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Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases

Kimberly A. Orem*

I. Introduction

In 1972, the United States Supreme Court in *Furman v. Georgia*¹ found that the death penalty as applied in the state statutory schemes under its review constituted “cruel and unusual” punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.² The Court concluded that these standardless sentencing schemes failed to provide capital judges and juries with a rational basis to distinguish those who should die from those who should live.³ However, it was not until 1976, in *Gregg v. Georgia*,⁴ that the Court addressed whether the death penalty could be applied in a constitutional manner.⁵ *Gregg* addressed the

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1. 408 U.S. 238 (1972) (per curiam) (holding that the death penalty as applied in the state statutes before the Court violated the Eighth and Fourteenth Amendments to the Constitution).

2. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The full text of the Eighth Amendment reads as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII (emphasis added). The Eighth Amendment protection against cruel and unusual punishment has been incorporated through the due process protection of the Fourteenth Amendment to apply to the states. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Robinson v. California*, 370 U.S. 660, 675 (1962).

3. *Furman*, 408 U.S. at 293-94 (Brennan, J., concurring).

4. 428 U.S. 153, 186-87 (1976) (holding that the death penalty does not invariably violate the Constitution).

5. *Gregg v. Georgia*, 428 U.S. 153 (1976). On the same day that it decided *Gregg*, the Court also decided four other capital cases in which Eighth Amendment issues were raised. See *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

concerns voiced in *Furman* by incorporating substantive and procedural protections. The *Gregg* Court rejected the *per se* unconstitutionality of the death penalty and launched the arguably dichotomous stream of Eighth Amendment death penalty jurisprudence that has evolved since the death penalty's reinstatement.

The protections of the Eighth Amendment in this context can be classified as either "substantive" or "procedural."⁶ A death penalty statute passes "procedural" Eighth Amendment muster if the concerns of *Furman* can be met by inserting certain safeguards into the capital trial and sentencing process to prevent the arbitrary and capricious infliction of the death penalty. To meet this end, many states have attempted to narrow the class of death eligible persons by: (1) identifying specific crimes for which the death penalty can be imposed; (2) requiring the sentencer to find at least one clearly defined aggravating factor before recommending death; and (3) assuring the sentencing body's access to mitigation evidence prior to sentencing.⁷ Procedures such as these do not necessarily correct for the frailties deduced by the Court under the Eighth Amendment's "substantive" protections—that is, execution for certain offenses and in certain circumstances is unconstitutional, regardless of procedural protections.⁸ Such categorical prohibitions are based upon the conclusion that, in these situations, execution would either be grossly disproportionate to the severity of the crime or involve unnecessary and wanton infliction of pain and would offend the "evolving standards of decency that mark the progress of a maturing society."⁹ The analysis the Court uses to cure certain deficiencies with procedural mechanisms and others with substantive protection may fairly be called "dichotomous" for attempting to employ rationales which are at odds with one another.

Recent cases have revealed the potentially devastating effect of this dualistic analysis.¹⁰ Once a case has been read to implicate the "procedural"

6. Note that the Supreme Court has neither explicitly recognized nor discussed the categorizations discussed in this article. The division is, instead, evidenced by the analyses used in the Court's capital jurisprudence and serves merely to facilitate an understanding of the type of Eighth Amendment analysis the Court may employ in a particular case. At times, the Court has used the terms "procedural" and "substantive" in the capital context, but not necessarily in the manner discussed in this article.

7. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987) (note that many people read this case to stand only for the proposition that statistical racial disparity will not be used to find the death penalty unconstitutional).

8. For example, execution of the mentally insane has been held by the Court to be unconstitutional under all circumstances despite procedural protections. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

9. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (recognizing the dynamic nature of the Eighth Amendment).

10. See *infra* Part IV of this article for discussion of this recent application of the dichotomy.

aspect of the dichotomy, and the potential infirmities of death penalty infliction in the situation are therefore "curable," the Eighth Amendment works to protect the capital defendant *only* in assuring his right to a fair trial. Although the guarantee of a fair and procedurally valid trial is certainly a beneficial guarantee, it provides little solace to the capital defendant who attempts to raise an Eighth Amendment issue, such as actual innocence, after trial and sentencing.¹¹ It is certainly arguable that the execution of an innocent person is "cruel and unusual" within the meaning of the Eighth Amendment.¹² However, in *Herrera v. Collins*,¹³ the Court refused to acknowledge this and, instead, decided that the petitioner had not made a strong enough showing of actual innocence to meet the high standard the Court would hypothetically apply if, as the Court assumed *arguendo*, such an execution would constitute "cruel and unusual" punishment.¹⁴ Until the Court finds a complete bar to execution of the innocent and chooses, instead, to handle such cases through procedural analysis, the Court could be said to imply that execution of an innocent person who has received a fair capital trial is constitutional. This is the current understanding; thus, the Eighth Amendment now essentially serves as a due process protection for the capital defendant at trial and sentencing and no more.¹⁵

This article will track the evolution of the Eighth Amendment dualism, from *Furman* to its modern implications, detailing the procedural and substantive protections which the Eighth Amendment guarantees and discussing some that it does not.

