frankfurter advocated a case by case approach in which the Court would determine whether a claimed right was so fundamental as to be required under a basic notion of due process.29 Although a majority of the Court never adopted Justice Black's incorporationist approach, the period from 1949 to 1970 saw most of the criminal procedural safeguards specified in the Bill of Rights applied to the states on the basis of the fundamental fairness required by the due process clause of the fourteenth amendment.30 Thus, by focusing on the purportedly fundamental nature of criminal procedural protections, the Court's approach in determining which protections were applicable to the states by the due process

29. Justice Frankfurter himself noted the influence of the "natural law" tradition on his interpretation of the requirements of due process. 332 U.S. at 65. Professor Ratner observed:
   The terms sense of justice, fundamental principles, rights fundamental to the American scheme of justice, traditions and conscience of the people, basic civil rights, fair play, concept of ordered liberty, decency and heritage, are modern designations for the natural rights of man. They are labels, not standards for decision, suggesting long-range community values perceived by the judiciary but not necessarily reflected by the Constitution. Values thus labeled have become constitutional limitations on governmental authority, apparently to be balanced against the social benefits of regulation.
   Ratner, supra note 4, at 1057.
30. See note 26 supra.
clause was "the blood brother of natural law in the area of substantive due process."31

Since the mid-1960's, the Court has faced the question of whether procedural rights guaranteed by the due process clause to criminal defendants were also guaranteed to individuals threatened with deprivation of their liberty through non-criminal proceedings. These alternative systems, such as juvenile court and civil commitment, are designed as rehabilitative alternatives to the criminal justice system. The Court examined the basic purpose or purposes of the criminal law as contrasted to the basic purpose or purposes of these alternative systems, and attempted to define the difference between criminal and civil proceedings. The Court thus used substantive due process analysis in considering the constitutionality of legislation involving alternative systems for dealing with social deviance by analyzing the legislative purposes in establishing such systems and determining whether the means used by the legislatures were permissibly related to the purported goals.

The Court's concern with the procedural safeguards surrounding the process whereby an individual is deprived of liberty (whether by means of the criminal process or an alternative rehabilitative system) has underlined a new emphasis in our society on personal freedom. Although the Court has never specifically stated that the right to be free from unjust criminal incarceration and criminal stigmatization is a fundamental right calling for the strictest constitutional scrutiny, such a holding is implicit in its decisions regarding the procedural protections surrounding a criminal trial.32 It is only in recent years that a discrepancy has been noted in the Court's reviewing the procedural aspects of criminal cases and not the substantive content of the criminal laws themselves.33 There are references in the Constitution to crime and punishment,34 but the Bill


32. The Bill of Rights is concerned primarily with limitations surrounding the imposition of the criminal sanction. The impact of the Court's finding such limitations applicable to the states by reason of the fundamental fairness required by the due process clause of the fourteenth amendment has already been noted. It is also significant that in In re Winship, 397 U.S. 358 (1970), the Court held, on the basis of the due process clause alone, that proof beyond a reasonable doubt was required in criminal cases and juvenile delinquency proceedings.


of Rights deals primarily with the procedures surrounding the trial of a criminal case. Substantive limits on the power of the states and federal government to enact criminal statutes must therefore be found in the broad wording of the due process clause and, to a degree, in the eighth amendment's prohibition against cruel and unusual punishment. These methods require the application of substantive due process analysis.

**Equal Protection and Substantive Due Process**

As with procedural due process, equal protection also seems more concerned with procedure than substance. Nevertheless, the striking similarity in practice between substantive due process analysis and the equal protection analysis of recent cases has led to the use of the term "substantive equal protection." The similarity begins when one notes that it is not a denial of equal protection for a state to classify if the classification bears an appropriate relationship to a proper state purpose. As a result, there has been an increased focus in equal protection cases on the state's purpose for a classification. This is especially true when either a suspect classification or a fundamental interest is involved. In such cases, a strict relationship between means and ends, the classification and the purpose, is required. Thus, equal protection analysis parallels substantive due process analysis in both its aspects.

**Right to Privacy and Substantive Due Process**

Deprivation of liberty results in the deprivation of another substantive right—the right to privacy. The Court has of late recognized new areas of personal privacy where the government cannot intrude at all and others where it can intrude only to a limited

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38. Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of obscene material);
extent and only with good reason. Early cases such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, decided during the heyday of economic substantive due process, broadly defined the liberty interests protected by the due process clause. Those decisions held that certain restrictions on family and parental rights were beyond the power of the state even though such rights were not specifically recognized in the Constitution. These early cases are increasingly being relied on by the Court and provided precedent for the landmark decision in *Griswold v. Connecticut*. Although

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40. 262 U.S. 390 (1923). The statute made it a misdemeanor to teach in any school a modern language other than English to any child who had not graduated from the eighth grade. During the course of its opinion, the Court stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399.

41. 268 U.S. 510 (1925). The statute made it a misdemeanor for a parent to fail to send a child between eight and sixteen years of age to public school. The Court struck down the statute:

> Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Id.* at 534-35. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court sustained the claim of Amish parents that their convictions under a compulsory school attendance law violated the free exercise clause of the first amendment as made applicable to the states by the fourteenth amendment and rights recognized in *Meyer* and *Pierce*.

42. The Court relied on *Meyer* in *Ingraham v. Wright*, 430 U.S. 651 (1977), to hold that a liberty interest protected by the due process clause of the fourteenth amendment was involved when school authorities punished a child for misconduct by paddling.

43. 381 U.S. 479 (1965).
the right to practice contraception is not specifically granted by the Constitution, *Griswold* held unconstitutional a Connecticut criminal statute prohibiting the use of contraceptives and the giving of information, instruction or medical advice on methods of preventing conception. Justice Douglas, writing for the majority, sought to take the decision out of the classic substantive due process mold and to make it more objective by tying it to a zone of privacy created by "penumbras and emanations" formed by various specific guarantees of the Bill of Rights. It is questionable whether Justice Douglas's approach achieved anything that a pure substantive due process approach, the approach used by Justice Harlan in his concurring opinion, could not achieve.\(^4\)

**Eighth Amendment and Substantive Due Process**

Although not calling it by name, the Supreme Court has also applied substantive due process in eighth amendment cases. For instance, the court normally relies on that amendment's ban on cruel and unusual punishment rather than the due process clause to determine the propriety of state purposes for imposing the criminal sanction as well as to determine the appropriate relationship between a specific sanction and the purposes of the legislature. In *Robinson v. California*,\(^4\) the Court found an eighth amendment limitation on the state's ability to define criminality. The Court concluded that the eighth amendment prohibits the imposition of criminal sanctions in the absence of a voluntary act.\(^5\) The minimum

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4. If Justice Douglas was trying to use a more objective approach than that possible under substantive due process in order to avoid the type of political clash that followed the Court's economic substantive due process decisions, he has been criticized as not succeeding. Professor Kauper has pointed out that the emanations and penumbra theory could just as easily have been applied in economic substantive due process cases. Although liberty of contract is not specifically mentioned in the Constitution, the Constitution does protect against the impairment of the obligations of contract and against expropriation of property without compensation. "[T]he Court is applying essentially the same process as that used in the fundamental rights approach, but dignifying it with a different name and thereby creating the illusion of greater objectivity." Kauper, *supra* note 13, at 253. See generally, Heymann and Barzelay, *supra* note 13; Ely, *supra* note 13; Emerson, *supra* note 13; Epstein, *supra* note 13; Perry, *supra* note 14.  


45. The Court's attempts to place limits on the substantive criminal law by use of the eighth amendment's prohibition on cruel and unusual punishments rather than the due process clause have been noted by Professors Packer and Dubin. Under one label or another, it is apparent that the Supreme Court is beginning to develop some notions of substantive due process about criminal legislation. Standards of rationality and fairness for the legislative invocation of the criminal sanction can be seen gradually and haltingly to emerge. 'Substantive due process' is a
standards established by Robinson can be contrasted with the Court’s decisions regarding the extreme end of the criminal sanction spectrum—the legislatively ordained situations in which the death penalty can be imposed.

In the 1976 decisions regarding the death penalty, the Court concluded that due to the extraordinary nature of the penalty, death can be imposed only when rendered subsequent to proceedings which allow the incorporation of individualizing devices. These cases ensure that the imposition of death fulfills the purported purposes of the criminal law in a specific case.47 In so doing, the Court engaged in classic substantive due process analysis. First, the Court sought the purposes for which criminal punishment is imposed in order to determine their propriety. Second, it determined whether the death sentence fulfilled any of the purported purposes. Finally, the Court asked whether less drastic alternatives, such as a life sentence or the imposition of death only in individual cases, were constitutionally required where they more directly fulfilled the purposes of the criminal law.

The Court’s application of substantive due process analysis under the guise of the eighth amendment is punctuated by the Court’s exclusive reliance on the due process clause in related decisions regarding the constitutionality of the death sentence. In McGautha v. California,48 an early attack on the constitutionality of the death sentence, it was argued that the due process clause required standards for the imposition of the death sentence and bifurcated trials

[47] See notes 313-21 supra, and accompanying text.
on the issues of guilt and punishment. Justice Harlan, writing for the Court, rejected both contentions. However, when Furman v. Georgia was decided in 1972, a majority of the Court agreed that a capital sentencing scheme having no standards and providing for no appellate review violated the eighth amendment’s ban on cruel and unusual punishments. The majority reasoned that death is such an extraordinary punishment that its imposition in such an arbitrary and capricious manner could serve none of the purposes of the criminal law. Chief Justice Burger, dissenting in Furman, stated that “it would be disingenuous to suggest that today’s ruling has done anything less than overrule McGautha in the guise of an Eighth Amendment adjudication.”

More recently, in Gardner v. Florida the Court held unconstitutional the imposition of the death sentence where the trial judge relied, in part, on a confidential presentence report. Justice Stevens relied solely on the due process clause to hold that Florida’s procedure was subject to the “defects which resulted in the holding of unconstitutionality in Furman v. Georgia,” a purported eighth amendment decision.

Summary of Judicial Application of Substantive Due Process

Under rubrics of procedural due process, equal protection, right to privacy and eighth amendment, the Court has been applying substantive due process analysis in criminal cases. A variety of reasons combine to explain the Court’s historical reluctance to confront the criminal law substantively: the early history of our country in which economic issues and their relationship to property rights overshadowed issues of personal civil rights and liberties; the limited federal jurisdiction over substantive criminal law; the primary emphasis in the Bill of Rights on procedural as opposed to substantive rights in criminal cases; the lack of jurisdiction in the Supreme

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49. 408 U.S. 238 (1972). See note 302 infra and accompanying text.
50. 408 U.S. at 400.
52. Id. at 361. Several of the concurring Justices would have reached the same result relying solely on the eighth amendment.

This conclusion stems solely from the Eighth Amendment’s ban on cruel and unusual punishments, on which the Woodson decision expressly rested, and my conclusion is limited, as was Woodson, to cases in which the death penalty is imposed. I thus see no reason to address in this case the possible application to sentencing procedures—in death or in other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered in this case.

Id. at 364 (White, J., concurring). Justice Blackmun also concurred, citing only earlier eighth amendment decisions, and the Chief Justice concurred without opinion.
Court to review even the procedural aspects of state criminal cases until passage of the fourteenth amendment; the coincidence of the beginning of Supreme Court review of state criminal cases with the "demise" of economic substantive due process; the belief that the definition of criminality and the imposition of the criminal sanction lay most clearly with the states' police power; and the difficulty of applying substantive due process of either an ends or means-ends variety to the substantive criminal law because of the conflicting purposes ascribed to the application of the criminal sanction. Notwithstanding its recent forays into reviewing the constitutionality of substantive criminal laws, the aforementioned factors still combine to produce trepidation on the part of the Court to admit that its analysis is akin to, if not indistinguishable from, classic substantive due process analysis.

Substantive due process analysis has now been applied by the Court in three lines of cases dealing with the substantive criminal law. The first two confront the question of constitutional limitations on the definition of criminality and the third deals with constitutional limitations on the means that may be used to effect the purposes of the criminal law, i.e., the aforementioned death cases. In the first and oldest line of Supreme Court decisions applying substantive due process analysis to the criminal law, the Court addressed the question of whether it is constitutional to impose criminal liability in the absence of culpability. The second line of cases concern whether constitutionally mandated criminal procedural safeguards are applicable in cases involving alternative, and theoretically rehabilitative, systems of dealing with social deviants. In those cases, the Court had to articulate some rationale for differentiating between criminal and non-criminal methods of handling deviancy. Finally, in the death penalty cases, the Court sought to discover the state's purposes for imposing criminal punishment. From there, the Court determined the propriety of those purposes, the relationship between those purposes and the imposition of the

53. Culpability as used herein is defined more broadly than it is in the MODEL PENAL CODE (Prop. Official Draft, 1962) [hereinafter cited as MODEL PENAL CODE]. The MODEL PENAL CODE, § 2.02(2), defines culpability in relation to specific mens rea and lists four culpable mental states: purposely, knowingly, recklessly, and negligently. Culpability as used herein further encompasses those who are "morally blameworthy," Hart, supra note 34, at 401, and, in the words of Professor Fingarette, "response-able." Fingarette, Disabilities of the Mind and Criminal Responsibility—A Unitary Doctrine, 76 COLUM. L. REV. 236, 247 (1976). A definition of culpability which encompasses those who are "morally blameworthy" or "response-able" includes requirements of a specific mens rea, a voluntary act, and an absence of justification or excuse. Although the MODEL PENAL CODE requires these for a finding of criminality, see note 63 infra, it defines culpability only in relation to specific mens rea.
death sentence as a criminal sanction, and the necessity for a less drastic alternative. The remainder of this article will focus on these three lines of cases.

**SUBSTANTIVE DUE PROCESS ANALYSIS IN TRADITIONAL CRIMINAL CASES—ENDS ANALYSIS**

**The Requirement of Culpability**

Logic\(^5^4\) as well as constitutional law\(^5^5\) necessitates a rejection of the positivist position that a criminal law is any command of a sovereign, and requires instead a determination of the difference between criminal and non-criminal conduct. Most legal theorists who have dealt with the problem from Professors Laylin and Tuttle in 1922\(^5^6\) to Professor Fingarette in 1975,\(^5^7\) have come to the conclusion reached by Professor Hart that a crime "is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."\(^5^8\) To evoke this moral condemnation, the conduct must result from an exercise of free will, since it is illogical and useless to condemn as moral failure conduct that is inevitable.\(^5^9\) The unique stigmatization

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\(^5^4\) Professor Hart rejected the positivist notion that law is a command of a sovereign, and that "a crime is anything that is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy." Hart, *supra* note 34, at 404.


\(^5^6\) 'There is an invariable principle to the effect that a mere event is not a crime on the part of a human being; but crime consists in the opposition of the individual will to the will of the state, having perceptible causal connection with a given event. . . . 'Due process of law' guarantees to the individual immunity from punishment on account of that which is not a crime; i.e., an event not contributed to by the exercise or non-exercise of his will.

Laylin & Tuttle, *supra* note 1, at 643-44.

\(^5^7\) Although departing from the traditional common law devices for imposing culpability requirements in criminal cases, Professor Fingarette states:

A distinctive feature of law is the recognition that in fact some persons, though not 'out of their mind,' will willfully, recklessly or negligently disobey. They may be evil, or rebellious, or foolish. But they grasp the relevance of law to their conduct, though they defy or ignore it. They are intended subjects of the law and must fully answer for their non-conforming conduct. They are response-able, and hence they are responsible.


\(^5^8\) Hart, *supra* note 34, at 405.

\(^5^9\) Professor Packer has stated, regarding our criminal law system’s acceptance of free will, that

Neither philosophic concepts nor psychological realities are actually at issue in the criminal law. The idea of free will in relation to conduct is not, in the legal system,
and involuntary loss of liberty which follow a criminal conviction\textsuperscript{60} are based on culpability for having made a wrong moral choice. The necessity for morally blameworthy conduct is inherent in the common law definition of crime. At common law, there was no crime unless there was a voluntary act (\textit{actus reus} or A.R.), a culpable mental state (specific \textit{mens rea} or M.R.), and an absence of excuse or justification (E or J).\textsuperscript{61} Thus, in traditional common law terms, criminality can be expressed in the form of an equation: A.R. + M.R. = Crime, unless E or J. These elements, whether considered separately or together, are related to conscious, voluntary wrongdoing, and are, in either the traditional form or a modern equivalent,\textsuperscript{62} required for a criminal conviction.

The requirements of a voluntary act and specific \textit{mens rea} are commonly defined as the basic elements of a crime, with the burden of proof, both of production and persuasion beyond a reasonable doubt, on the state. Matters of justification or excuse are usually defined as affirmative defenses with the burden of proof, of production, and often persuasion, on the defendant.\textsuperscript{63} Affirmative defenses

\begin{quote}

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a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will. . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints (the only kind with which the law is concerned) would be fatally impaired unless the law provided a \textit{locus poenitentiae}, a point of no return beyond which external constraints may be imposed but before which the individual is free—not free of whatever compulsions determinists tell us he labors under but free of the very specific social compulsions of the law.

