RECENT CASES

PLURALITY DECISIONS — THE *MARKS* RULE — FOURTH CIRCUIT DECLINES TO APPLY JUSTICE WHITE'S CONCURRENCE IN *POWELL V. TEXAS* AS BINDING PRECEDENT. — *Manning v. Caldwell*, 900 F.3d 139 (4th Cir. 2018).

In 1977, the Supreme Court answered a question that had long plagued the U.S. judiciary: What precedential value, if any, should plurality decisions have? *Marks v. United States*[1] held that when a plurality decision is reached, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[2] Recently, in *Manning v. Caldwell*,[3] the Fourth Circuit confronted the *Marks* rule on its way to upholding Virginia's interdiction statute.[4] The statute allows the state government to issue a "civil order designating that a person is a 'habitual drunkard' or has been convicted of driving while intoxicated."[5] With that civil label, interdicted individuals then face criminal prohibitions against the consumption, purchase, and possession of alcohol.[6] Under any conception of the *Marks* rule, the *Manning* court should have been bound to Justice White's concurrence in *Powell v. Texas*,[7] which is irreconcilable with the Virginia statute's indirect punishment of alcoholism.

In *Powell*, the Supreme Court upheld the criminal punishment of an alcoholic for public intoxication by a 4–1–4 vote. The plurality concluded that punishing Powell was not an Eighth Amendment violation because his punishment was for conduct and therefore consistent with *Robinson v. California*[8] — the case that established the unconstitutionality of punishing status.[9] In concurrence, Justice White also endorsed the constitutionality of Powell's punishment, but in doing so he relied upon Powell having control over whether to be drunk *in public*.[10] He did not believe that it would be constitutional to punish an alcoholic solely for drinking, because to punish conduct compelled by addiction alone would be to "convict[] for addiction under a different name."[11]

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1 430 U.S. 188 (1977).

2 *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

3 900 F.3d 139 (4th Cir. 2018).

4 *Id.* at 143, 146.

5 *Id.* at 143.

6 *Id.*

7 392 U.S. 514 (1968).

8 370 U.S. 660 (1962); *see Powell*, 392 U.S. at 532–37.

9 *Robinson*, 370 U.S. at 667.

10 *Powell*, 392 U.S. at 549–50 (White, J., concurring in the result).

11 *Id.* at 548.

Five decades later, the *Manning* plaintiffs — four homeless individuals — each received civil interdiction orders for having "shown [themselves] to be . . . habitual drunkard[s]."[12] Those orders then imposed criminal prohibitions that apply only to interdicted individuals and individuals under the age of twenty-one: bans on the consumption, purchase, and possession of alcohol.[13] The plaintiffs were prosecuted at least eleven times each for violating these proscriptions.[14] They ultimately filed suit in the United States District Court for the Western District of Virginia, seeking declaratory and injunctive relief.[15] In particular, they argued that the Virginia law constituted cruel and unusual punishment under the Eighth Amendment; that it had deprived them of the Fourteenth Amendment guarantees of due process and equal protection; and that it was unconstitutionally vague in violation of the Fourteenth Amendment.[16]

The defendants moved to dismiss for failure to state a claim.[17] Chief Judge Conrad granted that motion,[18] concluding that the interdiction statute did not qualify as cruel and unusual punishment.[19] The statute punished conduct rather than status, so it was consistent with *Powell*, which, Chief Judge Conrad reasoned, had declined to extend *Robinson*'s Eighth Amendment prohibition of "status crimes" to crimes involving conduct compelled by status.[20] Chief Judge Conrad did not address the *Marks* rule in conducting this analysis. Furthermore, Chief Judge Conrad found that the interdiction statute did not violate the Due Process Clause or the Equal Protection Clause[21] and that it was not unconstitutionally vague.[22]

The Fourth Circuit affirmed.[23] Writing for the panel, Judge Wilkinson[24] concluded that the interdiction statute did not violate the Eighth Amendment's ban on cruel and unusual punishment.[25] *Robinson* prohibited the criminalization of status, not conduct.[26] Virginia's legal scheme was consistent with that holding, as interdiction was a civil label, and all of the criminal sanctions that attached to that

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12 *Manning*, 900 F.3d at 143 (quoting VA. CODE ANN. § 4.1-333(A) (2016)).
13 *Id.*
14 *Id.*
15 Hendrick v. Caldwell, 232 F. Supp. 3d 868, 877 (W.D. Va. 2017).
16 *Id.* at 876–77.
17 *Id.* at 875.
18 *Id.*
19 *Id.* at 884–88.
20 *Id.* at 885–86.
21 *Id.* at 889–91, 893–95.
22 *Id.* at 892.
23 *Manning*, 900 F.3d at 143.
24 Judge Wilkinson was joined by Judge Niemeyer.
25 *Manning*, 900 F.3d at 147–48, 151.
26 *Id.* at 144–45 (citing Robinson v. California, 370 U.S. 660, 664, 666–67 (1962)).