11. See *Herrera v. Collins*, 506 U.S. 390, 397-98 (1993) (holding that a claim of actual innocence based upon newly acquired evidence is not, in and of itself, a basis for federal habeas relief).

12. See *id.* at 419 (O'Connor, J., concurring) (recognizing the "fundamental legal principle that executing the innocent is inconsistent with the Constitution"); *id.* at 430 (Blackmun, J., dissenting) (stating that "[n]othing could be more contrary to contemporary standards of decency . . . or more shocking to the conscience . . . than to execute a person who is actually innocent") (citations omitted).

13. 506 U.S. 390 (1993).

14. *Id.* at 417-19. The Court's treatment of *Herrera's* claim left open the option of articulating a standard for future cases in which a stronger showing of actual innocence is argued.

15. Furthermore, in its arguably shocking decision in *Strickler v. Greene*, the Court implied that if sufficient evidence of a capital defendant's guilt exists, he may not even be assured the procedural safeguards presumably guaranteed by the Eighth Amendment procedural jurisprudence. 119 S. Ct. 1936 (1999). In *Strickler* the Court affirmed the conviction and death sentence after refusing to grant *Strickler* relief on his claim of withheld evidence because of his failure to show materiality under the *Brady* standard and prejudice to excuse his procedural default of this claim. *Id.* at 1955.

II. Procedural Eighth Amendment Guarantees

A. The Furman Mandate and Gregg's Response

The Court has said on many occasions that the unique nature of the death penalty carries with it a need for heightened reliability in the procedures by which it is imposed.¹⁶ This need for a heightened degree of certainty in capital cases made the *Furman* Court especially concerned about the "wantonly" and "freakishly" inflicted death sentences under the statutes it considered.¹⁷ In *Gregg* the Court interpreted *Furman* to mandate "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹⁸ *Gregg* suggests that the concerns voiced in *Furman* can be met by a "carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance" which is best served by a "bifurcated proceeding at which the sentencing authority is apprised [sic] of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."¹⁹ The *Gregg* Court stressed that bifurcation of the trial into guilt and sentencing phases would help to eliminate some of the constitutional deficiencies identified in *Furman*.²⁰

B. Aggravating Circumstances and Mandatory Death Sentences

The inclusion of aggravating factors in state capital sentencing schemes has not always lead to their constitutional affirmation. To meet the Eighth Amendment's demands, states must "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'"²¹ In *Godfrey v. Georgia*²² the Court evaluated Georgia's designation of the "outrageously or wantonly vile, horrible and inhuman" nature of the offense as an aggravating factor which triggered the possibility of a death sentence.²³ Analyzing this factor in light of its use and the lack of jury guidance supplied by the Georgia courts, the Court found the factor to be

16. See generally *Spaziano v. Florida*, 468 U.S. 447, 456 (1984); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

17. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

18. *Gregg*, 428 U.S. at 189.

19. *Id.* at 195. The Court went on to examine and uphold the constitutionality of the method Georgia used to adapt its statute to meet the *Furman* concerns. *Id.* at 196-207.

20. *Id.* at 191-92.

21. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (citing *Gregg*, 428 U.S. at 196 n.47).

22. 446 U.S. 420, 433 (1980) (holding that the failure of a certain aggravating factor to distinguish the case under review in which the death penalty was imposed from other cases in which it was not mandated reversal of the death sentence).

23. *Id.* at 428.

unconstitutionally vague because it did not restrain the arbitrary and capricious infliction of the death penalty.²⁴

In an attempt to limit sentencing discretion in death penalty cases in accord with *Furman*, some states, such as North Carolina, simply eliminated jury discretion and automatically imposed death sentences for capital crimes upon a finding of guilt.²⁵ In *Woodson v. North Carolina*²⁶ the Court addressed this statutory answer to *Furman*'s rejection of "unbridled jury discretion" in the capital context.²⁷ The Court found North Carolina's attempt inadequate to meet *Furman*'s demand to replace "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."²⁸ The Court in *Woodson* also found that the North Carolina statute did not adequately allow individualized consideration of both the offender and the offense.²⁹ Although the Court recognized the lack of a clear textual constitutional mandate of individualized inquiry, it held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."³⁰ Therefore, the mandatory nature of the sentencing scheme eliminated individual

24. *Id.*; see also *Maynard v. Cartwright*, 486 U.S. 356, 360-66 (1988) (holding the "especially heinous, atrocious, or cruel" aggravating circumstance to be unconstitutional vague for similar reasons). In *Maynard* the Court emphasized the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty." *Id.* at 362. However, not all challenges to similarly worded aggravating factors for vagueness have been successful. See *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) (holding that the "especially heinous, atrocious, or cruel" and the "knowingly created a great risk of death to many persons" aggravators were not unconstitutionally vague as construed by the Supreme Court of Florida).