\end{quote}

\begin{quote}

Packer, \textit{The Limits of the Criminal Sanction} 74-75 (1968).

60. "The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes. Here at the very least the line should be drawn. No one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of \textit{mens rea}. . . ." Packer, \textit{Mens Rea and the Supreme Court}, 1962 \textit{Sup. Ct. Rev.} 107, 150.

61. A justification, such as self-defense, looks to acts and circumstances surrounding the event; an excuse, such as insanity, looks to the personal attributes of the actor. See, e.g., Fletcher, \textit{The Right Deed for the Wrong Reason: A Reply to Mr. Robinson}, 23 \textit{U.C.L.A. L. Rev.} 293, 309-10 (1975).


63. \textit{But see} \textit{Model Penal Code} § 1.14(10):

'[\textit{M}aterial element of an offense,' means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.

The comments to this section state:

Here what is needed is a concept that delineates the types of elements to which requirements of \textit{mens rea} should be applied. Paragraph (10), defining 'material element of an offense,' is designed to perform this function. When problems of
differ as to whether they provide total relief from criminal liability or whether they merely reduce the degree.\textsuperscript{64} Such defenses also differ by either attacking absence of a basic element, such as alibi (if one is not at the scene of the crime, one cannot have satisfied the basic elements), or by conceding the basic elements but claiming that a separate governmental policy (such as the prohibition on entrapment) precludes liability.\textsuperscript{65} This article will focus on the insanity defense, which arguably fulfills all of the above-mentioned functions: it may preclude a finding of criminality by negating specific \textit{mens rea} or \textit{actus reus}; it may preclude a finding of criminality although conceding specific \textit{mens rea} and \textit{actus reus} because of the condition of the actor; or it may merely reduce the degree of liability in the form of diminished capacity.\textsuperscript{66} The factors in the culpability equation are related and often indistinguishable, and a finding of criminality is prohibited if any element is absent.\textsuperscript{67} Since

\textsuperscript{64} [The more common affirmative defenses may be separated into two groups: those that provide a complete defense by excusing or justifying a defendant’s act, such as self-defense, duress, necessity and accident, and those that the defendant offers to mitigate his conduct and thereby reduce the punishment, such as intoxication, incomplete self-defense, and the heat of passion or sudden provocation defense. …


65. Comment, \textit{Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard}, 11 \textit{Harv. C.R.-C.L. L. Rev.} 390, 400-01 (1976). It may be impossible, however, to separate any excuse or justification from the basic elements of an offense since all of these factors relate to the actor’s culpability under the circumstances. The minority position in Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958), was that entrapment was an issue, much like fourth amendment exclusionary rule issues, totally separate from the issue of the actor’s culpability and related only to misconduct on the part of the police. The majority in each case, however, rejected this position, apparently viewing entrapment as going to specific \textit{mens rea}. See \textit{LaFave & Scott}, \textit{Criminal Law}, § 8, 47-57 (1972).


67. Professor Wales has noted the same assumptions regarding culpability underlie A.R., M.R., and insanity. But what of the underlying assumption of free will? The Model Penal Code and virtually every code derived from it provide at least two defenses unrelated to \textit{mens rea} that may negate the threshold capacity for free choice assumed by the criminal law. One, the automatism or involuntariness defense, negates a prescribed element of the crime, the requirement of a \textit{voluntary} act or omission. The other, the insanity
each factor relates to the absence of moral blameworthiness, it may therefore be questioned whether it is proper to place the burden of persuasion regarding excuse or justification on the defendant.

The application of substantive due process analysis to the criminal law requires first, an assessment of the proper purpose or purposes of the criminal law, and second, an assessment of whether the means chosen to implement such purposes bear a constitutionally permissible relationship thereto. The primary purpose of the criminal law is the prevention of harmful conduct. This is achieved through the secondary purposes of retribution, deterrence, rehabilitation and isolation. Under an ends type of substantive due process analysis, the Court determines whether any or all of the purposes are proper. Under a means-ends analysis, the Court determines whether a given set of facts justifies a finding of criminality and the imposition of a criminal sanction in light of the proper purpose or purposes of the criminal law.

Retribution and deterrence are both based on culpability—the defense, assumes a voluntary or conscious act and is directed at substantial impairments to the capacity for free choice arising from mental disorders. Together, the two defenses suggest a concept of culpability broader than that affected by the element of mens rea. It is only when the two-step hurdle of minimal capacity for free choice has been crossed—whether by presumption or by the state's overcoming defense evidence—that the more refined measures of culpability contained in the mens rea element are brought into play.


68. Retribution is a multi-faceted concept and there is continuing debate over its validity as a proper purpose (end) of the criminal law. The argument, made by Aristotle and continuing to be made by Justice Marshall, is that retribution looks only to the past and serves no useful future social purpose. Critics further argue that retribution can set the limit on the amount of punishment that should be imposed, but cannot itself justify the imposition of any punishment. Proponents of retribution claim that it serves socially useful purposes by reinforcing society's basic moral values and preventing individuals from taking the law into their own hands. See generally Gardner, The Renaissance of Retribution—An Examination of Doing Justice, 1976 Wis. L. Rev. 781.

69. Deterrence is criticized on the ground that there is insufficient evidence to prove that it works. However, some evidence does exist to show that deterrence works in relation to calculated monetary offenses of the white collar variety. General deterrence has also been attacked by Kant, Bentham, Mill and their present day successors in the belief that punishing an individual merely as an object lesson for others accords little or no dignity to the individual on whom punishment is imposed.
concept that an individual has the choice of doing good or evil. They are also similar in that both contain an implied notion of proportionality. The theoretical justification for retribution is that an individual who has voluntarily chosen to do evil is blameworthy and deserving of the imposition of a criminal sanction in proportion to the amount of harm done. Deterrence embraces a different type of proportionality. Under specific deterrence, the punishment should be severe enough to make the individual who chose to commit a criminal act in the past choose not to commit a similar criminal act in the future. Under general deterrence, the punishment should be severe enough to assure that other members of the population do not choose to commit the prohibited act.

It has been said that "[n]o idea is more pervaded with ambiguity than the notion of reform or rehabilitation." At its base, rehabilitation encompasses some type of personality change. This change can be brought about by several means. The least intrusive type of societal interference with individual autonomy is reasoned argument that convinces an individual to freely choose to modify behavior. The most intrusive type of interference with individual autonomy is socially imposed psychological techniques of behavior modification. Reasoned argument obviously does not characterize rehabilitative efforts in either our criminal law system or our alternative systems for dealing with social deviance. Thus, rehabilitation is not based on free will but rather on determinism. Furthermore, it does not contain any notion of proportionality. Criminal punishment based on rehabilitative principles accepts certain basic premises: (1) that individuals' actions are pre-determined by heredity and environment; (2) that human knowledge has progressed to the point where we now know what hereditary and environmental factors shape human behavior; (3) that we can manipulate these factors so as to cause human behavior to conform to accepted norms; and, (4) that the state will expend the time, money, and resources needed to effectuate such changes.

Isolation, is not really a separate purpose of the criminal law. As part of retribution or deterrence, isolation has an element of proportionality in it. As part of rehabilitation, there is no limit to the

72. See Allen, supra note 70, at 26.
period for which one can be isolated; one is isolated until one is rehabilitated.

All four purposes seek to prevent socially deviant behavior. The first two purposes, retribution and deterrence, require that past deviant acts exist to prove the need for future action. These purposes look to crime detection and punishment in order to prevent future crime. On the other hand, rehabilitation is based on preventing future criminality by individuals whose dangerousness may or may not have been exhibited by specific prior bad acts. The rehabilitation process can be triggered by non-criminal acts and even thoughts interpreted to indicate a future threat to society.73 There is no perforce notion of proportionality implicit in the rehabilitative ideal since one is isolated and rehabilitated until one no longer poses a threat to society. Although rehabilitation has been viewed for the greater part of this century as an advanced idea, "the rehabilitative ideal has often led to increased severity of penal measures."74

The conventional wisdom is that all four purposes underlie the criminal law and capital punishment,75 yet there is no consensus as to which purpose is most proper. It is impossible to have a consistent theory of criminal law and capital punishment based equally on all

74. See Allen, supra note 70, at 34.
75. Professor Hart views these varied principles as a fact of any penal code rather than a misfortune:

Examination of the purposes commonly suggested for the criminal law will show that each of them is complex and that some may be thought of as wholly excluding the others. Suppose, for example, that the deterrence of offenses is taken to be the chief end. It will still be necessary to recognize that the rehabilitation of offenders, the disablement of offenders, the sharpening of the community's sense of right and wrong, and the satisfaction of the community's sense of just retribution may all serve this end by contributing to an ultimate reduction in the number of crimes. Even socialized vengeance may be accorded a marginal role, if it is understood as the provision of an orderly alternative to mob violence.

Hart, supra note 34, at 401. But Professor Hart recognizes the problem as one of priority and relationship of purposes as well as one of legitimacy. Id. See also Greenawalt, supra note 55, at 938-39. Accepting the greatest conflict between a free will deterrence theory and a rehabilitative deterministic theory, it is arguable that imposition of a criminal sanction geared to free will deterrence reasoning will include the environmental pressures existent in a deterministic world.
four concepts, since, in theory and in practice, they conflict. 6 Accepting that criminal law is distinct from other methods of dealing with social deviance in that it is concerned with a conscious, voluntary choice to do wrong, primary emphasis in that field should be placed on retribution and deterrence. The purpose of rehabilitation should be given primary emphasis in the alternative systems.

Nevertheless, during the course of this century, isolation and rehabilitation have assumed importance not only in the establishment of alternative systems of dealing with social deviance but in the criminal law system itself. It is a sign of changing philosophical orientation or a perceived failure of rehabilitation that today there is a strong trend toward returning to basic concepts of retribution and deterrence with their emphasis on free will, voluntary bad acts and proportionate sentencing. Whether attributable to the basic fallacy of deterministic philosophy, or our lack of knowledge and failure to allocate adequate resources, the trend is unmistakable. This trend can be perceived in the criminal law system in the recommendation of the elimination of parole and probation and in determinate sentencing. 77 It can be seen in alternative systems such as the juvenile court, in the recommendation of waiver of juvenile court jurisdiction over older juveniles in favor of the criminal law, and in the recommendation of determinate penalties.78

Confusion in criminal law analysis as to the exact role of moral blameworthiness arises because of the various concepts under which culpability has been defined—actus reus, mens rea, and sanity. This confusion should be alleviated once it becomes clear that all of these requirements are actually tied to free will. They can be expressed either separately, as at common law and in the Model Penal Code, 79 or under a unitary theory such as that of Professor Fingarette.80

The Supreme Court confronted the question of whether the definition of criminality includes culpability in three types of cases. One line of cases deals with the traditional issue of whether strict liability criminal offenses, those which eliminate from the definition of

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6. An example of this conflict is presented by the case of a young first offender who may be so affected by prosecution and conviction that specific deterrence, rehabilitation and isolation do not require incarceration, but goals of retribution and general deterrence do. Sentencing of white collar criminals raises similar problems. See United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976).

77. See, e.g., IMPRISONMENT, ch. 1139, WEST. COL. LEG. SERVICE, 4752-4849 (West 1976).


79. See notes 53 & 63 supra.

80. See notes 53 & 57 supra.
the crime the element of specific mens rea, are constitutional. Second, the Court held in Robinson v. California, that a voluntary act, actus reus, is constitutionally required in the definition of criminality. Finally, dicta in Supreme Court opinions indicate that the criminal sanction cannot be imposed when the actor was insane at the time of the relevant act or omission. The Court has, furthermore, given indications of substantive requirements in the definition of criminality in its decisions regarding burden of proof, In re Winship, Millaney v. Wilbur, Rivera v. Delaware, and Patterson v. New York.

1. Mens Rea

In its broadest sense, mens rea is equated with culpability. Thus, no factor in the equation can be excluded and only acts and accompanying mental states that satisfy all parts of the equation can be considered criminal. However, mens rea in the sense most litigated before the Supreme Court is equated with specific mens rea (M.R. in the equation). The question, therefore, has been whether it can be eliminated from the definition of criminality to produce what are known as strict liability or public welfare offenses.

The Supreme Court’s decisions in these strict liability cases have been inconsistent. They lead to the conclusion that “mens rea is an important requirement, but it is not a constitutional requirement, except sometimes.” Until United States v. Balint, no strict
liability case that reached the Supreme Court had involved the possibility of imprisonment. Moreover, no decision had dealt with the issue of a mens rea requirement as a constitutional limit on the use of the criminal sanction.\textsuperscript{90} Balint, however, need not stand as precedent for the propriety of imposing imprisonment for the violation of a strict liability offense since there was no mention in the Court's opinion of the fact that the statute in question included the possibility of five years imprisonment. In \textit{Morissette v. United States},\textsuperscript{91} the Court held that a federal statute making it a crime to "knowingly convert" government property was not a regulatory public welfare offense but rather a statutory formulation of the traditional common law offense of theft, and therefore required proof that the defendant knew the property belonged to another.\textsuperscript{92} The recent decision of \textit{United States v. Feola},\textsuperscript{93} confronted the propriety of a conspiracy conviction to assault a government official when the assailants did not know that the victim was a federal officer. The opinion seems at first glance to allow the use of strict liability for a serious common law crime. However, the majority opinion interpreted the federal officer requirement to be merely jurisdictional and not an aggravating factor in the definition of the offense.\textsuperscript{94} The Court further stated, citing \textit{Morissette},\textsuperscript{95} that if the statute were in fact an aggravated assault statute, knowledge would be required for a conviction.

Professor Packer concluded, as had Professors Laylin and Tuttle before him, that "Strict liability in the criminal law is irrational, in the substantive due process sense of that word."\textsuperscript{96} They would draw the due process line and require specific mens rea when a finding would result in criminal stigma and a possible involuntary

\textsuperscript{91} 342 U.S. 246 (1952).
\textsuperscript{92} The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.
\textsuperscript{93} 420 U.S. 671 (1975).
\textsuperscript{94} \textit{Id.} at 676-77. The validity of this interpretation is questionable since 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) provides a maximum three month sentence for simple assault, while 18 U.S.C. § 111 (assaulting, resisting, or impeding certain officers or employees) provides a maximum three year sentence for simple assault on a federal officer.
\textsuperscript{95} 420 U.S. at 683.
loss of liberty. Such a weighing of the severity of result with the strictness of constitutional requirements is in keeping with traditional due process analysis. The result reached by Professors Packer, Laylin, and Tuttle as a matter of constitutional analysis has also been reached by the American Law Institute in its Model Penal Code as a matter of policy. Under the Code, there can be no strict liability where an offense carries the possibility of imprisonment.

Despite the failure to rationalize its holdings in strict liability cases, the Supreme Court will probably not reverse its position that mens rea is not a constitutional requirement in such cases. However, decisions in other substantive criminal cases dealing with culpability requirements indicate the Court's acceptance of the notion that a finding of moral culpability is required before the infliction of a criminal sanction. Strict liability offenses are therefore a limited exception, which, insofar as the cases indicate, apply only when imprisonment is not at issue.

Each of the elements necessary to a criminal conviction, i.e., a voluntary act, specific mens rea, and sanity, is justified on the ground that punishment in the absence of free choice does not serve purposes of retribution or deterrence. However, it is difficult to differentiate between the absence of a voluntary act, specific mens rea, and sanity. A set of hypotheticals helps to point out this difficulty. One lunatic killed because God so instructed. A second lunatic killed by strangulation meaning only to squeeze a lemon. Except for the defense of insanity the first lunatic's intent to kill and performance of the voluntary act of killing would result in a conviction for murder. The second lunatic did not intend to kill and thus, theoretically, could not be convicted of murder even in the absence of an insanity defense. Another difficulty in distinguishing specific mens rea and insanity arises in jurisdictions such as California and

97. Laylin & Tuttle, supra note 1, at 636-37; Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 150.
98. Just as it has been suggested that civil liability might be justified where punishment might be too drastic as a method of police power, so it may be submitted that greater public necessity must be shown to justify the punishment of death or that of imprisonment than might be required to support a slight fine. Laylin & Tuttle, supra note 1, at 636.
99. See note 63 supra. Strict liability offenses do not really live up to their name. Culpability is eliminated in such offenses only in the sense of specific mens rea. Requirements of a voluntary act and sanity are never eliminated. W. LAFAVE & A. SCOTT, CRIMINAL LAW, 145-46 (1972) [hereinafter cited as W. LAFAVE & A. SCOTT].
100. Actually, the presumption that people intend the natural consequences of their acts would compel both lunatics to raise the insanity defense. See note 207 infra.

