

2000

Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence

Joseph L. Hoffmann

Indiana University Maurer School of Law, hoffma@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Hoffmann, Joseph L., "Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence" (2000). *Articles by Maurer Faculty*. Paper 374.

<http://www.repository.law.indiana.edu/facpub/374>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence

Joseph L. Hoffmann*

I. Introduction

For the past twenty-five years, the law of federal habeas corpus has been inextricably intertwined with the law of the death penalty. Every capital case is fought primarily on the legal battleground of habeas. Every habeas reform is motivated largely by concerns about the impact of habeas on the administration of the death penalty. It is thus no coincidence that the most important federal habeas legislation enacted since the original Habeas Corpus Act of 1867¹ was a part of the Antiterrorism and Effective Death Penalty Act of 1996.² At least in our time, any meaningful discussion about habeas must take account of the relationship between habeas and the death penalty.

But what is the nature of that relationship? Today, we generally take for granted that the purpose of federal habeas in state capital cases (as in all other state criminal cases) is to provide a mechanism for the litigation of federal constitutional criminal procedure issues arising primarily under the Fifth, Sixth, Eighth, and Fourteenth Amendments.³ Undoubtedly such

* Professor of Law, Indiana University—Bloomington. The author would like to thank the participants in this symposium for their many helpful comments and suggestions. Special thanks go to the habeas panelists, Jordan Steiker, Steve Bright, Jim Liebman, and Larry Yackle, and Evan Caminker. The author would also like to thank the faculty, staff, and judge-students at the National Judicial College who helped him develop the ideas expressed herein during twelve years of teaching the College's "Handling Capital Cases" course for state trial judges. Finally, the author would like to thank Bill Stuntz for his many contributions to the author's thoughts about habeas and capital cases.

1. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

2. Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (codified at 28 U.S.C. §§ 2261-2266 (Supp. IV 1998)).

3. Fourth Amendment search and seizure claims are no longer directly cognizable on habeas corpus as a result of the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976) (holding that federal habeas corpus relief is not available to a prisoner who previously has been afforded the opportunity for full and fair consideration of his search and seizure claim at trial). *But cf.* Kimmelman

procedural matters are properly within the scope of habeas, but is that all there is to habeas in capital cases?

A quarter-century ago, the answer to this question was not at all clear. In *Furman v. Georgia*,⁴ the United States Supreme Court held that the death penalty, at least under then-existing state and federal capital sentencing statutes, violated the Eighth Amendment's prohibition on "cruel and unusual punishments."⁵ Four years later, when the Court decided that the new post-*Furman* death penalty statutes enacted in Georgia,⁶ Florida,⁷ and Texas⁸ satisfied the Eighth Amendment's requirement of rationality and predictability in capital sentencing,⁹ no one could predict the future direction of constitutional death penalty law. Of course, all capital cases would still need to comply with the same Fourth, Fifth, Sixth, and Fourteenth Amendment procedural rules applicable to other criminal cases. But would the United States Constitution impose any additional requirements? More specifically, after *Gregg*, would the Eighth Amendment fade from view, leaving further questions about the validity of individual death sentences imposed under the new statutes to be decided by state law? Or would the Eighth Amendment continue to play a more significant role?

Shortly after *Gregg*, lawyers representing several death row inmates tried to persuade the Court to adopt an interpretation of the Eighth Amendment that would have ensured an active role for federal habeas courts in the substantive supervision of state death sentencing. In a series of cases, the defense argued to the Court that the Eighth Amendment not only regulated states in their enactments of death penalty statutes but also

v. Morrison, 477 U.S. 365 (1986) (holding that a Sixth Amendment claim of ineffective assistance of counsel is cognizable on habeas even though the defense lawyer's alleged error consisted of a failure to raise a Fourth Amendment claim properly in earlier state proceedings).

4. 408 U.S. 238 (1972).

5. The Eighth Amendment reads, in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

6. *Gregg v. Georgia*, 428 U.S. 153 (1976).

7. *Proffitt v. Florida*, 428 U.S. 242 (1976).

8. *Jurek v. Texas*, 428 U.S. 262 (1976).