25. See N.C. GEN. STAT. § 14-17 (1975).

26. 428 U.S. 280, 305 (1976) (declaring the North Carolina mandatory death penalty scheme unconstitutional). Note that the Court did not pass on the constitutionality of a mandatory death penalty statute limited to an extremely narrow category of homicide. *Id.* at 287 n.7. However, the Court did decide this issue in *Sumner v. Shuman*, holding that even when narrowly tailored, the mandatory death sentence statute did not allow consideration of relevant mitigating circumstances and thus could not be reconciled with the Eighth and Fourteenth Amendments. 483 U.S. 66, 77-78 (1987).

27. *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976).

28. *Id.* at 303.

29. *Id.* at 304.

30. *Id.*; see also *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (holding that a mandatory death sentence statute failed to comply with *Furman*'s requirement that unbridled jury discretion be replaced by procedures that safeguard against arbitrary and capricious imposition of death sentences).

considerations fundamental to the constitutional imposition of the death penalty.³¹

C. Mitigation and Individualized Sentencing

In tension with this duty of the states to limit discretion of the sentencing body is the duty *also* to provide it with all relevant mitigation information so that the sentencing body may make an individualized determination as to whether the death penalty is warranted in each specific case. In *Lockett v. Ohio*³² the Court emphasized that the widely accepted notion of individualization of sentences in noncapital cases holds even more importance in capital cases because of the unique and final nature of the death penalty.³³ The Court emphasized that "where sentencing discretion is granted, it generally has been agreed that the sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is [h]ighly relevant—if not essential—[to the] selection of an appropriate sentence."³⁴ In *Eddings v. Oklahoma*³⁵ the Court likewise found that, just as a state may not constitutionally bar the sentencing body's access to mitigation material, neither can the sentencer refuse to consider relevant mitigating evidence.³⁶ This tension between limiting the jury's discretion while allowing it maximum access to mitigation evidence for an individualized determination might have led to inconsistency. However, because the Court has never held that there must be completely unlimited or unguided discretion, even as to consideration of mitigating evidence, that has not occurred.³⁷

31. *But see* *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (holding mandatory imposition of a death sentence if jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or where the aggravating circumstances outweigh the mitigating circumstances, constitutional so long as jury is able to consider and give effect to all relevant mitigating evidence).

32. 438 U.S. 586, 608-09 (1978) (holding that limits imposed on mitigation material available to the sentencer violated the Constitution).

33. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

34. *Id.* at 602-03 (internal quotation marks and citations omitted) (alterations in original).

35. 455 U.S. 104 (1982).

36. *Eddings v. Oklahoma*, 455 U.S. 104, 112-17 (1982).

37. *See Franklin v. Lynaugh*, 487 U.S. 164, 181-82 (1988) (plurality opinion) (rejecting the interpretation of *Lockett* to mean that the state has no role in structuring the jury's consideration of mitigation evidence). The Court has occasionally discussed this tension within the Eighth Amendment capital jurisprudence and has assessed Eighth Amendment compliance of the capital sentencing schemes under review by looking to whether the states acted to resolve this tension through mechanisms that both prohibit the arbitrary imposition of the death penalty and also provide the jury with sufficient access to mitigation. *See generally* *Graham v. Collins*, 506 U.S. 461 (1993); *California v. Brown*, 479 U.S. 538, 544-45 (1987) (O'Connor, J., concurring); *Zant v. Stephens*, 462 U.S. 862, 875-77 (1983). Lower courts have upheld certain restrictions on presentation of mitigation evidence, perhaps to avoid arbitrary capital sentencing decisions which would render the imposition of the death

III. Substantively Protected Eighth Amendment Categories

In defining what constitutes "cruel and unusual" punishment, the Court has consistently construed the Eighth Amendment to provide protection, not only from barbarous and torturous methods of punishment, but also to provide protection "against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged."³⁸ As it is not limited to the methods of punishment thought to be cruel and unusual at the time of the Amendment's enactment, this interpretation manifests the evolving and dynamic nature of the Eighth Amendment analysis.³⁹ Through Eighth Amendment substantive protections, the Court has held the imposition of the death penalty for certain crimes and certain offenders unconstitutional *per se*. *No procedural protections can be used to make the imposition of the death penalty constitutional in such cases.* The categories for which the Court has granted immunity from death sentences include the following: (1) execution of defendants who were convicted for acts committed while fifteen years old or younger;⁴⁰ (2) execution of those who have become insane post-trial;⁴¹ (3) execution for rape of an adult woman, without more;⁴² and (4) execution for accomplices to a murder in which the accomplice did not take a human life or act with reckless disregard for human life.⁴³

A. Age of the Offender

The Court has read the Eighth Amendment substantive protection against cruel and unusual punishment to bar infliction of the death penalty

penalty unconstitutional. *See* *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999) (disallowing evidence of the nature of prison life as mitigation to combat a finding of future dangerousness); *see also* *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991) (overruling the holding in *Booth v. Maryland*, 482 U.S. 496 (1987), that the Eighth Amendment acts as a *per se* bar on admission of victim impact evidence and leaving the decision whether to admit such evidence during sentencing to the states).