Whether criminality does not exist because of a lack of a voluntary act, specific mens rea, or sanity, has important procedural and substantive implications. The state normally bears the burden of production and the burden of proof on voluntary act and specific mens rea. A large number of states, however, place the burden of production and proof by a preponderance of insanity on the defendant. Furthermore, a verdict of not guilty by reason of insanity, as
New York which recognize diminished capacity. In such jurisdictions, the first lunatic might not be totally excused from criminal liability, but mental impairment would reduce the severity of the offense and the degree of punishment.

2. Actus Reus

The requirement that there be actus reus or a voluntary act is deeply embedded in the common law and is reflected in every Anglo-American penal code. The Supreme Court in Robinson v. California, made a voluntary act constitutionally required in the definition of criminality. The Court recently reaffirmed that position when it cited Robinson for the proposition that the eighth amendment "imposes substantive limits on what can be made criminal and punished as such. . . ." Because the voluntary act requirement is based on the same rationale as the requirements for specific and general mens rea—that the criminal law is based on free will and that neither retribution nor deterrence are proper when free choice does not exist—it is difficult to determine the difference between the lack of a voluntary act, the lack of specific mens rea, and insanity.

A case involving both lack of specific mens rea and lack of a voluntary act was Lambert v. California. There, the Court had opposed to a simple not guilty if the state fails to prove a voluntary act or specific mens rea beyond a reasonable doubt, can result in automatic commitment to a mental institution.

101. N.Y. Penal Law § 125.25(1)(a).
102. The voluntary act requirement is clearly stated in the Model Penal Code, § 2.01, which makes a voluntary act a prerequisite for a criminal conviction and lists acts which are not voluntary: a) a reflex or convulsion; b) a bodily movement during unconsciousness or sleep; c) conduct during hypnosis; d) a bodily movement that otherwise is not a product of the effect or determination of the actor, either conscious or habitual.
104. Fingarette, Addiction and Criminal Responsibility, 84 Yale L.J. 413, 417-18 (1975); Greenawalt, supra note 55, at 928-29; Wales, supra note 67, at 704.
106. The Model Penal Code requires a voluntary act because, "The law cannot hope to deter involuntary movement or to stimulate action that cannot physically be performed. . . ." Model Penal Code § 201, Comment 1 (Tent. Draft No. 4, 1955).
107. Instead of saying that "a bodily movement that. . . . is not a product of the effort to determination of the actor, either conscious or habitual," is not a voluntary act, Model Penal Code § 2.01(2)(d), one could as easily say that there is no specific mens rea, or in the words of the Model Penal Code, no culpable mental state, accompanying the act.
to determine the constitutionality of an obscure strict liability statute prohibiting the failure to register.\textsuperscript{109} The \textit{amicus} brief in \textit{Lambert} argued in clear substantive due process terms that the registration ordinance was an "unwarranted invasion of the right of privacy, right to liberty, and privileges and immunities of a citizen of the United States in that it penalizes a morally innocent and passive status and is not reasonably restricted to the evil with which it purports to deal."\textsuperscript{10} However, the question in \textit{Lambert} was phrased somewhat differently by Justice Douglas: "whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge."\textsuperscript{111} Several factors influenced the Court in holding the statute unconstitutional: (1) it was a strict liability statute requiring no specific mens rea; (2) it affected purely passive conduct not normally considered blameworthy; and, (3) the statute was an obscure municipal ordinance.\textsuperscript{112}

The last factor makes the decision an exception to the \textit{ignorantia legis neminem excusant} doctrine, a doctrine which has been criticized as not in keeping with normal culpability requirements. The prohibitions against \textit{ex post facto} laws and vague statutes\textsuperscript{113} recog-

\textsuperscript{109} Omissions, failures to act, are not a normal mode of culpability.

\textsuperscript{110} The \textit{amicus} brief [in \textit{Lambert}] relied on two points. The first point was a \textit{mens rea} argument . . . The second was that the registration ordinance was an "unwarranted invasion of the right of privacy, right to liberty, and privileges and immunities of a citizen of the United States in that it penalizes a morally innocent and passive status and is not reasonably restricted to the evil with which it purports to deal." In other words, a substantive due process argument was directed against the 'reasonableness' of the ordinance, with all of the difficulties that attend such a position in the climate of constitutional adjudication that has prevailed since the judicial crisis of the mid-1930's.


\textsuperscript{112} Justice Douglas equated the ordinance to a "law . . . written in print too fine to read or in a language foreign to the community." \textit{Id.} at 230.


There is an aspect of the Court's void-for-vagueness decisions, of which Papachristou v. Jacksonville, 405 U.S. 156 (1972) is typical, that has not often been noted. Although the entire statute was held void-for-vagueness, some of the prohibited conduct was clear. The true basis for invalidating the statute may have been that it made criminal innocuous acts that were not morally blameworthy and should not provide a basis for criminal conviction in our society.
nize that one cannot be held criminally liable for violating a law if the prohibited acts were not criminal at the time they were performed, or if a statute is so vague that it does not give reasonable notice of what is prohibited. Therefore, the question has been asked that since "[I]t is inconsistent with basic notions of fairness to penalize one for an act that, because of the inconsistence, inaccessibility, or vagueness of the law, the actor believed legal when done, why is it fair to punish one who is ignorant of the law for any other reason?"\textsuperscript{114}

The difficulty in distinguishing between the lack of a voluntary act and insanity is manifested by the words of Justice Frankfurter, dissenting for himself and Justice Black, in \textit{Leland v. Oregon}. \textit{Leland} tested the constitutionality of placing the burden of proving insanity beyond a reasonable doubt on the defendant:

\begin{quote}
[A] muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind the muscular contraction resulting in another's death, there must be culpability to turn homicide into murder.\textsuperscript{115}
\end{quote}

3. \textit{Insanity}

Insanity is traditionally considered a defense to be raised after the basic elements of the crime, \textit{actus reus} and specific \textit{mens rea}, have

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\textsuperscript{115} 343 U.S. 790, 802-03 (1952). Justices of the two state supreme courts that have considered whether the insanity defense can be constitutionally eliminated, have similarly equated the lack of a voluntary act and insanity. In \textit{State v. Strasburg}, 60 Wash. 106, 116, 110 P. 1020, 1024 (1924), the Washington Supreme Court held that to take from the accused the opportunity to offer evidence that he was insane at the time of the act, would be as grave a violation of his trial by jury as taking from him the right to present evidence that he did not physically commit the crime at all. Similarly, the Mississippi Supreme Court in \textit{Sinclair v. State}, 161 Miss. 142, 132 So. 581 (1931), held that a state statute eliminating the insanity defense was unconstitutional. Justice Griffith, concurring in the per curium opinion, anticipated \textit{Robinson} by considering insanity a disease wherein the volition of the sufferer "has no responsible part in the existence of the affliction." \textit{Id.} at 175, 132 So. at 589 (Griffith, J., concurring). This is somewhat similar to \textit{LaFave \\& A. Scott}, supra note 99, at 271-72. \textit{Strasburg} and \textit{Sinclair} are discussed more fully at notes 122-37 \textit{infra} and accompanying text.
been proved by the state beyond a reasonable doubt. Yet insanity is recognized as a defense for the same reason *mens rea* and *actus reus* are required, because free will, and therefore moral culpability, do not exist in the case of an insane defendant.\(^{116}\) The overlap between specific *mens rea* and insanity,\(^{117}\) and *actus reus* and insanity,\(^{118}\) has already been discussed. Despite these overlaps, however, insanity remains a separate concept. The lunatic who killed because God so instructed may have possessed the specific *mens rea* required, intent to kill, and may have committed a voluntary act, the killing. However, the lunatic could still raise an insanity defense going to a concept of culpability broader than that recognized by the basic elements of the offense. The separateness of the insanity defense is further shown by the fact that, in theory, the insanity defense applies even to strict liability offenses, that small category of cases where no specific *mens rea* is required in the definition of the crime.\(^{119}\)

The issue of whether the insanity defense can be eliminated has never been squarely faced by the Supreme Court of the United States, although there is a dictum that such an attempt would be unconstitutional.\(^{120}\) The issue was raised by the Nixon Administr-

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\(^{116}\) Purposes of retribution and deterrence are not served if we convict the insane. W. LaFave & A. Scott, *supra* note 99, at 271-72.  
\(^{117}\) See notes 100-01 *supra* and accompanying text.  
\(^{118}\) See note 115 *supra* and accompanying text.  
\(^{119}\) W. LaFave & A. Scott, *supra* note 99, at 270. In practical terms, insanity is virtually never raised as a defense to a minor criminal charge because of the possibility of long term involuntary loss of liberty under civil commitment statutes.  
Professor Fingarette reviewed the place of specific *mens rea*, *actus reus*, and insanity in the criminal law. His "unitary theory" leaves two issues of culpability to the jury. The essential D.O.M. [disability of mind] issue, in contrast to the many different and obscure issues that may currently arise, is the narrow one of whether the defendant could act rationally at the time with regard to his offending conduct and, if not, whether he culpably induced the Mental Disability.  
\(^{120}\) Robinson v. California, 370 U.S. 660, 666 (1962); Powell v. Texas, 392 U.S. 514, 535-37 (1968). The editors of the Columbia Law Review have noted: The excuse of mental disease, at least, as embodied in the *M'Naghton Rules*, is so traditional a part of Anglo-American jurisprudence, so deeply rooted in judicial notions of fairness, that it must be ranked as fundamental. Although there is no Supreme Court case so holding, it is probable that, at a minimum, this form of the insanity defense has become incorporated into the guaranty of due process, and such a conclusion is implicit in Leland v. Oregon.  
The Supreme Court has held that it would violate due process for a state to try an incompetent insane defendant. Pate v. Robinson, 383 U.S. 375 (1966). The holding of *Pate* was recently reaffirmed in an opinion written by Chief Justice Burger for a unanimous Court in Drape v. Missouri, 420 U.S. 162 (1975). The Chief Justice noted the long common law tradi-
tion's proposal, S.1., which would have eliminated a separate insanity defense but allowed admission of evidence of mental disease or defect to negate specific mens rea. 121 Two state supreme courts which considered the issue, in Washington122 and in Mississippi,123 rejected, on constitutional grounds, legislative attempts to eliminate the insanity defense. These early decisions demonstrate the operation of substantive due process analysis in deciding a basic issue of culpability. In both cases, the various justices followed the now familiar pattern of first determining the purpose or purposes of the criminal sanction, and then analyzing whether the elimination of the insanity defense was properly related to those purposes.

In State v. Strasburg, the Washington Supreme Court accepted the proposition that positivist criminal jurisprudence is inconsistent with our constitutional scheme of government.124 Although the opinion is couched in terms of the right to jury trial, the analysis is unmistakably substantive due process.125 The Washington court concluded that "the accused has the right to have the jury pass on every substantive fact going to the question of his guilt or innocence."126 To determine whether eliminating insanity from consider-

121. Section 522 is abolitionist in the sense of eliminating a 'separate insanity defense.' Although evidence of mental disease or defect is admissible if it tends to negate the mental element (mens rea) of a crime, it does not constitute a general defense of excuse. . . .

Two problems are posed. First, one may question whether such alteration of the insanity defense can co-exist with an otherwise rather traditional structure of criminal liability and defenses without standing the logic of that structure on its head. This question poses corollary issues of policy and constitutional interpretation. Second, one may question whether judicial construction of this decidedly opaque provision will conform to the expectations of the draftsman.

Wales, supra note 67, at 688-89; see Platt, supra note 120.


124. 60 Wash. at 112-20, 110 P. at 1021-25.

125. See Wales, supra note 67, at 730 n. 9.

126. 60 Wash. at 114, 110 P. at 1023. Justice Parker rhetorically asked if the legislature could exclude from the jury's consideration any fact or facts which it wished and concluded that it could not.
Substantive Due Process

The court based its decision primarily on two factors: first, the common law's acceptance of the insanity defense; and second, the necessity of culpability in order to prove criminality. In this latter respect, the court equated an act by an insane person with the lack of actus reus.\(^{127}\)

In the Mississippi case, *Sinclair v. State*, the court, in a *per curiam* opinion, held that the elimination of the insanity defense would violate the state's due process clause. The reasoning of the individual concurring justices presaged to a great degree the rationales expressed by the United States Supreme Court in *Griswold v. Connecticut*. Justice Ethridge, in a concurring opinion analogous to Justice Douglas' in *Griswold*, argued that the elimination of the insanity defense was prohibited by a number of state constitutional sections, including Mississippi's prohibition against cruel or unusual punishments, and clauses guaranteeing due process, equal protection, and a jury trial. Justice Ethridge focused on culpability, noting the insanity defense's relationship to free choice concepts inherent in the requirement of specific and general *mens rea*\(^{128}\) and actus reus.\(^{129}\) He concluded that the elimination of the insanity defense would not serve the purposes of the criminal law, namely, specific deterrence, general deterrence or retribution.\(^{130}\) Justice Griffith, concurring, took a due process natural law approach resembling Justice Harlan's in *Griswold*.\(^{131}\) He concluded that an act com-

\(^{127}\) Professor Wales, commenting on Strasburg, noted that the opinion could be read to suggest that insanity negates all three elements of criminal liability— *mens rea*, actus reus, and causation. Wales, *supra* note 67, at 689.

Laylin and Tuttle equate the right to present an insanity defense with the right to present an alibi. "[T]here is no perceptible difference between punishing a man for a criminal act he did not commit and punishing him for the happening of an event which he did not will and could not prevent as a criminal act which he did commit." Laylin & Tuttle, *supra* note 1, at 632.

\(^{128}\) The opinion indicated a particularly sophisticated approach to the difference between specific *mens rea* and general *mens rea*. General culpability is referred to as malice or animus. 161 Miss. at 159-60, 132 So. at 584 (Ethridge, J., concurring).

\(^{129}\) Some of Justice Ethridge's reasoning foreshadows that of the Supreme Court in *Robinson*. See footnote 115 *supra*.

\(^{130}\) 161 Miss. at 159, 132 So. at 583-84 (Ethridge, J., concurring). Finally, he engaged in a means-end type of substantive due process analysis by recognizing that part of the legislative motivation for eliminating the insanity defense was the possibility of perjury. He noted that the amount of perjury committed in support of self-defense, a defense that could not be eliminated, equalled, if not exceeded, that committed in support of the insanity defense. 161 Miss. at 166-67, 132 So. at 586 (Ethridge, J., concurring).

\(^{131}\) It is enough that the legislation runs into conflict with the fundamental and paramount laws of nature. And with that latter as the premise, then there is no necessity that any particular section of the Constitution shall be advanced into
mitted without rational will was not an act susceptible of a criminal sanction and relied on a lack of *actus reus*, disease rationale which foreshadowed *Robinson v. California*.132

In each case, the state argued that it was appropriate to eliminate the insanity defense, thus eliminating any culpability requirement, from the definition of criminality, since the criminal law had advanced from a retributive stage to one which emphasized rehabilitation.133 Nevertheless, both courts found that a change in labels could not change the reality of the punitive aspects of criminal conviction and punishment.134 However, the justices were careful to point out the feasibility and propriety of dealing with non-culpable but dangerous individuals through civil proceedings and even of involuntarily restraining such individuals for purposes of care and treatment.135 The same conclusion, that the insanity defense cannot be eliminated from the criminal law, was reached as a matter of consti-

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166 Miss. at 178-79, 132 So. at 590-91 (Griffith, J., concurring). In fact, Justice Griffith voiced concern similar to Justice Harlen when he criticized the stretching of constitutional sections to cover every inhibition. *Id.* at 172, 132 So. at 588 (Griffith, J., concurring).

132. And when an insane person commits a homicide, he does no more than transmit, as one of the results of his affliction, a death-dealing but nevertheless irresponsible manifestation of that baneful disorder. It is the disease that has done it, and diseases which are the sole work of nature cannot be punished as a crime, no more than could epilepsy or blindness or curvature of the spine by denounced as penal offenses.

161 Miss. at 176, 132 So. at 590 (Griffith, J., concurring). For a discussion of *Robinson*, see footnote 103 *supra* and accompanying text.

Chief Justice Smith, the lone dissenter, was willing to give great deference to the legislative judgment that a valid purpose was served through elimination of the insanity defense.

133. 60 Wash. at 120, 110 P. at 1025; 161 Miss. at 180-83, 132 So. at 593-95 (Smith, C.J., dissenting).

134. 60 Wash. at 120, 110 P. at 1025; 161 Miss. at 175-76, 132 So. at 589-90. (Griffith, J., concurring). This rejection of labels resembles the Supreme Court’s approach to the juvenile court in *In re Gault*, 387 U.S. 1 (1967). See footnotes 257-67 *infra* and accompanying text.

135. 60 Wash. at 121, 110 P. at 1024; 161 Miss. at 176, 132 So. at 590 (Griffith, J., concurring). The same points were made by Laylin and Tuttle:

Care must be taken here to distinguish between 'punishment' as conceived of herein and other usages to which the state may attempt to submit the individual. . . . The plea of defense is 'not guilty' of the crime charged; and the verdict of 'guilty' is itself a punishment, as it carries the stigma of condemnation with it. There may be restraints on individuals and possibly even corporal inflictions which are not imposed as punishment at all. Detention in hospitals for the insane is referable to the police power, no doubt; but such confinement is justified by fear of what the insane person is and may therefore do rather than as a punishment for what he has done.