9. The requirement that death sentencing be rational and predictable, which is based on the views expressed in the separate opinions of the five Justices who found the death penalty unconstitutional in *Furman*, see *infra* notes 39-40 and accompanying text, is one of two key Eighth Amendment procedural requirements for capital sentencing that have been imposed by the Court. The second is the requirement of individualized sentencing, which in turn requires sentencer consideration of all mitigating evidence an individual defendant facing a possible death sentence seeks to offer. See *Lockett v. Ohio*, 438 U.S. 586, 605-06 (1978). Recently, at least some members of the Court have concluded that these two requirements are incompatible. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the *Lockett* requirement be abandoned); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (Thomas, J., concurring) (agreeing with Justice Scalia's argument in *Walton*, and arguing for the abandonment of the *Lockett* requirement); *Callins v. Collins*, 510 U.S. 1141, 1156 (1994) (Blackmun, J., dissenting from the denial of certiorari) (arguing for the abolition of the death penalty based on its inability to satisfy the incompatible requirements imposed by *Furman* and *Lockett*).

limited the case-by-case imposition of the death penalty to particular kinds of crimes and criminals.¹⁰

For example, in *Lockett v. Ohio*,¹¹ the defense contended that on the particular facts and circumstances of the case, the Eighth Amendment would be violated by giving Lockett the death penalty because she was only a young, relatively minor participant in a murder committed by others. Similarly, in *Godfrey v. Georgia*,¹² the defense argued that—again, on the particular facts and circumstances of the case—the Eighth Amendment prohibited the death penalty for Godfrey because he killed his victims instantly in the heat of a domestic dispute,¹³ did not cause unnecessary pain or suffering to his victims, and afterwards calmly turned himself in to the police. In short, in *Lockett*, *Godfrey*, and several other early post-*Gregg* cases, defense lawyers asked the Court to interpret the Eighth Amendment as a case-specific substantive constitutional limit on capital punishment.¹⁴

The Supreme Court, however, declined to do so. Instead, the Court in each case found a procedural flaw in the way the particular case was handled. In *Lockett*, for example, the Court ruled that Ohio should not have imposed any limits on the mitigating evidence sought to be introduced by the defendant.¹⁵ In *Godfrey*, the Court held that Georgia's statutory standard of eligibility for the death penalty was unconstitutionally vague.¹⁶ Although most of the procedural flaws identified by the Court in *Lockett*, *Godfrey*, and similar cases would not have violated existing federal constitutional standards for criminal cases in general, the Court found them to be intolerable in capital cases. The Court chose to characterize these

10. See, e.g., Brief for Petitioner at 61-68, *Lockett v. Ohio*, 438 U.S. 586 (1978) (No. 76-6997); Petition for Certiorari at 42-45, *Lockett*, 438 U.S. 586 (No. 76-6997) (both arguing that sentencing "non-triggermen" accomplices in a homicide to death is unconstitutional); see also *Pulley v. Harris*, 465 U.S. 37 (1984) (rejecting the defendant's argument that a comparative proportionality review is required in each death penalty case); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversing a death sentence because the trial judge refused to consider mitigating evidence); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (reversing a death sentence because the particular crimes committed did not meet the statutory standard of "a consciousness materially more 'depraved' than that of any person guilty of murder").

11. 438 U.S. 586 (1978).

12. 446 U.S. 420 (1980).

13. Today, society's changed views about the horrors of domestic violence would probably render Godfrey's crime more likely deserving of death than it was in 1980.

14. Throughout this article, I will use the terms "substance" and "substantive" to refer to two kinds of claims that might be made by a defendant who has been convicted and sentenced to death: (1) the claim that the defendant is in fact innocent of the crime, and (2) the claim that the defendant, although guilty of the crime, nevertheless does not deserve the death penalty. The first of these claims is a claim of factual error in the guilt/innocence determination, which may or may not be accompanied by a procedural legal error. The second claim does not necessarily involve either a factual or a procedural legal error. Rather, it is a claim of moral error—that is, a claim that the defendant's death sentence does not comport with the moral values of the community.

15. *Lockett*, 438 U.S. at 608.