38. *Weems v. United States*, 217 U.S. 349, 371 (1910) (citation and internal quotation marks omitted). Note that the Court's use of the term "disproportionate" in many cases which analyze the substantive Eighth Amendment protection does *not* imply the necessity of proportionality review, the comparison by a reviewing court of the defendant's sentence with other capital defendants whose cases and individual characteristics are similar. Instead, this "disproportionality" refers to the "abstract evaluation of the appropriateness of a sentence for a particular crime." *Pulley v. Harris*, 465 U.S. 37, 42-43 (1984). The Court has disavowed any Eighth Amendment requirement for proportionality review, although it may be used as a device by which a state's statutory scheme meets the concerns voiced in *Furman*. *Id.* at 50-51.

39. *See* *Ford v. Wainwright*, 477 U.S. 399, 406 (1986).

40. *See* *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

41. *See* *Ford*, 477 U.S. 399.

42. *See* *Coker v. Georgia*, 433 U.S. 584 (1977).

43. *See* *Tison v. Arizona*, 481 U.S. 137 (1987).

on capital defendants who committed the capital crime while they were fifteen years old or younger. In *Thompson v. Oklahoma*⁴⁴ the Court discussed how "evolving standards of decency" consider capital punishment of one under the age of sixteen at the time of the offense by examining the work product of state legislatures and sentencing juries.⁴⁵ The Court found that society seems to draw the line between childhood and adulthood at sixteen years of age at the earliest.⁴⁶ Although most state legislatures had not specifically addressed the minimum age for infliction of the death penalty, all eighteen states that had done so required a defendant to have attained at least the age of sixteen at the time of his or her capital offense.⁴⁷ Considering the behavior of juries, the Court came to the conclusion that "imposition of the death penalty on a 15-year-old [sic] offender is now generally abhorrent to the conscience of the community."⁴⁸

The Court concluded its inquiry by stressing that it, the Court, was the final arbiter of the constitutionality of such executions.⁴⁹ Considering the lower level of culpability of fifteen-year-old offenders and the absence of retributive or deterrent effects of such executions, the Court held that such executions were "nothing more than the purposeless and needless imposition of pain and suffering" and, thus, were unconstitutional.⁵⁰ Despite the seemingly protective stance of the Court on the subject of juveniles, the Court has held sentencing schemes which allow execution of sixteen- and seventeen-year-old capital defendants to be constitutional.⁵¹

B. Insanity

In *Ford v. Wainwright*⁵² the Court held that the Eighth Amendment prohibits states from imposing the death penalty on a prisoner who is

44. 487 U.S. 815, 838 (1988) (holding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen years of age at the time of his or her offense).

45. *Id.* at 821-22 (quoting *Trop v. Dulles*, 358 U.S. 86, 101 (1958)) (internal quotation marks omitted).

46. *Id.* at 824. The Court here considered the line society has drawn between childhood and adulthood in such contexts as the rights to vote, serve on a jury, drive, marry, purchase pornographic materials, and gamble. *Id.* & nn.16-21.

47. *Id.* at 826-29 & nn.24-30.

48. *Id.* at 832. The Court here looked to actual sentencing decisions of juries, as compiled and analyzed in private studies as well as by the Department of Justice. *Id.*

49. *Id.* at 833 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)) (internal quotation marks omitted).

50. *Id.* at 836-38 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) (internal quotation marks omitted).

51. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding imposition of the death penalty on murderers sixteen and seventeen years of age consistent with the Eighth Amendment).

52. 477 U.S. 399 (1986).

insane.⁵³ The Court recognized that the Eighth Amendment protection covers both acts of punishment considered cruel and unusual at the time of the adoption of the Bill of Rights and also those which society now considers by consensus to be cruel and unusual.⁵⁴ Thus, the Eighth Amendment analysis is an evolving one. The Court in *Ford* found no basis to condone execution of the insane at English common law or within modern community standards or modern penal justifications and, hence, held such executions unconstitutional.⁵⁵ The Court, finding a lack of a national consensus against executing mentally retarded people convicted of capital offenses, subsequently declined to extend this ban to execution of the mentally retarded.⁵⁶

C. Rape of an Adult Woman, Without More

In *Coker v. Georgia*⁵⁷ the Court held that a sentence of death for the crime of rape of an adult woman, without more, was grossly disproportionate and excessive punishment and was forbidden by the Eighth Amendment.⁵⁸ The Court reiterated its excessiveness inquiry as stated in *Gregg* as

53. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

54. *Id.* at 405-06.