label were for conduct.[27] Judge Wilkinson thereby determined that the interdiction statute was constitutional, rejecting the argument that *Robinson* protected conduct "'proximately' caused by '[non]volitional acts.'"[28] The court also held that the interdiction statute was consistent with *Powell*.[29] After surveying circuit court precedent in support of that conclusion,[30] the court gave a nod to the *Marks* rule. Though noting the relevance of *Marks* for interpreting a 4–1–4 decision like *Powell*, the *Manning* majority found that *Powell* did not establish binding rules affecting the constitutionality of the interdiction statute.[31] Justice White's concurrence "wanted to leave open the question of whether conduct compelled by addiction might be protected under *Robinson*."[32]

Without a "clear signal" from the Supreme Court that it was unconstitutional to punish compelled acts, the *Manning* majority held that states could continue doing so.[33] The court refused to concede that alcohol addiction and the consumption of alcohol were one and the same on the basis that "[s]uch a position ha[d] no plain limiting principle."[34] To hold otherwise would create a "slippery slope," whereby "child molesters," "stalkers, domestic abusers, and others driven by impulses they [are] allegedly powerless to check" could similarly challenge the constitutionality of their convictions.[35] Thus, the court found the statute to be a constitutional,[36] prophylactic[37] policy decision.[38] After concluding that the interdiction statute also conformed to the Due Process Clause[39] and the Equal Protection Clause,[40] the court affirmed.

Judge Motz concurred in the judgment. On her view, Justice White's concurrence in *Powell* was binding precedent under the *Marks* rule as the narrowest grounds of that decision.[41] Unlike Judge Wilkinson, she believed that Justice White's concurrence established the principle that

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[27] *Id.* at 147–48.

[28] *Id.* at 147 (alteration in original) (quoting *id.* at 155 (Motz, J., concurring in the judgment)).

[29] *Id.* at 145–47.

[30] *Id.* at 146 (first citing Fisher v. Coleman, 639 F.2d 191 (4th Cir. 1981); then citing United States v. Stenson, 475 F. App'x 630, 631 (7th Cir. 2012); then citing Joshua v. Adams, 231 F. App'x 592, 594 (9th Cir. 2007); then citing Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000); and then citing United States v. Benefield, 889 F.2d 1061, 1064 (11th Cir. 1989)).

[31] *See id.*

[32] *Id.* at 145.

[33] *Id.* at 146–47.

[34] *Id.* at 148.

[35] *Id.*

[36] *Id.* at 147–48.

[37] *Id.* at 149.

[38] *Id.* at 150–51 ("To say that Virginia's approach . . . is unconstitutional thus not only misreads its purpose, but also engages in policy choices reserved largely for legislatures and substantially for the states." *Id.* at 150.).

[39] *Id.* at 151–52.

[40] *Id.* at 152–53.

[41] *Id.* at 155–56 (Motz, J., concurring in the judgment).

criminal punishment for compelled conduct is constitutional only when paired with volitional conduct.[42] On these grounds, the interdiction statute — which had punished the plaintiffs for nonvolitional drunkenness and homelessness — would have been a violation of the Eighth Amendment,[43] were it not for a binding circuit precedent.[44] Judge Motz explained that Justice White had considered the situation presented by *Manning* — "in which an individual is an alcoholic *and* lacks a home" — and had concluded that criminal punishment under such circumstances would be unconstitutional.[45] To Judge Motz, this admonition should have prevented the government from sidestepping *Robinson*'s prohibition of status crimes by merely "bifurcating" a statute that would otherwise be an unconstitutional punishment of status.[46] By interdicting someone for being an addict and then punishing conduct compelled by that addiction, Virginia "*effectively* . . . criminalized" the status of being addicted, "even if it *nominally* punished" the conduct of possession or consumption.[47] Judge Motz also pointed out that "[p]laintiffs challenge[d] *only* the targeted criminalization of *otherwise legal* behavior that [was] an involuntary manifestation of their illness."[48] Therefore, a holding in the *Manning* plaintiffs' favor would not create the "slippery slope" that the *Manning* majority feared.[49]

Judge Motz was correct that Justice White's concurrence permits the punishment of compelled conduct only when it is accompanied by volitional conduct. She was also correct that, under the *Marks* rule, Justice White's concurrence was the narrowest grounds and thus, a binding precedent. By failing to apply the substance of Justice White's concurrence to its analysis, the *Manning* majority rendered both *Robinson* and *Powell* toothless, a result that the *Marks* rule was designed to prevent.