16. *Godfrey*, 446 U.S. at 431-32.

procedural flaws as violations of the Eighth Amendment, thus giving rise to the so-called "super due process" interpretation of that constitutional provision that prevails today.¹⁷

We can only speculate about why the Court chose to treat the Eighth Amendment as a procedural rather than substantive check on individual death sentences. But, with the benefit of hindsight, we can easily observe the consequences of the choice. The Court's choice has helped to ensure that capital habeas litigation almost always focuses solely on the procedures by which the defendant was convicted and sentenced rather than on the crucial substantive questions of whether the defendant is in fact guilty and, even if guilty, whether he deserves a death sentence.¹⁸ No matter how strongly the habeas court may feel that the jury—or the judge, in a non-jury trial—has made a substantive error in the defendant's conviction or death sentence, the habeas court is virtually powerless to act directly and reverse the defendant's conviction or death sentence on the basis of such doubts.

This disability is an extreme manifestation of the problem of so-called "excessive proceduralism" in habeas corpus that Professor Jordan Steiker has recently described, criticized, and tried to remedy.¹⁹ Steiker's article deals primarily with the relationship between habeas procedural issues and the underlying issues of federal constitutional criminal procedure, which he calls the "merits" that often become lost in the battle over habeas procedures.²⁰ He proposes significant changes in the rules of habeas, designed to eliminate or greatly reduce the relative importance of habeas procedural issues, and thereby allow habeas courts to reach more easily the merits of death row inmates' constitutional claims.²¹ He argues that such changes would benefit both death row inmates, by ensuring that the merits of their constitutional claims are addressed by habeas courts, and the states,

17. See Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148 (1980) (suggesting that "the human dignity to personhood standard has both a 'substantive' and 'procedural' aspect; that the same result for persons that gives form to the retributivist substantive limitation on punishment also engenders a super due process procedural limitation").

18. Professor William Stuntz has argued that this shift in capital litigation focus is the result of both the Court's failure to validate substantive Eighth Amendment claims and the rational responses of various criminal justice actors, particularly defense lawyers, to the incentives created by procedural Eighth Amendment litigation. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 44 (1997) ("It is not only that constitutional law has been too loath to regulate substance in the law of capital punishment. The point is that heavy procedural regulation has tended to drive substance away.").

19. See Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315.

20. *Id.* at 317.

21. *Id.* at 320-21, 345-46.

by reducing the time and money now devoted to the litigation of habeas procedural issues.²²

In this Article, I will propose a more radical response to the problem of excessive proceduralism in capital habeas cases. I will argue that, through reinterpretation of the Eighth Amendment, the United States Supreme Court should empower federal habeas courts not only to address the merits of death row inmates' federal constitutional criminal procedure claims, but also to address and remedy substantive errors in the conviction and sentencing of those death row inmates. I will demonstrate how the Court's post-*Gregg* Eighth Amendment decisions have led inexorably to the current spate of procedural restrictions on federal habeas—restrictions that have not only damaged the overall viability of the writ, but also contributed to the substantive arbitrariness of death sentencing.²³ Near the end of the Article, I will argue that the only solution to this serious problem is for the Court to reverse course and declare that the Eighth Amendment imposes substantive limits on the case-by-case imposition of capital punishment.²⁴ This change, in turn, would require habeas courts to review the merits of every capital case, including both the defendant's guilt and the deservedness of the death sentence, a development that would not only improve the quality of substantive justice in capital cases, but also secure the future of habeas itself.

II. The Cycle of the Supreme Court's Modern Death Penalty Jurisprudence

In order to understand habeas today, we must begin with a review of the developments of the past twenty-five years both in habeas law itself and in Eighth Amendment death penalty law. Although the Supreme Court's Eighth Amendment decisions at first glance may seem haphazard, upon closer inspection it is possible to discern a clear pattern among them. In retrospect, it is increasingly obvious that this pattern—an endless, vicious cycle that has led to the excessive proceduralism of federal habeas law described by Steiker²⁵—was the inevitable result of the Court's misguided attempt to use procedural solutions to solve substantive problems.²⁶