55. *Id.* at 406-10. The United States Court of Appeals for the Fourth Circuit recently addressed the execution of the insane in *Swann v. Taylor*, No. 98-20, 1999 WL 92435, at *1 (4th Cir. Feb. 18, 1999), in which it emphasized that a *Ford* claim is not ripe for review until execution is imminent. *Id.*, at *17-18. Thus, a *Ford* claim may be raised late in the habeas proceedings and is not vulnerable to procedural default in the earlier stages of the appellate process. When Swann did raise this claim, it was rejected in the Virginia courts and certiorari was denied by the United States Supreme Court. See *Swann v. Taylor*, 119 S. Ct. 1591 (1999) (mem.). However, the second avenue of redress on such *Ford* claims came to Swann's rescue in the eleventh hour when Governor James S. Gilmore granted Swann clemency. Gilmore commuted Swann's sentence to life imprisonment without parole only four hours before his scheduled execution due to Swann's severe mental impairment. See Frank Green, *Gilmore Grants Swann Clemency Sentence Commuted to Life Without Parole*, RICHMOND TIMES-DISPATCH, May 13, 1999, at A1, available in 1999 WL 4355070; *Calvin Swann Gilmore Gives Life*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, VA), May 14, 1999, at B10, available in 1999 WL 7164912. For a more detailed discussion of *Swann*, see Kimberly A. Orem, Case Note, 12 CAP. DEF. J. 191 (1999) (analyzing *Swann*).

56. See *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

57. 433 U.S. 584 (1977).

58. *Coker v. Georgia*, 433 U.S. 584, 598 (1977). *Coker* was convicted under section 26-2001 of the Georgia Code, which read that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20[sic] years." GA. CODE ANN. § 26-2001 (1972). This statute, on its face, does not differentiate on the basis of age of the victim, thereby including rape of an adult woman within its scope. Note that the victim in this case was a sixteen-year-old woman, considered an adult merely because she was married. See *Coker*, 433 U.S. at 605 (Burger, J., dissenting). Because this woman could be viewed as a minor since she was under the age of eighteen, this was an arguably striking decision for the Court to choose to decide the constitutionality of the death

finding unconstitutional a punishment which "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."⁵⁹ Emphasizing the omission of the rape of an adult woman in other state capital statutes as well as the infrequency with which Georgia juries had recommended death based on this charge, the Court next turned to its constitutional analysis.⁶⁰ Although the Court recognized the serious nature of the offense, it found that rape of an adult woman could not compare with the severity of murder, which entails an unjustified taking of a human life, and thus could not warrant the uniquely severe and final penalty of death.⁶¹

D. *Accomplices to Murder*

In *Enmund v. Florida*⁶² the Court held the death penalty disproportionate, and thus unconstitutional, when imposed for aiding and abetting murder when the defendant does not kill, attempt to kill, or intend to kill the victim.⁶³ Taking the same approach as it did in *Coker*, the Court found that few jurisdictions authorized the death penalty solely for participation in a robbery in which a life is taken by another and, further, that juries have repudiated imposition of the death penalty for non-triggerman convictions in robberies.⁶⁴ The Court went on to consider the constitutionality of the imposition of the death penalty for crimes of this nature and found that the lower degree of culpability of Enmund in these circumstances destroyed any retributive or deterrent value of infliction of the death penalty in his case

penalty for the rape of an *adult* woman. Hence, per the broad holding in *Coker*, rape of a minor who is legally considered to be an adult woman due to her marital status cannot, without more, constitutionally warrant the death penalty even though the Court noted the acceptance of death sentences for rape of a minor in two other jurisdictions. *See id.* at 595-96.

59. *Coker*, 433 U.S. at 592.

60. *Id.* at 595-97. The Court has noted that one of the jury's most important functions in capital sentencing is to "maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) (citation omitted).

61. *Coker*, 433 U.S. at 598. *But see id.* at 603 (Powell, J., concurring in part, dissenting in part) (finding the Court's holding overbroad and hypothesizing the constitutionality of the death penalty for aggravated rapes involving a higher degree of brutality); *id.* at 606-11 (Burger, J., dissenting) (finding the Court's holding overbroad, thus impinging on states' rights and unnecessarily offending the tenets of federalism).

62. 458 U.S. 782 (1982).

63. *Enmund v. Florida*, 458 U.S. 782, 797 (1982). Note that application of the "murder-for-hire" and "murder by direction" capital statutory provisions used in such states as Virginia is dependent upon proof of an intent to kill. *See* VA. CODE ANN. §§ 18.2-31(2), (10) (Michie 1999).

64. *Enmund*, 458 U.S. at 789-97.

and thus would rendering its imposition unconstitutional.⁶⁵ In *Tison v. Arizona* the Court stressed the importance of the circumstance-specific individualized culpability inquiry mandated by *Coker* to determine constitutionality of the death penalty.⁶⁶ Although in *Enmund*, the mental state was not culpable enough to warrant the death penalty, the Court held in *Tison* that "reckless disregard for human life" represented culpability sufficient to warrant the constitutional imposition of the death penalty.⁶⁷

IV. Recent Implications of the Substantive/Procedural Dichotomy

In *Herrera v. Collins* the Court held that a claim of actual innocence is not an independent basis for federal habeas relief.⁶⁸ Herrera argued that the execution of a person who is innocent of the crime for which he will be executed violates the Eighth and Fourteenth Amendments to the Constitution.⁶⁹ The Court relied on its holding in *Townsend v. Sain*⁷⁰ to conclude that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief *absent an independent constitutional violation* occurring in the underlying state criminal proceeding."⁷¹ The Court recognized the presumption of innocence in criminal cases, but went on to note that once a defendant receives a fair trial

65. *Id.* at 798-801; see also *id.* at 827 (O'Connor, J., dissenting) (emphasizing the importance of individualized sentencing, allowing the jury to consider the defendant's role in the crime and mitigation evidence). *But see id.* at 816-23 (O'Connor, J., dissenting) (noting the reverence for felony-murder at English common law and in American jurisprudence and finding fault in the majority's conclusion that contemporary standards preclude imposition of the death penalty in these cases).