Between the *Manning* majority and Judge Motz, the latter had the proper interpretation of Justice White's concurrence in *Powell*. Judge Motz believed that Justice White had "expressly rejected the act-status distinction."[50] The *Manning* majority believed that Justice White had

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[42] *See id.* at 155.

[43] *Id.* at 156–57.

[44] *Id.* at 156 (citing Fisher v. Coleman, 639 F.2d 191 (4th Cir. 1981) (per curiam)); *id.* at 160. Judge Motz explained that she could not vote to overturn *Fisher v. Coleman*, 639 F.2d 191, because "[i]n the absence of an intervening change in the law, '[o]nly the full court, sitting *en banc*,'" could overturn circuit precedent. *Id.* at 160 n.4 (second alteration in original) (quoting Demetres v. E.W. Constr., Inc., 776 F.3d 271, 275 (4th Cir. 2015)).

[45] *Id.* at 155 (citing Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring in the result)).

[46] *Id.* at 157.

[47] *Id.*

[48] *Id.* at 157–58.

[49] *Id.* at 157 (quoting *id.* at 148 (majority opinion)).

[50] *Id.* at 155.

left open the question of the constitutionality of punishing conduct compelled by status alone.[51] The majority's conclusion was incorrect. First, it is at odds with the language of Justice White's concurrence, which stated: "If it cannot be a crime to have an irresistible compulsion to use narcotics . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name."[52]

Second, even if Justice White did not answer the question and his commentary on compelled conduct was only dicta, his concurrence still should have prohibited the interdiction law, given his understanding that the Court had already answered the question in *Robinson*. He explained that "[u]nless *Robinson* is to be abandoned . . . . the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk."[53] In other words, Justice White perceived the punishment of conduct compelled by status alone as an "abandonment" of *Robinson*. By leaving the question open in *Powell*, Justice White would have been preserving a preexisting regime in which punishment of conduct compelled by status alone was forbidden.[54] Therefore, regardless of whether Justice White answered the question or postponed the question and preserved his view of the status quo in the meantime, his narrow concurrence was based on the premise that the government could not punish conduct compelled by status alone.[55]

The *Manning* court should have treated Justice White's concurrence in *Powell* — correctly interpreted by Judge Motz — as binding precedent under the *Marks* rule. Most commentators detect two strains of the *Marks* rule that have been applied in the lower courts: the "implicit-consensus" approach and the "fifth-vote" approach.[56] Justice White's concurrence is the narrowest grounds under either.

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[51] *Id.* at 145 (majority opinion).

[52] Powell v. Texas, 392 U.S. 514, 548 (1968) (White, J., concurring in the result) (citing Robinson v. California, 370 U.S. 660 (1962)).

[53] *Id.* at 548–49.

[54] *See* Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1627–28 (1995).

[55] *See* Martin v. City of Boise, 902 F.3d 1031, 1048 (9th Cir. 2018) (interpreting Justice White's concurrence as establishing "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being" (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1135 (9th Cir. 2006))); Kate Stith-Cabranes, *Criminal Law and the Supreme Court: An Essay on the Jurisprudence of Byron White*, 74 U. COLO. L. REV. 1523, 1537–38 (2003); Recent Court Filing, *Statement of Interest of the United States,* Bell v. City of Boise*, No. 1:09-cv-540 (D. Idaho Aug. 6, 2015)*, 129 HARV. L. REV. 1476, 1479–80 (2016).

[56] *See, e.g.*, John P. Neuenkirchen, *Plurality Decisions, Implicit Consensuses, and the Fifth-Vote Rule Under* Marks v. United States, 19 WIDENER L. REV. 387, 388 (2013). Professor Ryan Williams detects a third approach, which he has termed the "issue-by-issue" approach. Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 817 (2017). The issue-by-issue approach is similar to the implicit-consensus approach and its result would be the same in the case of *Manning*. It differs primarily in that it looks for consensus

Under the implicit-consensus approach, the *Marks* rule applies only when the narrowest grounds are a "common denominator" of the other opinions used to reach a majority.[57] Justice White's conclusion that the government can punish compelled conduct when it is paired with volitional conduct shared a common denominator with the plurality opinion, which would have allowed punishment for any conduct, volitional or not.[58] All five Justices who joined or concurred in the *Powell* judgment agreed that conduct could be punished when there was an element of volition. Thus, there was an "implicit consensus" among them, and Justice White's opinion should be treated as binding precedent under this first approach.[59]