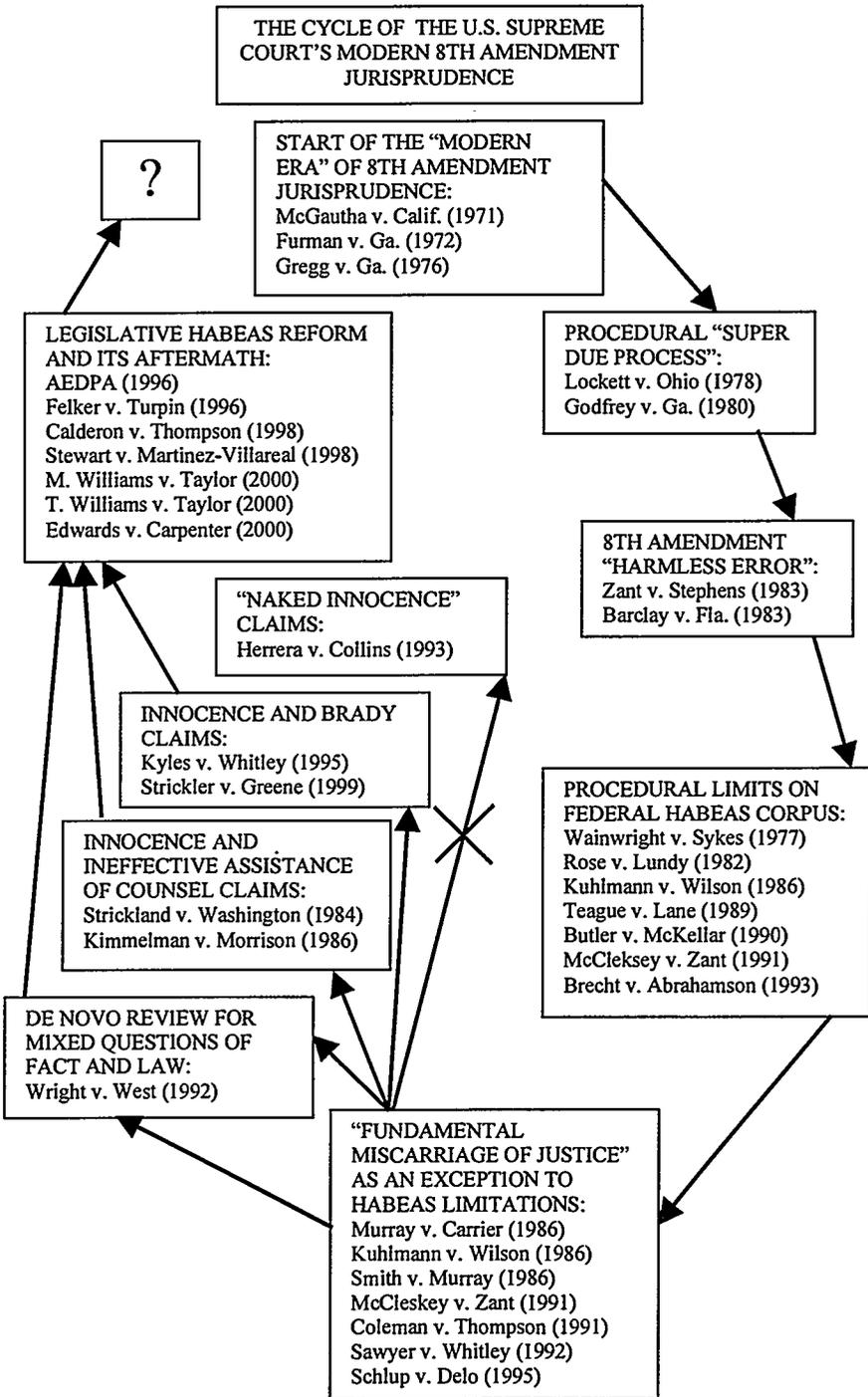
22. *Id.* at 321-23, 346-47.

23. *See infra* notes 56-59 and accompanying text.

24. *See infra* Part III.

25. *See generally* Steiker, *supra* note 19.

26. I do not suggest that the pattern I am about to describe was the result of a conscious, self-aware choice made by the Court or any of its individual members; rather, I suggest only that it can be seen, in retrospect, as a predictable and logical consequence of the Court's Eighth Amendment decisions.