66. *Tison v. Arizona*, 481 U.S. 137, 156-58 (1987) (holding that if the individualized inquiry into a defendant's culpability required in capital cases reveals major participation in the felony and reckless indifference to human life, the culpability requirement of *Enmund* is sufficient to warrant imposition of the death penalty). Note that Justice O'Connor wrote the majority opinion in this case, advocating the same individualization of sentencing concerns as she voiced in her *Enmund* dissent.

67. *Id.* at 157-58. The facts manifesting culpability in *Enmund* and *Tison* make them clearly distinguishable and, hence, help to explain the difference in Eighth Amendment protection. *Enmund* did not actively take part in the events leading to the death, but merely waited in the get-away car during a residential robbery. In *Tison* the defendant was armed, helped abduct the victims of the murders, was present at the murder site, and "could anticipate the use of lethal force during" the events leading to the murders. *Id.* at 145 (citation and internal quotation marks omitted).

68. *Herrera v. Collins*, 506 U.S. 390, 393 (1993).

69. *Id.* at 398. Herrera argued both a strict Eighth Amendment challenge as well as a Fourteenth Amendment Due Process challenge. The latter was similarly rejected by the Court. *Id.* at 411.

70. 372 U.S. 293, 317 (1963).

71. *Herrera*, 506 U.S. at 400 (emphasis added).

and is convicted this presumption disappears.⁷² Perhaps because it concluded that this presumption evaporates, the Court did not directly address whether executing an innocent person convicted in a fair and reliable trial proceeding would violate the Constitution.⁷³ Instead, the majority assumed *arguendo* that, *where state avenues of redress are closed*, a truly persuasive demonstration of "actual innocence" made after trial would render the execution unconstitutional and warrant federal habeas relief.⁷⁴ The majority of the Court did not articulate the standard a defendant would need to meet to be granted an evidentiary hearing, but did say that the threshold showing would necessarily be "extraordinarily high."⁷⁵

Although Justice O'Connor in her concurrence argued that the majority ought to avoid answering whether a fairly convicted person can be executed without an evidentiary hearing on newly discovered innocence evidence, her concurrence implied that for proof of actual innocence to offend the Eighth Amendment such evidence would need to make such an execution a "constitutionally intolerable event."⁷⁶ Justice Blackmun, in his dissent, propounded that such an execution would violate any standard of decency and read the procedural Eighth Amendment protections to extend beyond a valid conviction and death sentence.⁷⁷ However, even Justice Blackmun set the standard to warrant the desired evidentiary hearing extremely high. He would require that a defendant "must show not just that there was probably a reasonable doubt about his guilt but that he is *probably actually innocent*."⁷⁸

The Court in *Herrera* also distinguished another field of "actual innocence" inquiry. Proof of actual innocence may act to excuse default of

72. *Id.* at 398-99.

73. *Id.* at 399-400. The Court stressed the pragmatic concerns of disruption of the federal appellate system through the possible deluge of capital defendants likely to make such claims simply to utilize another opportunity for reversal. *Id.* at 401; see VA. SUP. CT. R. 1:1 (Virginia's "twenty-one day rule" making judgments final twenty-one days after entry of judgment). The *Herrera* Court also emphasized the availability of clemency as the historical remedy for claims of innocence based on newly discovered evidence made outside the time limit set by the applicable state law. *Herrera*, 506 U.S. at 411-17. This reliance on clemency is disturbing in many respects. First, there is no "right" to clemency. Clemency exists in most states as a broad discretionary gubernatorial power to grant clemency to death row inmates. Further, procedural protections guaranteed within other proceedings in the trial and appellate processes do not extend to clemency proceedings. See generally *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 282 (1998) (describing an appeal for clemency as a "unilateral hope," unprotected by procedural guarantees) (citation and internal quotation marks omitted).

74. *Herrera*, 506 U.S. at 417.

75. *Id.*

76. *Id.* at 419 (O'Connor, J., concurring) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.").

77. *Id.* at 431-32 (Blackmun, J., dissenting).