Laylin & Tuttle, *supra* note 1, at 641.
Culpability and the Burden of Proof

Due process substantive requirements regarding the definition of criminality are implicated in the Supreme Court's decisions regarding burden of proof in criminal cases. It was long accepted at common law, and finally determined as a matter of due process by the Supreme Court in In re Winship, that the state must bear a burden of proof beyond a reasonable doubt that a crime has been committed. The Court's decision in Winship, however, did not answer the more basic questions of whether certain elements are constitutionally required in the definition of criminality and whether they must be proved beyond a reasonable doubt by the state.

The norm in our system of criminal law is that a crime exists if there is an actus reus and a specific mens rea unless there is an excuse or justification (A.R. + M.R. = CRIME unless E or J). Typically, the state bears the burden of proving beyond a reasonable doubt the basic elements of the crime, actus reus and specific mens rea, on the left side of the equation, and the defendant bears the burden of production and sometimes the burden of proof by a preponderance on any excuse or justification, referred to as affirmative defenses, on the right side of the equation. This traditional formula, however, does not explain what factors may be treated as affirmative defenses and why. "The mere denomination of a defense to allocate the burden of proof is a conclusion [and] not a basis for analysis."

Under the present practice, the substance of the issue of mental disability, once properly introduced, becomes linked with a confusing variety of special defenses, verdicts, and procedures that may, in turn, involve post-verdict dispositional issues, and which can vary from one jurisdiction to another. Each such defense calls for its own peculiar strategies and legal doctrine. Each could result in different post-verdict dispositions, ranging from immediate and complete freedom to lengthy involuntary commitment in either a hospital or a prison.

136. See Laylin & Tuttle, supra note 1, at 642, 643-45.
137. See Hart, supra note 34, at 405-06, 424.
140. Note, Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant, 64 GEO. L.J. 871, 872 (1976). See also Finidgette, supra note 53, at 241:
Since *actus reus*, specific *mens rea*, and insanity all relate to culpability, and since they are often indistinguishable, the validity of treating them differently is questionable. The criminal law has traditionally operated on the assumption that insanity differs from *actus reus* and specific *mens rea* to the point of requiring the defendant to bear the burden of production and even of persuasion on insanity. However, if insanity is an aspect of *actus reus* or specific *mens rea*, and if *actus reus* or specific *mens rea* are not proven beyond a reasonable doubt by the state, no necessity arises for the defendant to bear any burden of production. Furthermore, in such a case, the verdict would be a simple not guilty rather than not guilty by reason of insanity, a finding that often leads to long term civil-commitment. Even if insanity differs from *actus reus* or specific *mens rea*, the fact that there is no culpability where there is a finding of insanity raises the question of whether such significant procedural differences and substantive results are proper.

Obviously, it is easier for a state to convict if the burden of proof of innocence is on the defense, but, under *Winship*, such a rule would be unconstitutional. Unless there is a constitutional limit on how a state may define criminality, the difference between guilt and innocence, a state could achieve such a result by a minimal definition of the basic elements of an offense. For example, a state could define murder simply as a killing and causation, placing on the defendant the burden of disproving specific *mens rea*, *actus reus*, sanity, and other traditional culpability factors. Calling such factors affirmative defenses and placing the burden of proof on the defendant may be considered a method of forcing the defendant to prove innocence.

There may be pragmatic reasons for placing the burden of production, and sometimes of persuasion, as to affirmative defenses on the defendant. An excuse such as insanity is a defense to all crimes, and, if the state was as a matter of course required to meet both production and persuasion burdens, the requirement would result in the expenditure of enormous amounts of time and effort by the state to disprove an issue that probably does not even exist in the vast majority of cases. Recognizing this difficulty, Professor Packer and the Model Penal Code would require the defense to meet a

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141. See note 119 supra.
142. *Cf.* W. LaFave & A. Scott, supra note 99, at 162-54. See also note 207 and accompanying text.
144. See note 63 supra.
burden of production on an affirmative defense, but once a defense going to a basic issue of culpability has been raised, would place the burden upon the state to disprove it beyond a reasonable doubt. However, the Supreme Court has not required a state to prove sanity beyond a reasonable doubt, nor has it provided a rationale for the difference in treatment of issues labeled basic elements of an offense and those labeled affirmative defenses. The Court has also failed to adopt a definitive position on which elements of culpability must exist in the definition of criminality.

The Court's decision in *Winship* is essential to an understanding of the burden of proof problems which have arisen in cases involving culpability factors. In *Winship*, both Justice Brennan for the majority and Justice Harlan concurring emphasized that the

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146. 397 U.S. 358 (1970). There are two important points to consider when discussing *Winship*. First, whether burden of proof is a substantive or procedural issue, the analysis used by the Supreme Court was basic substantive due process based solely on the command of the due process clause. Second, *Winship* was not a "criminal case," but rather a delinquency adjudication. The rise of alternative systems of dealing with social deviants—the juvenile court system is the prime example of such alternative systems—has forced the Supreme Court to look at the substantive bases of the criminal law system and the alternative systems.

147. 397 U.S. at 363-64.

148. *Id.* at 372. It is both the stigmatizing effect and possibility of imprisonment that differentiate criminal punishment from either civil commitment or any other sanction which society can impose. Two cases, Wisconsin v. Constantino, 400 U.S. 433 (1971), and Paul v. Davis, 424 U.S. 693 (1976), make clear that stigma alone cannot turn a civil sanction into a criminal sanction.

The Wisconsin statute at issue in *Constantino* provided that government officials could prohibit the sale of liquor to excessive drinkers by a process known as posting. The Chief of Police of Hartford, Wisconsin, without notice or hearing, posted in all retail liquor stores a prohibition on sale of liquor to Constantino. The Court stated the issue as "whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." 400 U.S. at 436. The Court determined that the stigma was such as to require notice and hearing.

*Paul v. Davis* involved the actions of two Kentucky police chiefs who, as a part of a campaign to fight shoplifting, drafted and circulated a poster to 800 merchants in the Louisville metropolitan area. The poster included Davis' photograph and name, and described him as "known to be active in this criminal field." Davis was previously arrested for shoplifting but the charge was dropped. The Court denied relief to Davis, and distinguished *Constantino*:

'[T]he governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry....' The 'stigma' resulting from the defamatory
interests a defendant has at stake in a criminal trial, involuntary loss of liberty and the stigmatization of a criminal conviction, require a higher burden of proof than in a civil case. Justice Brennan concluded in his opinion for the Court, that "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."\textsuperscript{49}

Once Winship established that the state must prove a crime beyond a reasonable doubt, the issue of exactly what factors go into the definition of criminality became important. This, as will be seen below, reopened the holding of \textit{Leland v. Oregon}\textsuperscript{50} regarding the insanity defense, and led to the decisions in \textit{Mullaney v. Wilbur}\textsuperscript{51} and \textit{Patterson v. New York}\textsuperscript{52} regarding the culpability required for a conviction for the highest degree of homicide.

1. \textit{Leland v. Oregon}

\textit{Leland} raised two issues regarding the insanity defense: first, whether the irresistible impulse rule was constitutionally required; and second, whether Oregon could place not only the burden of production but also the burden of persuasion beyond a reasonable doubt of insanity on the defendant. Justice Clark, writing for the Court, sustained the Oregon statute on both points.\textsuperscript{53} He, along
with the dissent, 154 found that the irresistible impulse test of insanity was not required by the Constitution. Nevertheless, both the majority and the dissenters seemed to accept, as a minimum constitutional requirement for the insanity defense, the McNaughton Rule requiring the ability to distinguish between right and wrong. 155

On the burden of proof issue, Justice Clark noted that Oregon was the only state that required the defendant to establish insanity beyond a reasonable doubt, with approximately twenty states requiring the defendant to establish it by a preponderance of the evidence. As to the two burdens he stated:

While there is an evident distinction between the two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. 156

have studied it. In these circumstances, it is clear that adoption of the irresistible impulse test is not "implicit in the concept of ordered liberty." 343 U.S. at 800-01.

154. At this stage of scientific knowledge it would be indefensible to impose upon the States, through the due process of law which they must accord before depriving a person of life or liberty, one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test, no matter how backward it may be in light of the best scientific canons. Inevitably, the legal tests for determining the mental state on which criminal culpability is to be based are in strong conflict in our forty-eight States. 343 U.S. at 803-04 (Frankfurter, J., dissenting).

155. Id. at 800-01 (Frankfurter, J., dissenting). Justice Frankfurter stated:

For some unrecorded reason, Oregon is the only one of the forty-eight States that has made inroads upon that principle by requiring the accused to prove beyond a reasonable doubt the absence of one of the essential elements of the commission of murder, namely, culpability for his muscular contraction. Like every other State, Oregon presupposes that an insane person cannot be made to pay with his life for a homicide, though for the public good he may of course be put beyond doing further harm. Id. at 804-05 (Frankfurter, J., dissenting). By thus acknowledging that every state accepted the insanity defense and that such is the common law tradition, Justice Frankfurter seems to indicate that such a defense is required by due process fundamental fairness.

On the other hand, Justice Frankfurter ends his discussion rejecting an irresistible impulse insanity test with the statement

But when a State has chosen its theory for testing culpability, it is a deprivation of life without due process to send a man to his doom if he cannot prove beyond a reasonable doubt that the physical events of homicide did not constitute murder because under the State's theory he was incapable of acting culpably. Id. at 803-04. (Frankfurter, J., dissenting). This statement can be read to support the proposition that it is within the state's power to define criminality in any way which it pleases, and that the Constitution only places limitations on the elements which the state has determined are essential to criminality. Only if the state has imposed a culpability requirement must it be faced with the burden of proving culpability beyond a reasonable doubt. Such a position is similar to the one taken by Justice Powell in Patterson v. New York, 97 S. Ct. 2319 (1977). See notes 213-18 infra and accompanying text.

156. 343 U.S. at 798.
Hence, Winship, which found a significant difference between proof by a preponderance and proof beyond a reasonable doubt, seemed to call this holding of Leland into question.

Justices Frankfurter and Black, with rare unanimity, dissented in Leland on the constitutionality of putting proof beyond a reasonable doubt of insanity on the defense. Justice Frankfurter's opinion indicated uncertainty as to the exact position of the insanity defense in the criminal law. At one point, he indicated that insanity was a part of actus reus;\footnote{But a muscular contraction resulting in a homicide does not constitute murder. Even though a person may be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind the muscular contraction resulting in another's death, there must be culpability to turn homicide into murder.} at another, a part of specific mens rea;\footnote{Whatever tentative or intermediate step experience makes permissible for aiding the State in establishing the ultimate issues in a prosecution for crime, the State cannot be relieved, on a final show-down, from proving its accusation. To prove its accusation it must prove each of the items which in combination constitute the offense. And it must make such proof beyond a reasonable doubt. This duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability. The only exception is that very limited class of cases variously characterized as mala prohibitum or public torts or enforcement of regulatory measures. . . Murder is not a malum prohibitum or a public tort or the object of regulatory legislation. To suggest that the legal oddity by which Oregon imposes upon the accused the burden of proving beyond a reasonable doubt that he had not the mind capable of committing murder is a mere difference in the measure of proof, is to obliterate the distinction between civil and criminal law.} and finally, that it was required by a general culpability requirement broader than either actus reus or specific mens rea.\footnote{Id. at 805-06 (emphasis added).} Regardless of whether insanity was defined as actus reus, specific mens rea or general mens rea, Justice Frankfurter found that it had to exist in the definition of criminality or there would be no distinction between criminal and civil law. His opinion may be read as a rejection of the positivist view of criminality and an acceptance of the necessity for culpability in order to sustain a finding of criminality. Satisfaction of either the traditional common law equation (A.R. + M.R. = CRIME unless E or J) or a modern revision such as Fingarette's "Unitary Doctrine" would recognize the role of voluntary choice in culpability.\footnote{See note 155 supra.} It was unusual for Justice Frankfurter, a judicial conservative normally very deferential to legislative judgments, to place such importance on culpability that he was willing to impose through the
due process clause a culpability requirement on the definition of criminality. However, Justice Frankfurter did leave open the issue of whether it would be proper to place any burden of production or persuasion of insanity on the defendant.

2. Mullaney v. Wilbur

Justice Powell's opinion for the Court in *Mullaney v. Wilbur* may be interpreted as placing substantive limitations on the factors that must go into the definition of criminality. Maine, following the common law, defined murder as an unlawful killing with malice aforethought, and manslaughter as a killing without malice aforethought and "in the heat of passion on sudden provocation." In a murder prosecution the state did not have to prove malice aforethought because it would be implied from the state's proof of an intentional killing. Maine recognized that "heat of passion" would negate malice aforethought and reduce murder to manslaughter. However, it required the defense to prove, by a preponderance of the evidence that the killing was "in the heat of passion on sudden provocation." Thus, Maine required malice aforethought as a basic element of the crime of murder, recognized that "heat of passion" would negate malice aforethought, and placed the burden of proving "heat of passion" on the defendant. The Court decided that Maine's requirement that the defendant prove by a preponderance

161. Justice Frankfurter explained that he was unwilling to defer to the legislative judgment in *Leland* because of a gulf "between deference to local legislation and complete disregard of the duty of judicial review. . . ." 343 U.S. at 807 (Frankfurter, J., dissenting). *But see note 155 supra.*

162. *See note 155 supra.*


166. 421 U.S. at 686.

167. The Court in *Mullaney* accepted that malice aforethought encompassed lack of provocation. 421 U.S. at 686-87. The majority in *Patterson v. New York*, 97 S. Ct. 2319 (1977) clearly stated that this was the law of Maine. Justice Powell, in his Patterson dissent, disputes such a reading of Maine's case law. The only thing that is clear is that it is unclear whether Maine law included lack of provocation within the term malice aforethought. See, e.g., Osenbaugh, supra note 145, at 444-45; Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 Geo. L.J. 871, 876-79 (1976).

168. 421 U.S. at 696. The Maine statutory scheme can be schematized in the following fashion:
that he acted in the heat of passion in order to disprove malice aforethought did not comport with Winship's directive that the prosecution prove every fact necessary to prosecute the crime charged beyond a reasonable doubt.\textsuperscript{169} The broadest reading of Mullaney is that the due process clause places limitations on the state's ability to remove key culpability factors from the basic elements of the offense by calling them affirmative defenses and thereby placing the burden of proof on the defendant. Stated simply, the state must disprove beyond a reasonable doubt all affirmative defenses relating to culpability once they are raised by the defendant. This reading is supported by the Court's statement that

if Winship were limited to these facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in the law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.\textsuperscript{170}

A narrower reading of Mullaney would permit the state freedom to choose which culpability factors it deemed important to the definition of criminality. However, if such factors made a significant difference in stigma or punishment, Mullaney would require the state to prove them beyond a reasonable doubt. The most restrictive interpretation is that once the state decides to make a culpability factor a basic element of an offense, \textit{i.e.}, to put it on the left side of the culpability equation,\textsuperscript{171} it cannot place the burden of disproving

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A.R. \quad + \quad M.R. \quad = \quad CRIME \quad unless \ E \ or \ J \\
MURDER
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<th>Burden of proof on the state beyond a reasonable doubt</th>
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<td>killing + malice aforethought = MURDER unless heat of passion (if intentional, implied)</td>
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MANSLAUGHTER
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| killing + intentional, but in heat of passion = MANSLAUGHTER |

\textsuperscript{169} 421 U.S. at 685. \textsuperscript{170} Id. at 698. \textsuperscript{171} This is what Maine did in Mullaney by requiring malice aforethought for a conviction for murder, but allowing it to be implied by proof of intent. See note 167 \textit{supra} and accompanying text.
the factor on the defendant.\textsuperscript{172} The broadest interpretation of \textit{Mullaney} requires acceptance of the natural law position that a state must not only include certain culpability factors in the definition of criminality, but also prove them beyond a reasonable doubt. Conceding the Court's reluctance to clash with the states on a matter traditionally considered within their police power, the definition of criminality, it is unlikely that the Court will reach such a result except in the most unusual circumstances. The narrowest interpretation of \textit{Mullaney} is a compromise between a pure positivist position of allowing a state to define criminality in any fashion it wishes, and a pure natural law position of requiring a state to include certain culpability factors in the equation.\textsuperscript{173} It requires a state to specify its policy judgments regarding culpability and prove beyond a reasonable doubt those facts which it denominated basic elements of the offense. Unless key traditional culpability factors are disregarded completely, the Court would not have to reach the ultimate issue of limitations on the definition of criminality.