My current argument builds directly on one I first presented in a 1993 *Indiana Law Journal* article.²⁷ There, I noted that even during the early 1990s, the allegedly conservative, pro-state Supreme Court continued to grant review of, and frequently reverse, state death penalty cases. Recent evidence, including new evidence presented in this symposium, suggests that the same thing can be said today, and perhaps with even more conviction, about current allegedly conservative, pro-state lower federal courts.²⁸

What can explain this phenomenon? Surely part of the answer is that federal judges, who are usually situated procedurally closer than their state counterparts to a capital defendant's ultimate day of reckoning, are strongly motivated as human beings to do whatever is within their judicial power—and perhaps, on occasion, even a few things outside of that power²⁹—to ensure that no person is unjustly put to death. Aware of the risks of both conviction and capital sentencing error and often feeling a heightened sense of judicial responsibility for the defendant's fate, the Supreme Court—like many lower federal courts—has long viewed death as different.³⁰ As Justice Souter recently wrote for a majority of the Court, “[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.”³¹

The most direct judicial action a federal judge can take to block an unjust execution is to rule that the death penalty is unconstitutional as applied to the individual defendant. Yet, with only a few rare exceptions,³² the Court has consistently declined to define the appropriate role of the federal courts in this way. Instead, as most lawyers are wont to do, the Court has tended to seek procedural solutions to substantive problems.

27. Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 *IND. L.J.* 817 (1993) [hereinafter Hoffmann, *Is Innocence Sufficient?*].

28. See Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 *MINN. L. REV.* 1015, 1044 n.166 (1993) (noting that federal courts grant 50-75% of the capital petitions for habeas corpus that they consider); James Liebman, Jeffrey Fagan, Valerie West, and James Lloyd, *Capital Attrition: Error Rates in Capital Cases 1978-1995*, 78 *TEXAS L. REV.* 1839, 1849 (2000) (calculating a reversal rate of 40% by federal habeas courts).

29. See the remarkable dialogue between the federal district court, sitting in habeas, and the U.S. Supreme Court in the case of Robert Alton Harris, who was executed in California in 1992. After a series of last-minute stays of execution, granted by the district court, were overturned on appeal by the state, the Supreme Court eventually issued an extraordinary order barring any further stays. See *Gomez v. United States Dist. Court for the N. Dist. of Cal.*, 503 U.S. 653 (1992).

30. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plurality opinion) (holding that the “qualitative difference” between death and all other penalties requires a greater degree of “reliability in the determination that death is the appropriate punishment in a specific case”).

31. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Baker v. Kemp*, 483 U.S. 776, 785 (1987)).

32. See *infra* notes 49-51.

This tendency dates all the way back to the start of the modern era of American death penalty law in the early 1970s, when the Court decided *McGautha v. California*,³³ *Furman v. Georgia*,³⁴ and *Gregg v. Georgia*.³⁵ All three cases involved systemic challenges to the manner by which the death penalty was being administered in the states and, together, these three cases substantially changed that manner of administration.

In *McGautha*, the Court narrowly upheld the existing state capital punishment systems against a claim that they violated the Constitution by relying on unconstrained jury discretion to decide whether individual defendants would or would not receive the death penalty.³⁶ The decision was noteworthy for the classic debate between Justice Harlan, writing for the majority, and Justice Brennan, in dissent, over the issue of discretion versus rules in capital sentencing. According to Harlan, discretionary capital sentencing by juries representing the moral view of the community was the best that could be done: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."³⁷ Brennan responded with a defense of due process legal standards: "But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds."³⁸

Just one year later, in *Furman*, the Court held five to four that all existing state death penalty statutes, which were based on a discretionary model of capital sentencing, violated the Eighth Amendment. There were nine separate opinions, but only two of the five Justices in the majority, Justices Brennan and Marshall, found the death penalty itself, on substantive grounds, unconstitutional.³⁹ In contrast, Justices White, Stewart, and Douglas based their votes against the death penalty on the infrequency, arbitrariness, and discriminatory impact, respectively, of the capital sentencing results reached under the existing state statutes.⁴⁰ Their opinions encouraged states to try to develop new death penalty statutes that would cure these defects.

33. 402 U.S. 183 (1971).

34. 408 U.S. 238 (1972).

35. 428 U.S. 153 (1976).

36. See *McGautha v. California*, 402 U.S. 183, 196 (1970) (rejecting petitioners' claim "that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable").

37. *Id.* at 204.

38. *Id.* at 285 (Brennan, J., dissenting).

39. See *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 359 (Marshall, J., concurring).

40. *Id.* at 311-12 (White, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 257 (Douglas, J., concurring).