78. *Id.* at 434-35 (emphasis added).

other independent constitutional claims which may have occurred earlier in the trial and appellate processes.⁷⁹ This so-called “fundamental miscarriage of justice” exception to the procedural bar of claims where defenses of abusive or successive use of the writ are raised does not recognize a finding of “actual innocence” as an independent constitutional claim; rather it is a “gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”⁸⁰ In *Schlup v. Delo*⁸¹ the Court discussed the relation of the “gateway” innocence claim to the *Herrera*-style innocence claim.⁸² The “gateway” innocence claim seeks to surmount the bar against certain constitutional claims which allege deficiencies with the trial procedure.⁸³ The *Herrera* claim, in contrast, attempts to acquire federal habeas relief from the Eighth Amendment on a claim of actual innocence alone, but claims no other constitutional deficiencies and concedes a fair trial proceeding.⁸⁴ The standards which defendants must meet differ greatly. *Herrera* claims require a showing of innocence which would make execution “constitutionally intolerable.” “Gateway” innocence claims need to meet a lesser standard—to raise sufficient doubt about guilt to make the execution a possible miscarriage of justice unless the conviction resulted from a fair trial.⁸⁵

V. Aftermath of *Herrera*

By deciding *Herrera* based upon the procedural considerations and protections within the capital trial and sentencing scheme and refusing to answer whether execution of the innocent is *per se* unconstitutional as a violation of the Eighth Amendment, the *Herrera* Court abstained from

79. For example, if a claim of ineffective assistance of counsel was procedurally defaulted prior to federal habeas review, a petitioner may yet gain review of such a claim if he can make the requisite showing of actual innocence.

80. *Herrera*, 506 U.S. at 404.

81. 513 U.S. 298 (1995).

82. *Schlup v. Delo*, 513 U.S. 298, 313-16 (1995).

83. *Id.* at 315-16.

84. *Id.* at 315.

85. *Id.* at 316; see also *Carriger v. Stewart*, 132 F.3d 463, 476-79 (9th Cir. 1997) (discussing the distinction between *Herrera* claims and “gateway” claims). *Schlup* mandates that to prove actual innocence sufficient to allow argument of defaulted constitutional claim of error, petitioner need show that it is “more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Schlup*, 513 U.S. at 327. However, in a case in which the petitioner is making a claim that he is not death eligible, another type of innocence claim, petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. See *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). For a more in-depth discussion of these differing standards, see Matthew S. T. Clark, Case Note, 12 CAP. DEF. J. 435 (2000) (analyzing *Graham v. Angelone*, No. 99-4, 1999 WL 710385 (4th Cir. Sept. 18, 1999)).

carving out a new category of substantive Eighth Amendment protection for the innocent. If innocence falls within the procedural Eighth Amendment analysis, execution of the innocent would be constitutional as long as procedural protections were assured at trial. Once a "fair" conviction and sentence are received, it seems that Eighth Amendment protection vanishes *regardless of innocence or guilt*. This decision of the Court has shocking implications when one considers the development of this Eighth Amendment dichotomy.

Innocence appears to have some of the earmarks of the substantively protected categories discussed within the Eighth Amendment capital jurisprudence. Two tests that the Court has turned to in finding substantive protections are (1) whether community consensus shows that "evolving standards of decency" find punishment under the circumstances of the offense or characteristics of the offender unacceptable and (2) whether such executions have retributive or deterrent effects on society. It is fairly easy to advance the position that community standards would *and should* shun execution of innocent people.⁸⁶ Further, the ability of capital punishment to be generally retributive or to deter future crimes in others is dependent upon the defendant's culpability. In cases of actual innocence, culpability does not exist. Hence, it would seem feasible for the Court to carve out such a categorical exception for the same reasons that it has done so in other instances.

Simultaneously, the Court could impose a high standard to warrant evidentiary review of innocence claims for the pragmatic reasons which caused the Court's hesitation to create a substantive bar against execution of the innocent. Perhaps this is what the *Herrera* Court intended to do without explicitly stating its intention. Justice O'Connor emphasized in her *Herrera* concurrence that the Court did not "state that the Constitution permits the execution of an actually innocent person."⁸⁷ However, the Court also declined to hold that the Constitution forbids such executions. Hence, one is left waiting for a challenge in which a petitioner can show compelling evidence of innocence which *may* warrant a constitutional bar to his execution and which *will* permit a showing of innocence as an inde-

86. For example, the state of Illinois has issued a moratorium on executions due to the "ample evidence that capital punishment is not being administered properly—having seen a rash of cases in which inmates sentenced death have not only had their convictions overturned but have been fully exonerated. The state came uncomfortably close to executing innocent men. Other states have actually put people to death despite grave doubts about their guilt." *Reality Check on the Death Penalty?*, CHI. TRIB., Mar. 3, 1997, at 14, available in 1997 WL 3525729. The imposition of this moratorium by Governor George Ryan and acts of political leadership in other locales such as in Oregon, Philadelphia, California, and Maryland manifest political abhorrence for execution of the innocent that should mirror the community standards on this issue. Nancy J. Bothne, *It's Time to Abolish Death Penalty*, CHI. TRIB., Feb. 21, 2000, at 16, available in 2000 WL 3638452.