The difficulty in determining \textit{Mullaney}'s holding regarding constitutional limits on the definition of criminality is increased by the Court's cryptic words about presumptions, which are the opposite side of the coin of burden of proof.\textsuperscript{174} The opinion stated that it was constitutionally permissible for a state to require a defendant to produce some evidence of an affirmative defense and for a state to aid the prosecution's burden of production by presumptions.\textsuperscript{175} However, the Court did indicate that there are some limitations to placing a burden of persuasion on a defendant by the use of presumptions relating to factors that go to culpability. The Court stated:

\begin{quote}
Shifting the burden of persuasion to the defendant obviously places an even greater strain upon him since he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact. Accordingly, the Due Process Clause demands more exacting standards before the state may require the defendant to bear the ultimate burden of persuasion.\textsuperscript{176}
\end{quote}

\begin{itemize}
\item[172.] "Heat of passion" eliminated malice aforethought. By requiring that the defendant prove he acted in the "heat of passion" by a preponderance of the evidence, Maine was really requiring the defendant to disprove the existence of malice aforethought.
\item[173.] See note 155 supra for a similarly limiting interpretation of Justice Frankfurter's opinion in \textit{Leland}.
\item[175.] 421 U.S. at 701-02 n. 28.
\item[176.] Id. at 703 n. 31.
\end{itemize}
No guidance was given regarding what "exacting standards" were to be met before the state could place a burden of persuasion regarding anything on the defendant. Further, the Mullaney Court failed even to indicate whether the burden of persuasion which could be placed on a defendant must be limited to traditional affirmative defenses or whether the burden allocated to the defendant could also include the basic elements of an offense.


The Court this past term had the opportunity to clarify the substantive culpability issues left unresolved by Mullaney in Rivera v. Delaware\(^1\) and Patterson v. New York.\(^2\) Rivera addressed the constitutionality of placing the burden of proof of insanity on the defendant by a preponderence. The Court, without opinion and over the strong dissents of Justices Brennan and Marshall who argued that Winship and Mullaney called the holding of Leland v. Oregon into question, dismissed the appeal for want of a substantial federal question. Unfortunately, even the opinion of the court below (the Supreme Court of Delaware), shed little light on the position of affirmative defenses in our substantive criminal law, specifically, the question of insanity.\(^3\) The Delaware court quoted from Justice Rehnquist's short concurring opinion in Mullaney that sanity is not a basic element of a criminal offense and, therefore, it does not violate due process to place the burden of proving insanity on the defendant.\(^4\)

Given the importance and difficulty of this issue, the Court erred in not articulating its rationale in reaching the conclusion that it does not violate due process to place the burden by a preponderance on the key culpability issue of insanity on the defendant. This disregard is all the more disconcerting when viewed against the background of the Court's recent reaffirmance of the related issue that trying an insane defendant violates due process.\(^5\) Instead, there is only the Court's subsequent conclusion in Patterson, where it attempted to explain the Rivera decision. The Patterson Court held that as to matters such as insanity, which a state labels an affirmative defense and does not include in the definition of the offense, it

\(^{177}\) 429 U.S. 877 (1976).
\(^{178}\) 97 S. Ct. 2319 (1977).
\(^{180}\) 351 A.2d at 563, quoting 421 U.S. at 705-06.
\(^{181}\) See note 120 supra and accompanying text.
is proper to place the burden of proof by a preponderance on the defendant.\textsuperscript{182}

The New York statute at issue in \textit{Patterson} defined murder simply as an intentional killing. Unlike Maine, New York did not require malice aforethought as a basic element of the offense. The New York statute clearly specified that “extreme emotional disturbance” was an affirmative defense\textsuperscript{183} to be proven by the defendant by a preponderance.\textsuperscript{184} Such a defense, if proven, would reduce murder to manslaughter. In a prosecution for manslaughter, defined as an intentional killing committed under the influence of extreme emotional disturbance, the New York manslaughter statute provided that the state need not prove extreme emotional disturbance.\textsuperscript{185} Thus, “extreme emotional disturbance” in New York, like “heat of passion” in Maine, was the only distinguishing factor between murder and manslaughter.

\textsuperscript{182} 97 S. Ct. at 2324-25.
\textsuperscript{183} A person is guilty of murder in the second degree when:
1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
   (a) the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime. . . .

\textit{N.Y. Penal Law} § 125.25 (McKinney 1975).

\textsuperscript{184} “When a defense declared by statute to be an ‘affirmative defense’ is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.” \textit{N.Y. Penal Law} § 25.00(2) (McKinney 1975).

\textsuperscript{185} A person is guilty of manslaughter in the first degree when:
1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision. . . .

\textit{N.Y. Penal Law} § 125.20 (McKinney 1975). Thus, unlike the Maine statute in \textit{Mullaney}, see note 168 \textit{supra}, the New York statute required only an intentional killing, not malice aforethought which was implied when an intentional killing was proved in Maine, for a conviction for murder. It purported to make extreme emotional disturbance an affirmative defense on the right side of the equation totally unrelated to the basic elements of the offense on the left side of the equation:
Both Justice White, writing for the majority in Patterson,\textsuperscript{188} and Justice Powell, author of the Court's opinion in Mullaney and now writing for the dissenters,\textsuperscript{187} recognized that New York's affirmative defense of "extreme emotional disturbance" was merely a new and expanded version of the common law "heat of passion" defense at issue in Mullaney. The New York statute differed in substituting modern terms for "archaic" common law terms and in permitting a subjective rather than an objective standard of reasonableness. By doing so, New York accepted diminished capacity and recognized that provocation can result from situations other than direct provocation by the victim.

The central focus of the majority opinion was that New York, unlike Maine,\textsuperscript{188} defined murder simply as a death, intent to kill, and causation. "No further facts are either presumed or inferred in order to constitute the crime."\textsuperscript{189} Justice White distinguished Mullaney from Patterson on the ground that New York had proved beyond a reasonable doubt all that it had to prove under its statute. Therefore, the New York statute conformed with Winship's requirement that the state prove beyond a reasonable doubt "every fact

\begin{align*}
\text{A.R.} & + \quad \text{M.R.} = \quad \text{CRIME unless E or J} \\
\text{MURDER} & \\
\text{Burden of proof on the state} & \text{Burden of proof} \\
\text{beyond a reasonable doubt} & \text{on D by a preponderance} \\
\text{killing} & + \quad \text{intent to kill} = \quad \text{MURDER unless extreme emotional} \\
\text{disturbance} & \\
\text{MANSLAUGHTER} & \\
\text{killing} & + \quad \text{intent to kill, but} = \quad \text{MANSLAUGHTER} \\
\text{extreme emotional disturbance} & \\
\end{align*}

\textsuperscript{186} Justices Burger, Stewart, Blackmun and Stevens joined in Justice White's opinion.

\textsuperscript{187} Justices Brennan and Marshall joined in Justice Powell's opinion. Justice Rehnquist took no part in the consideration of the case.

\textsuperscript{188} See note 167 supra and accompanying text.

\textsuperscript{189} 97 S. Ct. at 2325. The majority in Patterson did not seriously consider the presumption problem. It did remark that "[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." Id. at 2330. Conceivably, the Court thought that it was eliminating the problem of presumptions by requiring the state to prove, without the aid of any presumptions, the basic elements of the crime beyond a reasonable doubt and by placing the burden of proving affirmative defenses on the defendant. Since burden of proof and presumptions are merely two sides of the same coin, the underlying difficulties cannot be so easily resolved.
necessary to constitute the crime with which [Patterson was]
charged.' Justice White interpreted Winship's requirement of
proof beyond a reasonable doubt to mean only proof of the basic
elements of the offense as defined by state law.

Justice Powell, in dissent, sharply criticized the majority opinion:

The Court manages to run a constitutional boundary line through
the barely visible space that separates Maine's law from New
York's. It does so on the basis of distinctions in language that are
formalistic rather than substantive. . . . The only 'facts' neces-
sary to constitute a crime are said to be those that appear on the
face of the statute as a part of the definition of the crime.

The distinction between Mullaney and Patterson does not take ade-
quate account of the difficulty of interpreting a law as to its defin-
tion of basic elements and affirmative defenses, or of the fact that
the Court in Mullaney had stated that Winship was not limited to
a state's definition of the elements of a crime. Justice Powell noted
the danger posed by the Court's narrow holding:

The test the Court today establishes allows a legislature to shift,
virtually at will, the burden of persuasion with respect to any
factor in a criminal case, so long as it is careful not to mention the
nonexistence of that factor in the statutory language that defines
the crime. The sole requirement is that any references to the factor
be confined to those sections that provide for an affirmative de-
fense.

One explanation of the result in Patterson is that the members
of the Court did not fully appreciate the substantive dimensions of
their decisions in Winship and Mullaney. Justice White's opinion
in Patterson, however, exhibits extreme consciousness of the fact
that the definition of criminality is a matter within the states' police
power. In spite of the analytical shortcomings evident in

190. Id. at 2324.
191. We therefore will not disturb the balance struck in previous cases holding
that the Due Process Clause requires the prosecution to prove beyond reasonable
doubt all of the elements included in the definition of the offense of which the
defendant is charged. Proof of the non-existence of all affirmative defenses has
never been constitutionally required; and we perceive no reason to fashion such a
rule in this case and apply it to the statutory defense at issue here.

Id. at 2333.
193. See note 167 supra.
194. 421 U.S. at 699 n. 24, cited at 97 S. Ct. 2319, 2322 n. 6.
195. 97 S. Ct. at 2333-34.
196. "It goes without saying that preventing and dealing with crime is much more the
business of the States than it is of the Federal Government. . . . and that we should not
Patterson, the majority continued to recognize that proof beyond a reasonable doubt is essential in a criminal case in order to protect the innocent against unjust stigmatization and punishment. In fact, in Hankerson v. North Carolina, decided the same day as Patterson, Justice White held Mullaney retroactive, despite the effect of such a holding on the administration of justice, because, "[t]he reasonable-doubt standard of proof is as 'substantial' a requirement under Mullaney as it was in Winship."

An inconsistency is evidenced by the Court's continued acknowledgment of the importance of requiring the heaviest burden of proof to distinguish between the guilty and the innocent and yet virtually ignoring the very definitions of those terms. The Court specifically rejected the requirement that a state disprove all defenses going to culpability, even though it recognized that the clear trend is to have the state bear the burden of proof in such defenses. The majority relied on convenience arguments to sustain its holding regarding affirmative defenses, stating: "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." Justice White pointed out the difficulty New York would face proving the absence of extreme emotional disturbance, a difficulty which would result in fewer convictions. However, this difficulty was exactly what the decision in Mullaney required of Maine and what a majority of the states currently require.

The majority did recognize the need to place some constitutional limits on the definition of substantive criminal offenses. It noted that its opinion

lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." Id. at 2322.
197. Id. at 2326.
199. Id. at 2345.
200. "We thus decline to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." 97 S. Ct. at 2327. The majority specifically disclaimed any contrary reading of Mullaney. Id. at 2329 n. 15.
201. Id. at 2326 n. 10.
202. Id. at 2326.
203. Id.
204. Id. at 2333 (Powell, J., dissenting).
205. Justice Powell stated of the practice of requiring the state to meet a burden of proof beyond a reasonable doubt after the defendant has met a burden of production, "I know of no indication that this practice has proven a noticeable handicap to effective law enforcement." Id. at 2338.
may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. ‘[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.’ . . . The legislature cannot ‘validly command that the finding of an indictment or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilty.’

This statement indicates that the majority would find unconstitutional a statute which simply defined murder as death and causation and required the defendant to bear the burden of proving absence of traditional mens rea or actus reus. Although it seems that both the majority and the dissenters would find such a statute unconstitutional, the majority gave no rationale that would explain such a result.

There is some indication in the majority’s discussion of Rivera that it would be improper for a state to abandon the traditional requirement of specific mens rea. In Patterson, Justice White said of Leland and Rivera:

Under those cases, once the facts constituting a crime are established beyond reasonable doubt, based on all the evidence including the evidence of the defendant’s mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.

206. Id. at 2327.
207. Such a statute would reflect the system of criminal law advocated by Lady Wootton, Crime and Criminal Law (1963). For criticism of her system, see, e.g., Kadish, The Decline of Innocence, 26 CAM. L.J. 273 (1968).

Justice Powell, in dissent, posed a hypothetical statute:

For example, a state statute could pass muster under the only solid standard that appears in the Court’s opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim’s death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be relieved altogether of responsibility for proving anything regarding the defendant’s state of mind, provided only that the fact (sic) of the statute meets the Court’s drafting formulas.

97. S. Ct. at 2334 n. 8 (Powell, J., dissenting). Justice Powell had no doubts that the majority would strike such an “egregious” statute, but he could not discern the grounds by looking to Patterson. Id. at 2335 n. 9 (Powell, J., dissenting). Actually, such a statutory scheme may be in effect in jurisdictions which use a series of presumptions to aid the state in proving actus reus, specific mens rea, and insanity. First, regarding actus reus, one’s acts are presumed to be voluntary; second, regarding specific mens rea, one is presumed to intend the natural consequences of one’s acts; and third, regarding insanity, one is presumed to be sane. Thus, by proof beyond a reasonable doubt of the “act,” the state may also prove actus reus, specific mens rea, and the absence of insanity. As Justice Powell notes, such a scheme would probably not pass constitutional muster.

208. 97 S. Ct. at 2335.
This statement may be an indication that insanity not related to specific \textit{mens rea} or \textit{actus reus} need not be proven by the state, but that insanity which is related must be. Yet that reading may be invalid given \textit{Patterson}'s holding regarding the defense of "extreme emotional disturbance," a defense which encompasses diminished capacity. Since diminished capacity takes account of mental impairments falling short of those which would lead to an acquittal on the basis of insanity, \textit{Patterson} may allow shifting the burden of proof on at least some aspects of specific \textit{mens rea}.

4. Beyond \textit{Patterson}

A broad application of \textit{Patterson} is indicated by the decision in \textit{Hankerson v. North Carolina}.\footnote{209. 97 S. Ct. 2339 (1977).} Although \textit{Hankerson} involved the retroactivity of \textit{Mullaney}, the issue there was not "heat of passion" but self-defense. The North Carolina statute, like the Maine statute in \textit{Mullaney}, adopted part of the common law definition of murder as an "unlawful" killing. Self-defense would negate "unlawfulness" and thereby make a killing lawful. The North Carolina Supreme Court interpreted the general requirement of unlawfulness as including disproof by the state of the specific factor of self-defense.\footnote{210. \textit{Id.} at 2343.} However, all killings are lawful if any affirmative defense is established. The majority in \textit{Hankerson} accepted, as it had to, the North Carolina Supreme Court's interpretation of its statute and, therefore, held \textit{Mullaney} retroactive. However, it left the way open for the North Carolina Supreme Court to sustain the conviction:

The state does \textit{not} argue, as an alternate ground in support of the judgment below, that despite \textit{Mullaney v. Wilbur}, it is constitutionally permissible for a State to treat self-defense as an affirmative defense that the prosecution need not negative by proof beyond a reasonable doubt. Therefore, we do not address that issue in this case.\footnote{211. \textit{Id.} at 2346 n. 6. Justice Blackmun, in a concurring opinion joined by the Chief Justice, explicitly agreed. \textit{Id.} at 2346 (Blackmun, J., concurring).}

Although the general requirement of "unlawfulness" may be in the basic definition of the crime, the Court indicated its receptiveness to an argument that proof of self-defense, like proof of extreme emotional disturbance and insanity, may be placed on the defendant. Even in a state using the traditional common law formula, if the words "heat of passion," self-defense or insanity, or recognized equivalents, do not specifically appear in the definition of the crime
as basic elements but are encompassed under the broad heading of "unlawfulness," it may be that the defendant could be made to bear the burden of proof.212

Justice Powell, dissenting in Patterson, would have held the New York statute unconstitutional on the basis of Mullaney. His mode of analysis to determine whether the government must bear the burden of proof beyond a reasonable doubt involved a two part test:

The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. . . . But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof.213

Justice Powell’s test, concentrating on substance rather than form,214 sets clearer constitutional limitations on the definition of criminality than those obliquely referred to by the majority.215 Justice Powell was nevertheless hesitant to articulate due process substantive limitations on the states’ power to define criminality. Attempting to disclaim the substantive aspects of his approach,216 he would not require the states to include any specific factor in their criminal statutes. Justice Powell claimed that his approach only placed “procedural” burden of proof limitations on the states if they used a factor that made “a substantial difference in punishment

212. In Maine, malice aforethought and absence of heat of passion, were synonymous. See note 167 supra and accompanying text.
213. Id. at 2319, 2335.
214. Id. at 2336.
215. See note 206 supra and accompanying text.
216. The Court beats its retreat from Winship apparently because of a concern that otherwise the federal judiciary will intrude too far into substantive choices concerning the content of a State’s criminal law. The concern is legitimate, see generally Powell v. Texas, 392 U.S. 514, 533-534 (1968) (plurality opinion); Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting), but misplaced. Winship and Mullaney are no more than what they purport to be: decisions addressing the procedural requirements that States must meet to comply with due process. They are not outposts for policing the substantive boundaries of the criminal law.