The new breed of death penalty statutes made their way up to the Supreme Court in *Gregg v. Georgia*.⁴¹ The Court in *Gregg* and its companion cases upheld the new statutes of Georgia, Florida, and Texas, which in one form or another relied upon the Model Penal Code's concept of "guided discretion"—capital sentencing discretion "guided" by statutorily defined aggravating and mitigating circumstances.⁴² Two other statutes, those of North Carolina and Louisiana, were rejected because they eliminated all sentencing discretion by making the death penalty mandatory for certain crimes.⁴³ The Court concluded that such mandatory statutes were inconsistent with the individualized consideration necessary to produce just death sentences.⁴⁴ *Gregg* confirmed that, at least in the view of the majority, the *Furman* problem of irrational and unjust sentencing outcomes could be solved simply by adopting and implementing better capital sentencing procedures.

Although *Gregg* clearly represented at least a temporary end to the Court's interest in entertaining systemic challenges to the death penalty,⁴⁵ the years immediately following *Gregg* were marked by uncertainty about the future course of constitutional death penalty litigation. Opponents of capital punishment were not about to give up, even though the Court in *Gregg* had generally authorized the resumption of death sentencing. But the abolition strategy, which had previously emphasized systemic challenges to state capital punishment systems, had to change.

In several early post-*Gregg* cases, the Court was confronted with the new claim that the improved capital sentencing procedures approved in *Gregg* had failed to prevent a death sentence for a defendant who did not

41. 428 U.S. 153 (1976).

42. See *id.* at 193-94, 196-98 (describing the Model Penal Code's "controlled discretion" standard and explaining that Georgia's law fits this standard and conforms to the Constitution); *Proffitt v. Florida*, 428 U.S. 242, 247-52, 259-60 (1976) (announcing that Florida's death penalty statute, based on the Model Penal Code, satisfies the Constitution by ensuring an "informed, focused, guided, and objective inquiry" into the appropriateness of a death sentence); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding the Texas statute which, although less formalized than the Florida and Georgia statutes, requires an aggravating factor for death and allows for the presentation of mitigating factors).

43. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

44. See *Woodson*, 428 U.S. at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense, as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Roberts*, 428 U.S. at 333-36 (rejecting Louisiana's mandatory death penalty law because of its failure to allow for individualized consideration of aggravating and mitigating factors).

45. The Court did not address another systemic challenge to the death penalty until its decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which upheld the Georgia death penalty system against a claim that it discriminated based on the race of the victim.

deserve to die. In *Lockett v. Ohio*⁴⁶ and *Godfrey v. Georgia*,⁴⁷ for example, the defense argued that the death sentences were barred—on case-specific substantive grounds—by the Eighth Amendment. As I explained in my 1993 article:

The Court could have decided that, under the totality of the circumstances, the Eighth Amendment barred the imposition of a death sentence against Sandra Lockett. This substantive position was in fact advocated by Lockett's attorneys (who included Anthony Amsterdam) in both the petition for certiorari and the brief on the merits. Instead, however, the Court chose to reverse Sandra Lockett's death sentence on a procedural ground, apparently concluding that the sentencing judge would have reached the right result if only the Ohio statute had not prevented him from considering Lockett's minor role in the crime [and other factors] as a "mitigating circumstance[]." "

Similarly, in *Godfrey v. Georgia*, where the defendant instantly killed his wife and mother-in-law with a shotgun during a domestic dispute, and then calmly turned himself in to the police, the Court could have declared that such a case simply was not a proper one for the imposition of a death sentence. Rather, the Court chose to reverse Godfrey's death sentence on another procedural ground, apparently concluding that the jury would have reached the right sentencing result if only it had received a proper instruction about the statute's "aggravating circumstance" provision requiring that the crime be [found to be "outrageously or wantonly vile, horrible or inhuman . . . "].

In these and other post-*Gregg* decisions, the Court has struggled mightily to find procedural solutions to what appear to have been, at bottom, substantive disagreements with the outcomes of the particular cases.⁴⁸

Why did the Court choose the procedural route over the substantive one? Some of the early post-*Gregg* cases presented compelling examples of defendants whose death sentences must have seemed substantively wrong, at least to some members of the Court. Yet the Court refused to render substantive rulings in such cases. Indeed, in the entire quarter-century since *Gregg*, the Court has excluded only three categories of crimes and criminals from death-penalty eligibility on substantive grounds:

46. 438 U.S. 586 (1978).