The fifth-vote approach instructs lower courts to give binding precedential value to the opinion concurring on the narrowest grounds, even if that opinion is a reflection of the views of only one Justice.[60] In practice, the fifth-vote approach normally treats the opinion of the "median" Justice as the narrowest grounds.[61] Justice White was the median Justice in *Powell*. He agreed with the plurality's belief that conduct can be punished in most instances, but he was not ready to conclude that compelled conduct could always be punished. Similar to the dissent, which would have banned any punishment of compelled conduct, Justice White had reservations about punishing conduct when it was solely compelled by addiction. Therefore, his concurrence created a middle ground, deciding the case on the narrow basis that Powell had control over whether to be in public. Justice White's concurrence is thus

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among all of the Justices, including those in dissent. *Id.* at 817. Williams has also proposed a fourth approach, which he has termed the "shared agreement" approach. *Id.* at 822. The shared agreement approach would allow lower courts to choose between the results urged by the plurality opinion in *Powell* and by Justice White's concurrence. *See id.* at 835–38. This piece will not consider either of these approaches, choosing instead to focus on the dominant approaches to the *Marks* rule actually applied in the lower courts.

57 Williams, *supra* note 56, at 808 (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991)).

58 *Powell*, 392 U.S. at 533.

59 One might counter that it is not always so clear that Justices with a broader view have implicitly consented to the narrower grounds. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. (forthcoming 2019). If the plurality's position is framed as allowing punishment for any conduct, then Justice White's position that the state may punish volitional conduct is clearly the subset of the plurality position logically necessary to constitute a majority position. However, if the plurality's position is framed as allowing the state to *always* punish conduct of any type, then Justice White's position that the state may punish *only* volitional conduct seems to be at odds with the plurality. This second reading, however, is inconsistent with the *Marks* rule. A logical subset of a broader opinion will always be at odds with a portion of that broader opinion, by nature of being a subset. Although this syntactical reframing of the two positions would be a clever way for lower courts to work around the *Marks* rule, such an approach would swallow up the *Marks* rule in a way that the Supreme Court (which has not overruled *Marks*) would be unlikely to condone.

60 Williams, *supra* note 56, at 813–14 (citing Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694 n.7 (3d Cir. 1991), *aff'd in part*, *rev'd in part*, 505 U.S. 833 (1992)).

61 *Id.* at 814.

binding precedent under either of the dominant approaches to the *Marks* rule.

By failing to declare the interdiction statute unconstitutional, as required by Justice White's concurrence, the *Manning* court did what Justice White and the four dissenting Justices in *Powell* were unwilling to do: it sapped the practical force of *Robinson*, a six-Justice majority opinion of the Supreme Court that prohibited the punishment of status. The Virginia legislature may have cleverly avoided the explicit language of *Robinson* by civilly labeling the plaintiffs for their status and *then* punishing the conduct compelled by that status, but the effects of the interdiction statute are identical to the effects of the law that *Robinson* declared unconstitutional.[62] Punishing a homeless alcoholic for consuming alcohol is the same as punishing an alcoholic for being an alcoholic because, by definition, alcoholics cannot control their alcohol intake unless they are in recovery or recovered.[63]

In some ways, the *Marks* rule may seem countermajoritarian, because it gives precedential value to the opinion of only one or a few Justices. Nonetheless, the rule also serves majoritarian ends by constraining lower court decisions with principles to which a majority of the Supreme Court assented or would have assented, had they been forced to reach a middle ground. By not adhering to Justice White's concurrence in *Powell*, the *Manning* court caused the harm that the *Marks* rule was designed to prevent. It moved the law in a direction that had not received the assent of a majority of the Justices, thereby taking away the practical force of a Supreme Court majority decision that is still good law. To avoid such countermajoritarian results in the future, the Fourth Circuit ought to recognize and enforce the narrow holding of Justice White's concurrence and reassess contrary circuit precedent in that light.[64] Until then, homeless citizens of Virginia who are suffering from alcoholism will continue to endure unconstitutional punishment for who they are, as opposed to what they do.

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[62] *See* Benno Weisberg, Comment, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes*," 96 J. CRIM. L. & CRIMINOLOGY 329, 346 (2005).

[63] Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 395–97 (1988).

[64] As noted by Judge Motz, conflicting circuit precedent in *Fisher* prevented the court from voiding the interdiction statute. *Manning*, 900 F.3d at 160 n.4 (Motz, J., concurring in the judgment). In this case, however, horizontal stare decisis was in tension with vertical stare decisis. *Fisher* broke from Supreme Court precedent by deciding the case on the basis of the *Powell* plurality, thereby ignoring the *Marks* rule altogether, straying from *Powell* precedent, and severely weakening *Robinson*'s practical effect. In the future, the Fourth Circuit should adhere to vertical stare decisis and thus to Justice White's concurrence, given that the conflicting circuit precedent was wrongly decided. The Fourth Circuit should use a case like *Manning* as an invitation to overrule *Fisher* through an en banc decision and realign itself with the Supreme Court.