The Winship/Mullaney test identifies those factors of such importance, historically, in determining punishment and stigma that the Constitution forbids shifting to the defendant the burden of persuasion when such a factor is at issue. Winship and Mullaney specify only the procedure that is required when a State elects to use such a factor as part of its substantive criminal law. They do not say that the State must elect to use it.

Id. at 2336.
and stigma” and that was historically important. Regarding substantive limitations on what the states must include in the definition of criminality, he stated, “Perhaps under other principles of due process jurisprudence, certain factors are so fundamental that a State could not, as a substantive matter, refrain from recognizing them so long as it chooses to punish given conduct as a crime.”

The first part of Justice Powell’s test was adopted from Winship. In that case, whether a factor made a substantial difference in punishment or stigma seemed to be the only significant element in determining whether proof beyond a reasonable doubt applied. However, Justice Powell’s addition of a second element, historical importance, creates an anomaly. If, as he states, “[n]ew ameliorative affirmative defenses, about which the Court expresses concern, generally remain undisturbed by the holdings in Winship and Mullaney—and need not be disturbed by a sound holding reversing Patterson’s conviction,” a state which chose to use traditional common law terms would probably be bound by restrictions on burden of proof. Yet a state which radically altered its definition of criminality might not be so bound. Furthermore, it is extremely difficult to determine if an affirmative defense is new and ameliorative, or merely a reformulation of an old common law defense. In fact, the argument can be made that New York’s “extreme emotional disturbance” formulation was a new and ameliorative defense which did not meet both parts of Justice Powell’s test.

Taken together, Rivera and Patterson foreclose the argument that all culpability factors which the state deems relevant to the definition of criminality must be proven beyond a reasonable doubt. By careful draftsmanship, a state may place the burden of proving traditional affirmative defenses and new ameliorative defenses on the defendant, even where these defenses affect culpability. However, the Court carefully reserved the question of how far a state could go in removing traditional basic elements, i.e., specific mens rea and actus reus, from the definition of criminality and placing the burden of disproving them on the defendant. The Court also did not deal with the question of whether a state may dispense completely with a traditional excuse such as insanity as opposed to making it an affirmative defense to be proved by the defendant. In fact, the only certain result of these opinions would seem to be that future legislators will have to tread carefully when drafting criminal legislation. They will need to thoroughly consider and clearly pres-

217. Id. at 2337 n. 17.
218. Id. at 2337.
ent their policy decisions on culpability with a wary eye upon the fine and confusing lines drawn by Rivera and Patterson.

**Substantive Due Process Analysis in Cases Concerning Alternative Rehabilitative Systems of Dealing With Social Deviance—Means-Ends Analysis**

*The Theory*

The police power is the source of the states' authority to enact legislation promoting the health, safety, welfare and morals of the community. The *parens patriae* power\(^{219}\) is the source of the states’ responsibility for and control over the health, safety, welfare and morals of the individual. Theoretically, the state’s actions under the police power are for the good of the communal whole, and the state’s actions under the *parens patriae* power are for the benefit of the individual. Since the good of the individual may be said to redound to the benefit of the community, the *parens patriae* power may merely be a subdivision of the police power. Under both, the state seeks to deal with deviant behavior, and therefore both powers can be, and are, used for crime prevention. As the Constitution specifically requires that certain rights, such as those guaranteeing counsel and the right to jury trial, be available in the criminal justice system, the United States Supreme Court recently found it necessary to examine the underlying purposes (ends) of both the criminal justice and alternative systems of dealing with social deviance, in order to determine what procedures (means) are constitutionally required to fulfill them. It has, therefore, been engaging in classic means-ends substantive due process analysis.

Three factual assumptions underly "the rehabilitative ideal" which developed out of the expanded *parens patriae* power:\(^{220}\) first, that human behavior is the product of forces, such as heredity and environment, which are beyond the control of the individual; second, that we can discover exactly what these forces are and control them in order to mold human behavior; and third, that it is the duty of the state, for the good of the individual and society, to take charge

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\(^{219}\) The origins of the *parens patriae* power lie in the English Chancery Court's jurisdiction over wards of the King—dependent and neglected children. At common law, the Chancery Court's power never extended to acts of juveniles which would be crimes if committed by adults. See Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. Fam. L. 151 (1961). Today, however, it purportedly provides a theoretical underpinning for new and alternative systems to the criminal law, such as the juvenile court and civil commitment systems.

\(^{220}\) The rehabilitative ideal is itself composed of a complex of ideas that defy exact definition. See Allen, supra note 70, at 26. See also Packer, *The Limits of the Criminal Sanction* 12-13, 54-58 (1968).
of deviant individuals and rehabilitate them. These deterministic assumptions are in direct contrast to the free will assumptions of the traditional criminal law which function on notions of retribution and deterrence. The criminal law provides punishment, not treatment, for wrong moral choices. Each of these assumptions is subject to challenge, since the theory of determinism has not been proven. Even if determinism exists, present day knowledge of heredity and environment is still too vague to accurately predict human behavior. Assuming, arguendo, the validity of the first two assumptions, society still has been unwilling to allocate the scarce and expensive resources necessary to deal with social deviance.

Given the assumptions of the rehabilitative ideal, it is not surprising that the major movement in this country based on the parens patriae power was the juvenile court movement which began in the late nineteenth century. Children were the first and prime candidates for the exercise of the state's parens patriae power rather than its police power due to two factors: the common law recognition of infants' lack of mens rea, and the belief that children are more malleable than mature adults. Early intervention, isolation and rehabilitation were hallmarks of the juvenile court, just as they later became distinguishing characteristics of alternative rehabilitative systems dealing with insane, retarded, sexually deviant, and ad-

221. Although Dean Allen described the assumptions of fact underlying the legislation which established the alternative systems in a section regarding sexual psychopaths, the assumptions are applicable to any alternative rehabilitative process:

First, they assume a body of knowledge and technique that enables its practitioners to identify with reasonable accuracy those persons likely to commit dangerous . . . acts in the future and to exclude with reasonable certainty those posting no such danger. . . . Second, these laws assume that there is a therapy adequate to treat and cure [the person likely to commit dangerous acts]. . . . Third, these statutes assume, not only that such knowledge and techniques exist, but that, as a practical matter, they are available to the state in the administration of these laws.

ALLEN, supra note 70, at 14-15.

222. Kittrie, supra note 73, at 39, 373. There were limited common law exceptions to the criminal law's acceptance of free will. For instance, the acts of infants and lunatics were considered unblameworthy in the traditional sense. Children under the age of seven were not subject to the criminal sanction on the assumption that they were incapable of forming a mens rea. Similarly, insane persons were not subject to the criminal sanction. See Popkin and Lippert, Is there a Constitutional Right to the Insanity Defense in Juvenile Court? 10 J. Fam. L. 421 (1971).

223. ALLEN, supra note 70, at 15.

224. Woman as a class were soon thereafter the focus of the parens patriae power. In the early twentieth century special statutes were enacted dealing with women accused of deviant or criminal conduct. The theory was that women, like children, were not fully culpable under the regular criminal law system, and were more malleable than adult males. Therefore, they were fit subjects for rehabilitation. In recent years, such statutes have been struck down on equal protection grounds. See, e.g., Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Commonwealth v. Daniels, 430 Pa. 642, 243 A.2d 400 (1968).
dicted individuals. In fact, the number of individuals who were shifted from the jurisdiction of the criminal law to the jurisdiction of alternative systems increased so rapidly during the twentieth century that one writer has described the phenomenon as a "process of divestment" of the criminal law.

The rehabilitative ideal, once considered an advancement over the criminal law's emphasis on retribution and deterrence, has come under increasing attack. Rehabilitation itself is difficult to define; at its core it contains some notion of personality change. The change can be brought about by minimal intrusion into the individual, such as with reasoned argument, or by massive subliminal psychotherapeutic techniques, such as behavior therapy.

The violation of a specific criminal statute, an absolute prerequisite to a criminal conviction, is unimportant in the rehabilitative system. The emphasis there is on the prevention of future harm, not the detection and punishment of past criminal acts, and on what an individual is and will become, rather than what an individual has done in the past. But our ability to predict future behavior is limited and the most revealing evidence about the character of an individual is often based on past conduct.

Under the rehabilitative ideal, the individual is, in theory, treated rather than punished. In actual practice, the unavailability of treatment often subjects the individual to isolation and incapacity.
The isolation may extend for a longer period of time than that which would have followed a criminal conviction because, under the rehabilitative ideal, there are no notions of proportionality in punishment. Determinate sentencing is improper because the individual must be incarcerated for as long as it takes to change dangerous propensities. Thus, a minor criminal act, or even a non-criminal act, can lead to an extended period of isolation. The rehabilitative ideal may also result in mere extended incarceration due to the lack of therapeutic programs.

Although the criminal law and the alternative rehabilitative systems purportedly differ, their operation during the course of this century has been similar. Both aim at preventing deviant conduct, and both provide for the isolation of the individual from society. Social protection has always been inherent in the parens patriae power; a deviant individual is isolated not only for that individual's own good but also for the protection of society. Moreover, the stigma following incarceration as a result of rehabilitative proceedings is often as serious as the stigma which follows a criminal conviction. Today, the alternative rehabilitative systems bear striking resemblance to the traditional criminal law system: involuntary incarceration and stigmatization. Furthermore, the two systems

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234. ALLEN, supra note 70, at 33.
235. Id. at 34.
236. A large variety of statutes authorize what is called 'civil' commitment of persons, but which, except for the reduced protections afforded the parties proceeded against, are essentially criminal in nature, provide for absolute indeterminate periods of confinement. Experience has demonstrated that, in practice, there is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character. Id. at 35.

Yet while the declared purpose of the newly designed programs is radically different from those of traditional criminal law, the social sanctions utilized often remain as severe as those applied by the criminal process. The subject of these proceedings is not punished or burdened with a criminal record, but he may be incarcerated for a long and often indeterminate period. In addition, his return to society from a nonpenal institution is not necessarily any easier, and frequently is less predictable, than a return from prison. Nor is the treatment accorded in civil or therapeutic institutions always better or more effective than in prisons.

Kittrie, supra note 73, at 6. See also ALLEN, supra note 70, at 370-71.
237. "In all of its areas the therapeutic state is tinged with a lingering desire to defend society by isolating and controlling socially dangerous persons." Kittrie, supra note 73, at 42.
239. Even if the original intention of helping deviant individuals is being realized, one must also recognize that "when, in an authoritative setting, we attempt to do something for a [person] because of what he is and needs, we are also doing something to him." ALLEN, supra note 70, at 18.

Since, in many instances, no treatment is available, people are actually incarcerated
also share some theoretical justifications. The criminal justice process, distinctive because of its retributive and deterrent elements, includes rehabilitation. Criminal rehabilitation has received increasing attention during the course of this century, resulting in such changes within the criminal law system as the implementation of indeterminate sentencing, parole and probation, and in the divestiture of individuals out of the entire process. The alternative systems, theoretically based on rehabilitation, are increasingly seen to contain retributive and deterrent elements. Moreover, they result in stigmatization and involuntary incarceration, the two purportedly distinguishing features of criminal law and criminal punishment.\(^2\)

The criminal law cannot be based solely on retributive-deterrent purposes: some individualized rehabilitation should exist. By the same reasoning, the alternative systems cannot be considered solely rehabilitative: some recognition of the retributive-deterrent effects of involuntary incarceration and stigmatization is required. Yet, despite the similarities necessary between the two systems, they are based on different premises, and different consequences should follow from those premises.\(^2\) The criminal law's distinguishing feature is punishment. The stigmatization and involuntary incarceration peculiar to criminal law follows a finding that an individual is blameworthy due to an improper exercise of free will. The alternative systems of dealing with social deviance are based on the individual's need for treatment and rehabilitation. Although incapacitation of the individual to protect the public remains a characteristic of the alternative systems, this is only secondary to the basic principle of reformation.\(^2\)

If the criminal law is based on purposes of retribution and deterrence, crimes must be defined in terms of culpability: a voluntary act and specific and general mens rea. Advanced warning of what conduct is criminal must be given, and punishment should contain some notion of proportionality. If the alternative systems of dealing

\(^{2}\) See Note, Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1222-23 (1974).
with social deviance are based on concepts of rehabilitation and isolation, the first determination is to ascertain what deviant conduct is so hazardous to the individual and society as to justify the forced imposition of rehabilitative measures and isolation. Furthermore, if the primary justification for the invocation of an alternative system is the rehabilitation of the deviant individual, a determination must be made whether that individual has a right to such rehabilitation—a right to treatment.

As a result of the vast numbers of people diverted from the criminal law system to alternative rehabilitative systems, and because of the increasing awareness of the procedural and substantive deficiencies of the alternative systems, the Supreme Court in the last decade has started to examine the underlying foundations of each process. The Constitution specifically provides for certain procedural rights in the criminal justice system. However, there are no specific requirements other than the broad dictates of the due process clause to provide safeguards in the alternative processes. The initial cases concerning rehabilitation which came before the Supreme Court, involved claims that particular criminal procedural safeguards were required in rehabilitative settings. In determining the procedural issues, the Court had developed guidelines to use in deciding whether a proceeding was criminal or civil. Thus, it had to consider the substantive differences between the criminal sanction and alternative methods for dealing with social deviance.

243. See Kittrie, supra note 73, at 47.
244. The outlines may not be clear yet, but a new right has been born under the therapeutic state. The offender under the criminal law had no positive rights, merely a guarantee against abuse; a protection against excessive fines and cruel and unusual punishments. In the therapeutic realm, a new concept of due process is growing. This concept is founded upon a concurrency between the exercise of social power and the assumption of social responsibility. Its implication is that effective treatment must be the quid pro quo for society's right to exercise its parens patriae controls. Whether specifically recognized by statutory enactments or generally derived from the constitutional requirements of 'due process', the right to treatment is here. To some, the formulation of this concept, which curtails the state's therapeutic power through legal supervision, may sound like a call for undue judicial and legal interference with medical and therapeutic prerogatives. To others, this development is a mere annunciation of this nation's fundamental tool for the promotion of national aims and the protection of individual rights—the system of checks and balances—is finally reaching into the dark corners of the institutions entrusted with the thankless role of storing, curing, and rehabilitating those who deviate from society's norms.
Kittrie, supra note 73, at 398-99. See also Note, Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1316-17, 1326-27 (1974).
245. Dr. Morton Birnbaum's seminal article, The Right to Treatment, 46 A.B.A.J. 499 (1960), brought a great deal of attention to the problems of the alternative systems.
246. According to Professor Kittrie,
The first cases regarding alternative proceedings, *Kent v. United States*\(^{247}\) and *In re Gault*,\(^ {248}\) were juvenile cases. This was only appropriate since the juvenile court was the prototype for such systems. The Court engaged in substantive due process analysis to hold that the juvenile court had, to a large degree, failed to meet the stated rehabilitative purposes of its founders. Because a child subject to the jurisdiction of the juvenile court could suffer grievous injury similar to that of a criminal defendant (loss of liberty and stigmatization), the Court required a degree of procedural regularity normally associated with criminal proceedings. Furthermore, the Court indicated that continued dissatisfaction with the operation of the juvenile system could result in further safeguards in the future.\(^ {249}\)

*Kent* addressed the procedures and standards applicable when determining whether an individual should be dealt with by a rehabilitative system or by the traditional criminal justice system.\(^ {250}\) Under the then-existing Washington D.C. statute, Kent, at sixteen, was subject to the exclusive jurisdiction of the juvenile court. This jurisdiction, however, could be waived if he was charged with an offense, which if committed by an adult, could be punishable by death or life imprisonment, and if the judge, after a full investigation, ordered him tried in the regular criminal court.\(^ {251}\) The juvenile court judge, without a hearing,\(^ {252}\) denied motions aimed at proving that Kent was a fit subject for rehabilitation within the juvenile court, and ordered him transferred. The Supreme Court, without reaching the merits of the transfer, reversed. The Court held that the procedures of the transfer decision were deficient: Kent should have been granted counsel, access to his social service file, a hearing, a statement of reasons for the transfer, and appellate review of the decision.\(^ {253}\) Thus, for the first time, the Court applied certain criminal procedural rights to an individual involved in an alternative and

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249. See *Kent*, 383 U.S. at 556.
250. See notes 289-99 infra and accompanying text.
252. Id. at 546.
253. Id. at 561-63.
purportedly rehabilitative system. Furthermore, Kent was invested with even more rights than those available to adults charged with a crime. 254 The Court also threatened that unless the rehabilitative purposes of the juvenile court were met in the future, it would require full criminal procedural safeguards 255 in the juvenile system. 256

In Gault, the Court examined the theoretical bases of the juvenile court and contrasted it with the reality of such proceedings. 257 It held that the due process clause required that a child receive notice of the charges, 258 counsel, 259 protection against self-incrimination, 260 and the rights of confrontation and cross-examination. 261 Justice Fortas, writing for the majority, 262 noted that the constitutional requirements imposed by the decision would not interfere with the juvenile court's purported rehabilitative purposes. 263 He reiterated, however, Kent's threat that if the juvenile court in the future failed to provide rehabilitative treatment, full criminal procedural safe-


255. 383 U.S. at 555-56.