47. 446 U.S. 420 (1980).

48. Hoffmann, *Is Innocence Sufficient?*, *supra* note 27, at 823-24 (footnotes omitted) (quoting *Lockett*, 438 U.S. at 608, and *Godfrey*, 446 U.S. at 431).

rapists who did not kill,⁴⁹ felony-murderers who did not kill and who lacked heightened culpability for the death,⁵⁰ and murderers who killed before they reached the age of sixteen.⁵¹ All other reversals have been on procedural grounds.

One possible explanation for the Court's preference for procedure may be the significant counter-majoritarian dilemma posed by the Eighth Amendment. As I have noted elsewhere,⁵² a substantive Eighth Amendment decision to reverse a death sentence requires the Court to declare that society itself, as represented by the jury and judges who participated in the particular case, has acted in a cruel and unusual way. This kind of declaration, which cannot easily be hidden from society behind technical jargon or legal analysis, threatens to put the Court in an uncomfortable counter-majoritarian position. That the Court has tended to shy away from such a direct challenge to society's moral choices is not surprising.

This reluctance may be related to a second explanation, namely, that lawyers in general often see the world in procedural rather than substantive terms. Lawyers, after all, are professionally trained to focus on procedures and often suppress their substantive opinions in order to represent clients with whose views they may strongly disagree.⁵³

A third and final reason why the modern Court has chosen the procedural route lies in its strong concern for federalism. As Chief Justice Rehnquist has put it, "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."⁵⁴ I will argue later that this concern for

49. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death sentence in a rape case is "grossly disproportionate and excessive punishment" and "forbidden by the Eighth Amendment").

50. See *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that a criminal must both participate in a major felony and exhibit a reckless disregard for human life to justify the imposition of the death penalty); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding that ordering the execution of a getaway car driver who lacked the intent to kill violates the Eighth and Fourteenth Amendments).

51. See *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that imposing the death penalty on a seventeen-year-old does not constitute cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that sentencing a defendant under sixteen years of age to death violates the Eighth and Fourteenth Amendments).

52. See Joseph L. Hoffmann, *The "Cruel and Unusual Punishment Clause": A Limit on the Power to Punish or Constitutional Rhetoric?*, in *THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS* 139, 143 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993) (arguing that a finding that the death penalty is cruel and unusual punishment puts the court in a position of "'legislating' moral standards rather than 'adjudicating' them").

53. See Hoffmann, *Is Innocence Sufficient?*, *supra* note 27, at 822 ("Lawyers and judges tend to believe . . . that . . . if a procedure can be improved enough, then the results produced by that procedure will necessarily be right."); see also Stuntz, *supra* note 18, at 39-40 (identifying incentive-based reasons why defense lawyers, in particular, often prefer to make procedural rather than substantive claims on behalf of their clients).

54. *Herrera v. Collins*, 506 U.S. 390, 401 (1993).

federalism is misplaced—that in fact, the current situation of procedural death-penalty habeas litigation represents a greater intrusion on the prerogative of the states to carry out their respective capital punishment policies than would the alternative of substantive review of state death sentences by federal habeas courts.⁵⁵ But a majority of the Court seems to have believed, throughout the past twenty-five years, that it would somehow offend the states for federal habeas courts to review the substantive merits of capital sentencing decisions rendered and approved by state courts.

Whatever the reasons for its choice, the procedural approach adopted by the Court has turned out to be highly problematic for the states. When the Court decided *Lockett*, *Godfrey*, and other early post-*Gregg* death penalty cases on procedural rather than substantive grounds, it meant that not only the individual defendant's death sentence, but also the death sentences of many other defendants, were invalidated.⁵⁶ Before long, federal habeas courts—which carried the bulk of the burden of enforcing the Court's new Eighth Amendment procedural mandates⁵⁷—were reversing a substantial percentage of the death sentences that came before them for review.⁵⁸ Many of these death sentences, unlike the ones in *Lockett* and *Godfrey*, were not substantively questionable; yet they had to be reversed all the same. In other words, the Court's procedural approach inevitably led to the over-reversal, measured in substantive terms, of state death sentences. I have previously explained why this is so:

There are two major difficulties with an essentially process-oriented solution to a substantive problem, such as the problem of bad outcomes in death-penalty cases. First, and most obviously

55. See *infra* text accompanying note 163.

56. Most of the early post-*Gregg* Eighth Amendment decisions were applied retroactively, both to cases still pending on direct appeal and to habeas cases. It was not until the Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), that new constitutional criminal procedure decisions were held generally inapplicable to habeas cases. See generally Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165 [hereinafter Hoffmann, *New Vision*] (discussing the significance of *Teague* and the extensive changes it brought to federal habeas review).