87. *Herrera*, 506 U.S. at 427 (O'Connor, J., concurring).

pendent basis for federal habeas relief. Until such a challenge is granted certiorari by the Court, the Eighth Amendment will serve merely as a procedural protection during trial and a substantive protection for designated categories of offenders and crimes, thereby assuring the innocent merely the right to a fair trial. This renders the Eighth Amendment "cruel and unusual" punishment clause a mere due process clause for capital trial and sentencing proceedings when used outside of the few substantively protected categories.

Another recent decision by the Court appears to take even this constitutionally fair trial right away from capital defendants if sufficient evidence of their guilt exists. In *Strickler v. Greene*⁸⁸ the Court addressed the situation in which the credibility of an eyewitness's damning testimony was seriously called into question by documents not produced by the Commonwealth as required by *Brady*.⁸⁹ In assessing whether sufficient prejudice existed to warrant reversal of the conviction and death sentence, the Court emphasized the existence of "considerable forensic and other physical evidence linking petitioner to the crime."⁹⁰ This emphasis, paired with the heightened standard of prejudice required by the Court to warrant reversal,⁹¹ seems to suggest that an apparently guilty defendant does not even deserve the constitutional procedural protections which an innocent person is guaranteed at trial and sentencing.

VI. Conclusion

The Court has recognized that the Eighth Amendment requires procedural protections. The Court has also recognized that those protections must be supplemented by substantive bars to the application of the death penalty. Thus, it has carved out the substantively protected categories described earlier.⁹² Although the procedural guarantees have significantly improved certainty and reliability within the capital trial and appellate

88. 119 S. Ct. 1936 (1999). For a detailed analysis of *Strickler*, see Ashley Flynn, Case Note, 12 CAP. DEF. J. 165 (1999) (analyzing *Strickler*).

89. *Strickler v. Greene*, 119 S. Ct. 1936, 1955 (1999) (holding that the defendant had failed to show the necessary materiality and prejudice to excuse his procedural default); see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); see also *United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that the prosecution's duty to disclose extends to impeachment evidence).

90. *Strickler*, 119 S. Ct. at 1954 & n.41.

91. The Court required *Strickler* to demonstrate a "reasonable probability" that his conviction or sentence would have been different if the damning witness testimony was sufficiently impeached during his trial; this standard proved impossible to meet in his case. *Id.* at 1955.

92. See *supra* Part II.

processes in the United States, the Court's refusal to extend the scope of the substantive protections has stunted the growth of this important part of the Eighth Amendment's doctrinal protections.

The deleterious effect of creating a ceiling on the number of substantively protected Eighth Amendment categories within capital cases is exemplified by the Court's decision in *Penry v. Lynaugh*.⁹³ In *Penry* the Court refused to extend substantive protection to a classification which should warrant it by the standards previously enunciated in the Court's own jurisprudence.⁹⁴ The *Penry* Court found that "[t]he common law prohibition against punishing 'idiots' for their crimes" may indicate that it is "cruel and unusual" to "execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions" for the same reasons which justify the insanity defense in criminal law.⁹⁵ The Court further noted that the justification used in *Ford v. Wainwright* to invalidate the death penalty for the insane should prohibit the death penalty for the mentally retarded.⁹⁶ However, the Court refused to address this needed expansion of Eighth Amendment substantive protection by distinguishing *Penry*'s situation from one in which such expansion might be warranted. The Court skirted this issue by citing the jury's rejection of the insanity defense and emphasizing the absence of explicit bans on execution of the mentally retarded in state capital statutes.⁹⁷

Unless the Court abandons this restrictive reading of what constitutes "cruel and unusual" punishment, the Eighth Amendment protection may no longer be properly read to reflect the "evolving standards of decency" held by the community.⁹⁸ Further, unless growth of the substantive protections continues, procedural protections may also be inadequate. In cases such as *Herrera*, the procedural protections will fail to prevent execution of an innocent person, something clearly unacceptable by community standards. If one combines the *Herrera* Court's extensive emphasis on conviction and sentence resulting from a "fair trial" as protection of the innocent with the *Strickler* Court's arguable adoption of a "fair enough"

93. 492 U.S. 302 (1989).

94. *Penry v. Lynaugh*, 492 U.S. 302, 333-34 (1989).

95. *Id.* at 333.

96. *Id.*

97. *Id.* at 333-34.

98. See Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HAST. CONST. L. Q. 455 (1996), for an in-depth analysis of the evolving standard of decency used by the Court in Eighth Amendment capital jurisprudence and suggestions on how to increase the Court's awareness of the actual views of the community by, in part, recognizing that procedural mechanisms such as death qualification of juries, use of anti-sympathy instructions, and use of victim-impact evidence stack the deck against the accurate use of jury sentencing as an indicator of the community consensus.

standard for capital trials, whether a “fair enough” trial would be adequate to execute an innocent person surfaces and looms awaiting decision. It seems that the Court would face a much more difficult decision in such a case. Perhaps this is the decision which one must await to truly assess the constitutionality of execution of the innocent. Until then, the recognition of “evolution” of the standard of decency will remain frozen.