256. Although Kent contained considerable dictum on the substantive and procedural rights of juveniles, its actual holding remains open to question. The Court at one point indicated a constitutional basis for its decision: "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." 383 U.S. at 557. At another, it indicated both a constitutional and a statutory basis: "[I]t assures procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" Id. at 553. Finally, the decision can be read as resting on statutory grounds alone: "The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further." Id. at 556.


258. Id. at 31-34.

259. Id. at 34-42.

260. Id. at 42-57. The granting of the privilege against self-incrimination may be a very narrow one given the context of this case. Gault incriminated himself by testifying at the adjudicatory hearing. In finding such testimony inadmissible, the Court cited Miranda v. Arizona, 384 U.S. 436 (1966), which extended the right to counsel and the privilege against self-incrimination to police custodial interrogation. Since Gault can be read to apply only to the adjudicatory stage of juvenile proceedings, it is not clear that Miranda applies generally to juveniles.

261. Id. at 42-57.

262. As with Kent, the scope of Gault is not clear: We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship between the juvenile and the state. . . . For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct attention to the post-adjudicative or dispositional processes. . . . Id. at 13. The opinion can be interpreted as applying solely to the adjudicatory stage of a delinquency proceeding, and, even in such a case, only if the adjudication could result in a loss of liberty.

263. Id. at 21-22.
guards might be imposed.\textsuperscript{264} Justice Harlan expressed even greater deference to legislative judgment. Rejecting the clear comparison drawn by the majority between juvenile and criminal cases,\textsuperscript{265} Justice Harlan would use a broad fundamental fairness approach to determine what procedural rights should be applicable in juvenile delinquency adjudicatory proceedings.\textsuperscript{266} At this early stage of the Court’s review of the juvenile court system, he would have granted notice, counsel, and a written record for review.\textsuperscript{267} This scheme would permit the Court to measure, case by case, the realities of the juvenile court system against its theoretical underpinnings. It would also enable the Court to impose gradual change and constitutionalization if it became necessary.

In \textit{In re Winship}\textsuperscript{268} and \textit{McKeiver v. Pennsylvania},\textsuperscript{269} the Court affirmed its reluctance to eliminate all distinctions between the juvenile and criminal courts and thereby end the rehabilitative experiment completely. In both cases, the Court employed a balancing approach under the due process clause to determine whether the requested procedures were so essential to accurate fact finding as to overcome any adverse impact they might have on the juvenile court’s rehabilitative scheme. In \textit{Winship}, Justice Brennan emphasized that the stigma of a delinquency finding combined with the possibility of involuntary incarceration, required that the adjudication of delinquency be based on proof beyond a reasonable doubt.\textsuperscript{270} He found that the benefits of the criminal evidentiary standard would not detract from the purported rehabilitative aims of the juvenile court.\textsuperscript{271} In \textit{McKeiver}, the court declined to extend the right to a jury trial to juveniles, concluding that the jury was not “a necessary component of accurate fact finding.”\textsuperscript{272} Justice Blackmun suggested that jury trials in juvenile cases could disturb the “intimate, informal protective proceeding”\textsuperscript{273} of the juvenile court by bringing into that system the traditional delay, formality, and public nature of the adversary system.\textsuperscript{274} He concluded:

\begin{itemize}
\item \textsuperscript{264} \textit{Id.} at 22-23 n. 30.
\item \textsuperscript{265} \textit{Id.} at 70-71.
\item \textsuperscript{266} \textit{Id.} at 72.
\item \textsuperscript{267} \textit{Id.}
\item \textsuperscript{268} 397 U.S. 358 (1970).
\item \textsuperscript{269} 403 U.S. 528 (1971).
\item \textsuperscript{270} 397 U.S. at 365-68. Justice Harlen, in his concurring opinion, emphasized the same factors. \textit{Id.} at 373-74 (Harlen, J., concurring).
\item \textsuperscript{271} \textit{Id.} at 365-66.
\item \textsuperscript{272} 403 U.S. at 543.
\item \textsuperscript{273} \textit{Id.} at 545.
\item \textsuperscript{274} \textit{Id.} at 550.
\end{itemize}
If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.275

Thus, despite many obvious and practical failings of the juvenile court, the Supreme Court has been unwilling to reject the legislative judgment that such a rehabilitative system is meritorious and can be implemented in practice. Instead, the Court required basic procedural safeguards where their application would not detract from the juvenile justice system’s purportedly rehabilitative purposes.276 The method, the determination of purpose and the requirement that the means relate to that purpose, is of course, substantive due process.

**The Civil Commitment Cases**

The Supreme Court’s two major opinions dealing with civil commitment are *Jackson v. Indiana*277 and *O’Connor v. Donaldson.*278 *Jackson* involved the constitutionality of the pretrial commitment of a mentally deficient deaf mute on the basis of inability to stand trial. Justice Blackmun’s opinion for the Court is pure substantive due process, evidencing concern first with the purpose or purposes of the state in authorizing such pre-trial commitments and second, with whether the procedures surrounding such commitments were reasonably related to the state’s purpose or purposes.

Justice Blackmun did not engage in an intrusive ends type of substantive due process analysis, which would have required a determination on the validity of any or all of the purported justifications for civil commitment, *i.e.*, danger to self, danger to others, or the need for care, treatment and training. This was because Jackson’s confinement was not justified under any of them.279 He did

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275. *Id.* at 551. Justice White, concurring in *McKiever,* distinguished the deterministic principles of the juvenile court with criminal theory that assumes defendants “have a will and are responsible for their actions.” *Id.* at 551-52 (White, J., concurring).


278. 422 U.S. 563 (1975).

279. The Court found that Jackson could not be committed as either mentally ill or feebleminded. To support a commitment on the basis of mental illness, the state had to show both mental illness and a need for care, treatment, training or detention. There was no evidence that Jackson’s deficiency was within the definition of mental illness. The propriety of commitment for treatment or training would be questionable, since the record established that no training or treatment was available for Jackson’s condition at any state institution. Furthermore, the record failed to establish that Jackson was in need of custodial care or deten-
note, however, that "[C]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations of this power have not been more frequently litigated." The focus on purposes in the case, as is typical of many of the latter day substantive due process opinions, was to determine in due process and equal protection terms, whether the means used by the state related permissibly to the state's purposes.

Jackson did not come within the criteria of Indiana's commitment statutes as either mentally ill or feeble-minded. Nevertheless, he was permanently institutionalized under conditions similar to those of individuals committed under stricter substantive and procedural standards and who would be released under less stringent standards. Justice Blackmun, emphasizing that in such cases due process and equal protection analysis mesh, found denials of both constitutional rights. Applying a substantive due process analysis of the means-ends variety, Justice Blackmun concluded that the nature and duration of the commitment should at least bear some reasonable relation to the purpose for which one is committed. Furthermore, even if it is determined that the defendant probably soon would be able to stand trial, his continued commitment must be justified by progress towards that goal.

In the second case, Kenneth Donaldson was involuntarily committed as a mental patient for fifteen years. Although the lower court wrote a wide-ranging decision based on the right to treatment, the Court viewed the case as raising "a single relatively simple, but nevertheless important question concerning every man's constitutional right to liberty." Since the jury found that Donaldson was not dangerous to himself or others, the Court did not reach the issue of whether individuals who are mentally ill and dangerous can be confined without treatment. The Court did, however, make findings about the mentally ill person who is in no way dangerous but who is determined by the state to need care and treatment. In Donaldson's case, no care and treatment had been provided:

280. _Id_. at 737.
281. _Id_. at 730.
283. _Id_. at 738.
284. _Id_. (emphasis added).
286. 422 U.S. at 573.
Given the jury’s findings, what was left as justification for keeping Donaldson in continued confinement? The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. . . . Nor is it enough that Donaldson’s original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.287

Thus, in *Jackson*, the Court did not determine whether it is appropriate to exercise power over the mentally ill due to their threat to themselves or others or because of their need for treatment. Justice Blackmun did, however, accept substantive due process limitations requiring that articulated purposes exist and that legislative means bear an appropriate relationship to the stated purposes. In *O’Connor*, the Court went beyond a substantive due process means-end analysis and found a legislative purpose improper. It found that the state could not deprive a person of liberty who is harmlessly mentally ill without providing for care and treatment.

Both the juvenile cases and the civil commitment cases can be viewed as substantive due process decisions. In each, the Court examined the purported purposes of the legislature in establishing the alternative system under consideration and examined its accompanying procedures to determine at least the less intrusive question of whether the procedures and the purposes were sufficiently related to satisfy constitutional requirements. In the process of determining this question of the relationship of means to ends, the Court had begun to develop criteria to be used in testing the appropriateness of legislative purposes.

*Choosing a System*

Given the significant philosophical, procedural, and practical differences between criminal proceedings and alternative system proceedings, one might expect the Supreme Court to establish uniform standards for deciding into which system the individual should be placed. Two Supreme Court cases presented issues regarding the procedures for deciding which system should be used: the previously discussed *Kent v. United States*288 and *Dorszynski v. United States*.289 *Kent* noted the failures of the rehabilitative ideal in the

287. Id. at 574-75.
The Court required that significant procedural safeguards surround the determination whether a child be kept within the jurisdiction of the juvenile court, a rehabilitative alternative system, or turned over to the traditional criminal justice system. In *Dorszynski*, the Court held that the federal Youth Corrections Act, which permits a federal judge to sentence youthful offenders as adults under regular penal statutes if the court finds that the youth would not be benefitted by rehabilitative treatment, required an express finding of no benefit but did not require a statement of supporting reasons before penal sentencing.291

Dorszynski challenged the validity of his guilty plea on the ground that he had not been informed that under the Youth Corrections Act he could be incarcerated for up to six years for an offense that normally carried a one year sentence.292 However, after completing the sentence imposed under regular penal provisions, Dorszynski found that he still suffered from social disabilities accompanying a criminal misdemeanor conviction. These disabilities would not have followed conviction as a youth offender.293 He was thus caught in an ironic dilemma: under the rehabilitative scheme he would have received benefits such as no formal conviction and no associated civil disabilities, but he would have been subject to a potentially longer period of incarceration than under the normal penal statute.

Despite the fact that the judge’s choice under the Youth Corrections Act meant the difference between rehabilitative sentencing and retributive-deterrent sentencing, the Court held that a finding of ‘no-benefit’ did not constitute a substantive standard.291 Chief Justice Burger applied to the Youth Corrections Act a rule generally applicable to normal penal sentencing statutes. He held that if “a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end,”295 and determined that no reasons had to be given for the choice and no appellate review was permissible. The four dissenters, noting the substantial differences between the two methods of sentencing, would have required a statement of reasons for the judge’s determination.296 *Dorszynski* thus represents a withdrawal from *Kent*, which viewed the determination of judicial structure as a major one to be

290. *See* notes 250-56 *supra* and accompanying text.
292. *Id.* at 427-31 & n. 5.
293. *Id.* at 429 n. 6.
294. *Id.* at 441.
295. *Id.* at 431.
296. *Id.* at 452-55 (Marshall, J., dissenting).
accompanied by procedural safeguards to ensure the state's substantive purposes were met in actual practice. Dorszynski therefore strayed from the substantive due process approach the Court theretofore had followed.

The Supreme Court has actively examined systems on the periphery of the criminal process, i.e., systems of parole, probation and corrections.\textsuperscript{297} These systems are heavily influenced by rehabilitative theory. The presently conservative bench has hardly expanded the procedural protections afforded by the Warren Court to criminal defendants. But given the novelty of judicial review in these cases, the Court has naturally fallen into a substantive due process approach. Applying broad due process balancing, the Court has required hearings, records, findings of fact, reasons and appellate review.\textsuperscript{298} Such individualizing devices provide a basis for ensuring that the states' purposes in creating such systems are appropriate, and that the means used bear a constitutionally sufficient relationship to the purposes of the state.

The Burger Court's approach in parole, probation, and prison cases contrasts with its handling of sentencing cases. In the latter cases, it has declined to limit the vast and almost unreviewable discretion of legislatures, judges and juries. The one break in this pattern is in the death penalty cases, where the Court recently

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\textsuperscript{298}. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court considered whether due process required an opportunity to be heard prior to the revocation of parole. The Court initially found that the purpose of parole was to help people "reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." Id. at 477. Thereafter, the Court determined that the state and the parolee shared an interest in the parolee's "conditional liberty." After examining the purpose and balancing the interests, the Court outlined a two-stage process required by due process. The first stage is in the nature of a preliminary hearing to determine probable cause to believe that the parolee violated parole conditions. The second stage involves a hearing to decide whether the parolee did, in fact, violate the parole conditions and if so, the court must find whether revocation was appropriate. The Court also required notice, written findings of fact, and review.

Gagnon v. Scarpelli, 411 U.S. 778 (1973), extended the rights granted to parolees in Morrissey to probationers, and also considered whether parolees and probationers had a right to counsel during the revocation process. Regarding the counsel issue, the Court distinguished Mempa v. Rhey, 389 U.S. 128 (1967), as a sentencing case in which an absolute sixth amendment right to counsel applied. It then held that on the basis of due process fundamental fairness, a right to counsel might apply in parole/probation revocation cases, but would be determined on a case-by-case analysis. Consideration must be given to the complexity of the issues and the abilities of the individual involved, an approach reminiscent of Betts v. Brady, 316 U.S. 455 (1942).
\end{footnotesize}
applied many of the procedural limitations of the parole-probation-prison cases, such as requirements for records, reasons, and judicial review, to capital sentencing.299

**Substantive Due Process Analysis and the Death Sentence—Ends and Means-Ends Analysis**

Because statutory formulations of the purposes of criminal law are generally both broad and vague, and because appellate review of sentencing has not been the norm, the courts have had little opportunity to determine whether the imposition of a criminal sanction squares with any or all of the possible purposes for imposing the criminal sanction—retribution, deterrence, rehabilitation, and isolation. In *Furman v. Georgia*,300 however, every Justice of the Supreme Court analyzed the death penalty in terms of whether it satisfied any of the purported purposes of the criminal sanction.301

The death penalty decisions are classic examples of substantive due process analysis. The decisions scrutinize first, the purposes of the criminal sanction, second, whether the means (the death penalty), bear a constitutionally acceptable relationship to the purposes, and third, whether a less severe alternative is possible and constitutionally necessary. Less drastic alternatives to the general imposition of the death sentence could be either life imprisonment or the selective imposition of death only in cases where it would most effectively fulfill the purposes of punishment.

The statutes challenged in *Furman* imposed the death sentence without standards and without appellate review. Five Justices concurred to find the death penalties unconstitutional, and each had different views about the propriety of the purported legislative purposes in enacting criminal statutes. Nevertheless, all agreed that under the statutes before them in *Furman* the death sentence could be so seldom imposed or imposed in such an arbitrary and capricious manner that it would serve none of the purposes of the criminal law.302 They therefore declared the statutes unconstitutional.

Four years later, the Supreme Court upheld discretionary death sentence statutes in *Gregg v. Georgia*,303 *Proffitt v. Florida*,304 and

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300. 408 U.S. 238 (1972).
Jurek v. Texas,\textsuperscript{305} and declared unconstitutional mandatory death sentence statutes in Woodson v. North Carolina\textsuperscript{306} and Roberts v. Louisiana.\textsuperscript{307} Justices Brennan and Marshall voted against the death sentence in Furman and in all the 1976 cases. Justices Burger, Blackmun and Rehnquist dissented in Furman and voted to uphold the death sentence in all the 1976 cases. Justice White voted against the death sentence in Furman, but voted to uphold it in all the 1976 cases. The key opinions in the 1976 cases were the plurality opinions of Justices Stewart, Powell, and Stevens, in which these three "swing" Justices upheld the imposition of the death sentence in the discretionary cases and found it unconstitutional in the mandatory cases.\textsuperscript{308}

Although Furman and the 1976 cases were purportedly eighth amendment 'cruel and unusual punishment' decisions, the actual mode of analysis was substantive due process. The nexus between eighth amendment and due process analysis has previously been noted and is clear when the 1976 death penalty cases are considered in light of the Court's 1971 holding in McGautha v. California.\textsuperscript{310} In McGautha the Court held that due process required neither standards for the imposition of the death sentence nor bifurcated trials in capital cases.\textsuperscript{311} In 1976 the Court upheld the impos-

\begin{footnotesize}
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\item \textsuperscript{305} 428 U.S. 262 (1976).
\item \textsuperscript{306} 428 U.S. 280 (1976).
\item \textsuperscript{307} 428 U.S. 325 (1976).
\item \textsuperscript{308} In Gregg, the discretionary case, the judgment of the court was announced in an opinion by Justices Stewart, Powell and Stevens. Justice Burger wrote a concurring statement which Justice Rehnquist joined. Justice White wrote a concurring opinion which Justices Burger and Rehnquist joined. Justice Blackmun wrote a separate concurring statement. Justices Brennan and Marshall wrote dissenting opinions. In Woodson, the mandatory case, the judgment of the Court was announced in an opinion by Justices Stewart, Powell and Stevens. Justice White wrote a dissenting opinion which Justices Burger and Rehnquist joined. Justice Blackmun filed a dissenting statement and Justice Rehnquist filed a dissenting opinion. Thus, the discretionary cases were decided 7-2 and the mandatory cases were decided 5-4.
\item \textsuperscript{309} See notes 48-53 supra and accompanying text. In Furman, Justice Powell commented on the close proximity between the eighth amendment and due process clause in the area of capital punishment:
\begin{quote}
Whether one views the question as one of due process or cruel and unusual punishment, as I do for convenience in this case, the issue is essentially the same. The fundamental premise upon which either standard is based is that notions of what constitutes cruel and unusual punishment or due process do evolve.
\end{quote}
\item \textsuperscript{428} U.S. at 429.
\item \textsuperscript{310} 402 U.S. 183 (1971).
\item \textsuperscript{311} Id. at 208, 221. Justice Burger believed that Furman overruled McGautha. Furman v. Georgia, 408 U.S. at 400 (Burger, C.J., dissenting). A majority of the Court, however, did not adopt this view. The Gregg plurality distinguished McGautha on the grounds that it was a due process decision and that Furman was based on the eighth amendment. Gregg v. Georgia, 428 U.S. at 195 n. 47. Given the similarity between due process and eighth amend-
\end{itemize}
\end{footnotesize}
tion of death under the rubric of the eighth amendment only in those cases where the sentence was imposed under statutes which required standards, bifurcated trials, and appellate review. The recent decision of Gardner v. Florida, that the due process clause would be violated by the imposition of the death sentence in a case where the trial judge had relied, in part, on a confidential pre-sentence report, further establishes the nexus.312

Gregg v. Georgia was the focal point of the 1976 death penalty cases. The plurality upheld limited discretionary application of the death sentence, warning, however, that neither total discretion nor total lack of discretion (mandatory death) satisfies constitutional requirements. Furman had already outlawed complete discretionary application of the death sentence on the ground that it resulted in arbitrary and capricious imposition of death, a result which could not fulfill any of the purposes of the criminal sanction.313 The plurality found that mandatory imposition of the death sentence for a variety of murders, however, does not result in consistent and rational fulfillment of the criminal sanction either.314 Although such reasoning applies to sentencing generally, the plurality limited it to the imposition of the death sentence because death is obviously irreversible and "different," thus requiring a degree of rationality that is not constitutionally necessary in the imposition of other sentences.315

The plurality established a general test for the constitutionality of a criminal penalty.316 The two major guidelines are the avoidance
of "unnecessary and wanton infliction of pain"317 (the Furman standard), and proportionality. The problem of proportionality, however, did not exist in the cases before the Court as they involved only the crime of murder.318 The state statutes passing Constitutional muster shared three major characteristics: bifurcated trial, sentencing standards, and appellate review of the death sentence in individual cases.319 These factors, individually and in combination, helped to eliminate the Furman problem of arbitrary and capricious sentencing. Their effect was to focus attention on appropriate sentencing considerations at the time of disposition and to provide a review system to ensure uniform application of the appropriate considerations. Although the plurality did not, as a matter of constitutional law, require any or all of the factors,320 it did approve the presence of each factor in each case.321

Woodson v. North Carolina322 and Roberts v. Louisiana323 presented mandatory death statutes to the court. The North Carolina statute made death mandatory for all first degree murder convictions, defining murder in traditional common law terms to include premeditated killings and felony-murders.324 The Louisiana statute imposed mandatory death for a more narrowly defined crime of first degree murder.325 It provided for four possible verdicts (guilty, guilty of second degree murder, guilty of manslaughter, and not guilty) and required that the jury be instructed on all verdicts, whether or not supported by evidence or requested by the defendant.326 The plurality did not attempt to determine if the aims of the criminal sanction were proper but analyzed only whether the procedures employed to fulfill them were appropriate.327 Stated in substantive due process terms, the court did not engage in an intrusive

317. Id.
318. Id. at 187.
320. 428 U.S. at 195.
321. Id. at 195, 206-07.
324. The plurality emphasized that the North Carolina statute in Woodson was basically the same one the North Carolina Supreme Court held in violation of Furman. The North Carolina legislature redrafted the old statute but included a mandatory death sentence. 428 U.S. at 285-86.
325. 428 U.S. at 328-31 & n. 3.
326. Id. at 330.
327. The plurality claimed to approach the issue procedurally rather than substantively: [T]he Court now addresses for the first time the question whether a death sentence returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments. The issue, like that explored
ends approach, but rather in a less intrusive means-ends analysis. However, the means-ends analysis employed was rather vigorous, and included the notion of least restrictive alternatives in the requirement of individualization.\(^3\)

The plurality found mandatory death sentences unconstitutional for three reasons. First, the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments," both pointed conclusively to the repudiation of automatic capital sentences.\(^3\) Second, a mandatory death statute did not fulfill Furman's requirement that wanton jury discretion be replaced by a rationally reviewable process.\(^3\) Finally, the peculiarity of death as a sentence required the consideration of each person individually.\(^3\)

The first point is a traditional 'evolving standards of decency' position. The second and third points must be read together. Furman banned arbitrary and capricious application of the death sentence on the ground that it could not serve the purposes of the criminal law. Thus, for the death sentence to be constitutional, it must be applied in a rational and consistent fashion. A majority of the Court, consisting of the plurality plus the dissenting Justices, believed that the mandatory imposition of the death sentence is rational and serves purposes of deterrence. The plurality, however, required the less severe alternative of individualized consideration of whether the death sentence in a particular case fulfills purposes of retribution, deterrence and isolation.

The high degree of individualization required by the 1976 mandatory death cases was underscored by the Court's later decision in Harry Roberts v. Louisiana.\(^3\) Five members of the Court joined in a per curiam opinion finding unconstitutional a section of the Louisiana murder statute making death mandatory for intentionally killing a police officer in the line of duty. Although recognizing that such a killing could be regarded as taking place under aggravating circumstances, and that society has a special interest in protecting the police,\(^3\) the Court found it was "incorrect to suppose that no

\(^{328}\) See note 17 supra.  
\(^{329}\) 428 U.S. at 292-93.  
\(^{330}\) Id. at 303.  
\(^{331}\) Id. at 303-04.  
\(^{332}\) 97 S. Ct. 1993.  
\(^{333}\) Id. at 1995.
mitigating circumstances can exist when the victim is a police officer.\textsuperscript{334} The majority stated:

As we emphasized repeatedly in \textit{Roberts} and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow consideration of particularized mitigating factors, it is unconstitutional.\textsuperscript{335}

Thus, not only must a statutory scheme provide for individualizing procedural devices, but mitigating and aggravating factors must be taken into consideration as well.\textsuperscript{336}

The death penalty opinions all utilize substantive due process analysis by focusing on the propriety of retribution, deterrence, isolation and rehabilitation as legislative ends. The opinions further address the relationship between legislative means and ends, and whether the death sentence can be imposed as a mandatory penalty or whether it can be applied only in individual cases. Examination of these opinions reveals a disparity among the individual Justices as to their willingness to defer to legislative judgments. This deference is important to examining the propriety of the criminal sanction, and finally, to determining the weight to be given legislative responses to \textit{Furman}. It establishes the degree of relationship necessary for a means-ends analysis, including whether the general mandatory imposition of the death sentence fulfills legislative purposes and whether the Constitution requires a less drastic alternative.

Along with judicial deference, burden of proof figures significantly in the various opinions. The positions of the Justices on the deterrent effect of the death sentence depended on their willingness to place the burden of proof on the legislatures or upon those attacking the legislative judgments. If the evidence is inconclusive as to whether the death penalty is a better general deterrent than life

\textsuperscript{334} \textit{Id.} at 1966:

Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

\textsuperscript{335} \textit{Id.}

\textsuperscript{336} The Court did reserve “the question whether or in what circumstances mandatory death sentence statutes may be constitutionally applied to prisoners serving life sentences.” \textit{Id.} at 1966 n. 5.
imprisonment, the side with the burden of proof will lose.\textsuperscript{337}

All of the 1976 opinions interpreted \textit{Furman} as holding that the death sentences in those cases were unconstitutional because death was applied in an arbitrary and capricious fashion which failed to fulfill any of the purposes of the criminal law. The three member plurality upheld discretionary systems when they contained bifurcated trial, standards, and appellate review, and struck down mandatory death penalties for a failure to individualize. Yet they did not reject any of the purported purposes of the criminal sanction. The plurality Justices, along with Justices Burger, White, Blackmun, and Rehnquist who voted to sustain the death sentence in all the 1976 cases, deferred to legislative judgment in determining the propriety of various purposes of the criminal law, particularly with relation to retribution and deterrence. The plurality regarded retribution as a proper purpose of criminal law\textsuperscript{338} and deemed the death sentence an appropriate penalty in murder cases on a proportionality theory, \textit{e.g.}, a life for a life.\textsuperscript{339} The plurality further accepted the legislative judgment that the death sentence does deter, and consequently placed the burden of proving non-deterrence on those challenging the statutes.\textsuperscript{340} Thus, neither the plurality Justices nor Justices Burger, White, Blackmun or Rehnquist, engaged in the most intrusive ends type of substantive due process analysis to find any purpose of the criminal sanction improper.

Justice Brennan and Justice Marshall did not extend the same deference to legislative judgment that was expressed by the other members of the Court. Justice Brennan never mentioned the degree


\textsuperscript{338} In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. . . . "Retribution is no longer the dominant objective of the criminal law", \textit{Williams v. New York} . . . , but neither is it a forbidden objective or one inconsistent with our respect for the dignity of men. . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

428 U.S. at 183-84.

\textsuperscript{339} \textit{Id.} at 187. The plurality reserved judgment on the constitutionality of the death penalty for any crime other than murder. \textit{Id.} at 187 n. 35. However, in \textit{Coker v. Georgia}, 97 S. Ct. 2861 (1977), Justice White, in an opinion joined by Justices Stewart, Powell, and Stevens, relied on a proportionality theory to hold that the death sentence was excessive punishment under the eighth amendment for the crime of rape. Justices Brennan and Marshall concurred on the grounds that the death penalty is unconstitutional in all cases. Only Justice Rehnquist and Chief Justice Burger dissented.

\textsuperscript{340} \textit{Id.} at 186.
of deference to be given to legislative judgment. Justice Marshall expressed a type of natural law "right reason" requirement. He would not defer to the legislative or even public judgments unless they were "informed." Both Brennan and Marshall found retribution an improper justification for punishment. Justice Brennan could conceive of "no reason to believe that [the death sentence] serves any penal purpose more effectively than the less severe punishment of imprisonment." He found that the death sentence was not required to reflect society's abhorrence for capital crimes. First, it was not applied in an even-handed fashion. Moreover, society's condemnation was apparent by application of the most severe sanction, whatever that might be. Thus, life imprisonment could adequately express society's disapproval. Justice Marshall held that retribution was unacceptable as a goal not only because life imprisonment is a less drastic alternative, but also because retribution is simply a morally impermissible aim of the criminal law. Although stating that retribution alone cannot justify punishment, he recognized that retribution can place a limit on those who may be subject to the criminal sanction and on the degree to which they may be punished. Neither Brennan nor Marshall reached the burden of proof issue on the general deterrent effect of the death penalty, since their position was that the evidence supported the theory that the death penalty has no greater deterrent effect than life imprisonment. As for specific deterrence and isolation, both found the less severe alternative of life imprisonment equally effective. Therefore, on the basis of a need for a less drastic alternative, they found the death penalty unconstitutional.

341. Justice Brennan took the same absolutist position he had taken in Furman, arguing that the death penalty is beneath human dignity. Id. at 230 (Brennan, J., dissenting).

342. Id. at 231-32 (Marshall, J., dissenting).

343. Id. at 305 (Brennan, J., dissenting).

344. Id. at 303-04 (Brennan, J., dissenting).

345. Id. at 237-38 (Marshall, J., dissenting).

346. Id. at 237 (Marshall, J., dissenting).

347. Id. at 233-36 (Marshall, J., dissenting); 408 U.S. at 305 (Brennan, J., dissenting).

348. Id. at 233-38 & n. 14 (Marshall, J., dissenting); 408 U.S. at 335 (Marshall, J., dissenting); 408 U.S. at 300-01 (Brennan, J., dissenting).

349. 428 U.S. at 239 (Marshall, J., dissenting); 408 U.S. at 305 (Brennan, J., dissenting).

350. In contrast, the plurality stated in Gregg:

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 175.
The plurality opinions in the 1976 cases did not place the burden of proving deterrence on the legislatures or require the less restrictive alternative of life imprisonment. However, there is a difference between the plurality position on deterrence and the position taken by the four Justices (Burger, White, Blackmun and Rehnquist) who were willing to uphold the constitutionality of a mandatory death sentence. The four Justices were willing to defer to the legislative judgment that the mandatory imposition of the death sentence has a general deterrent effect.\textsuperscript{351} The plurality Justices, however, noted that the deterrent effect of the death penalty changes in different cases:

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.\textsuperscript{352}

By requiring individualization, either by means of bifurcated trials, standards, appellate review or otherwise, the plurality required a close relationship between the purposes of the legislature and the imposition of the death sentence in each case. The relationship was expanded further in \textit{Harry Roberts v. Louisiana}, where the Court required a consideration of mitigating as well as aggravating factors even for the narrowly defined crime of killing a police officer.\textsuperscript{353} The Court's individualizing requirements can be viewed as a less restrictive alternative of the Tribe structural due process approach.\textsuperscript{354}

The opinion of the plurality upholding the death sentence in the 1976 discretionary cases may be narrow one. The plurality held that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it. . . .\textsuperscript{355}

\begin{footnotes}
\item[351.] \textit{Id.} at 358.
\item[352.] \textit{Id.} at 185-86. There is some inconsistency in the plurality approach. It recognizes that deterrence is best served in cases of premeditated murder, but approves lists which include aggravating factors such as whether the crime was "outrageously or wantonly vile, horrible or inhuman. . . ." \textit{Id.} at 165 n. 9. The plurality thus left to be solved on a case by case basis problems of inconsistencies among the purposes of the criminal sanction that perhaps can never be reconciled.
\item[353.] See note 332 \textit{supra} and accompanying text.
\item[354.] See note 17 \textit{supra}.
\item[355.] 428 U.S. at 187.
\end{footnotes}
Considering the conflicting purposes of the criminal sanction, the type of individualization that was required to assure that the imposition of death in each individual case fulfills the purposes of the criminal law may be so stringent that the degree of rationality required is impossible to meet in practice.

**CONCLUSION**

Substantive due process, the basic mode of constitutional analysis and one which establishes a dynamic pattern with its evaluation of the propriety of legislative purposes (ends) and the relationship of procedures to purposes (means-ends) has finally been applied, although not by name, by the Supreme Court to three areas of criminal law. The first and oldest line of cases, those dealing with the constitutional necessity of culpability in the definition of criminality, an ends type of analysis, is the least clear. Specific mens rea is "sometimes" required; a voluntary act is required; and sanity is probably required. The Supreme Court did not take the opportunity offered by *Rivera v. Delaware* to clarify the relationship, if any, between each of these culpability elements. Although *Mullaney v. Wilbur* seemed to establish constitutional limits on the definition of criminality, the Court's decision in *Patterson v. New York* continues to allow the states great leeway in defining the elements of an offense on which the state need not bear a burden of proof beyond a reasonable doubt.

The second line of cases involves alternative rehabilitative systems of dealing with social deviance. The third line of cases involves the death sentence. In both of these areas, the Court, not limited by prior decisions, naturally fell into substantive due process analysis. In the second line of cases, the Court had to articulate a rationale for differentiating between criminal and non-criminal methods of dealing with social deviance, an ends type of analysis. This was necessary in order to reach the means-ends issue—whether constitutionally mandated criminal procedural safeguards are applicable in cases involving alternative rehabilitative systems of dealing with social deviance. Although the death cases (which comprise the third line of cases) were purportedly decided under the rubric of the eighth amendment rather than substantive due process, an examination of the various opinions shows the application of a highly developed form of both ends and means-ends substantive due process analysis. A majority of the Court was unwilling to find any legislative purpose improper, but required a high degree of relationship between means and ends, including the less drastic alternative of individualized hearings on the propriety of the death sentence.
and the consideration of mitigating as well as aggravating factors. The requirements established by these cases should lead to a continuing trend on the part of the Court to substantively examine the propriety of the purposes of the criminal law. Thus, substantive due process analysis in the criminal law is alive and not doing too badly in bringing to the criminal law a degree of rationality that has not previously been constitutionally required.