57. This allocation continued a tradition that had been established in the 1960s, when the lower federal courts were essentially deputized by the Warren Court, by means of the Court's dramatic expansion of federal habeas, to enforce often-unpopular new federal constitutional rules that defined the so-called "criminal procedure revolution." See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that the exclusionary rule is constitutionally required under the Fourth and Fourteenth Amendments); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that the criminal "accused must be adequately and effectively apprised of his [privilege against self-incrimination] and the exercise of that privilege").

58. In the post-*Gregg* years from 1976 to 1991, more than 40% of all death sentences were reversed on habeas. See JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.3, at 21-22 n.23 (3rd ed. 1998) (noting a habeas reversal rate of 42% between 1978 and 1984 and a habeas reversal rate of 41% between 1985 and 1991; when unpublished decisions are included, the reversal rate for the entire period (1978-1991) rises to 47%).

(despite the traditional lawyer's view), even perfect procedures cannot guarantee perfect results—which means that procedural law may wind up being pushed beyond its proper limits. If a federal judge, for instance, is disturbed by what he or she perceives to be the wrong result in a capital case, and if the only way to reverse the decision is to find a federal procedural error, then the judge will be under severe, maybe insurmountable, pressure to find (or perhaps manufacture?) such an error—even if, in the abstract, the procedures used in the state courts were well within the range of reasonable fairness. In other words, a process-oriented solution for a substantive problem can, if the matter is important enough to compel judicial action, provoke an otherwise unwarranted expansion of procedural law.

Second, given the first difficulty, the procedural law is likely eventually to expand to the point where it substantially over-regulates. The primary problem is that, every time a federal court announces a new procedural rule for the purpose of overturning a state death sentence with which the judge does not agree, the rule does not disappear after the particular case is over—rather, it becomes federal law that must be applied by other courts to other cases. As the federal law becomes increasingly more complex, procedural errors may be found in many cases even though all courts would agree that the results of those cases were correct. In the death-penalty context, habeas courts often deal with cases in which the federal procedural rules were violated, but in which the result of the proceeding was nevertheless correct, and in which reversal would thus impinge on the values of federalism and comity without producing a corresponding improvement in the basic justice of the outcome. In such cases, habeas courts face severe pressure to devise and apply curative methods (such as “harmless error” doctrines) to preserve the correct result even in the face of a recognized violation of federal procedural law.⁵⁹

In the early 1980s, the Court took the first in a series of steps to ameliorate the over-reversal problem which threatened to derail the administration of state death penalty systems the Court had upheld as constitutional just a few years before. In *Zant v. Stephens*⁶⁰ and *Barclay v. Florida*,⁶¹ the Court articulated a new Eighth Amendment “harmless error” test for death sentencing.⁶² *Zant v. Stephens* involved the recurring

59. Hoffmann, *Is Innocence Sufficient?*, *supra* note 27, at 825.

60. 462 U.S. 862 (1983).

61. 463 U.S. 939 (1983).

62. See generally Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (arguing that the Supreme Court has essentially stopped regulating states' administration of the penalty phase of capital murder trials).

situation where one statutory aggravating circumstance in a case is held invalid, but other valid aggravators remain.⁶³ The Court held that, in a state like Georgia where the statutory aggravating circumstances served only as a threshold requirement, establishing eligibility for the death penalty but not guiding the final sentencing decision, this situation did not require reversal of the death sentence.⁶⁴

Barclay presented a similar situation, but in a different statutory context, that of the Florida death penalty system, where statutory aggravators were not merely threshold requirements but served to guide the capital sentencer throughout the decisionmaking process. There, the Court held that harmlessness in capital sentencing could be established by the reviewing court in much the same way as traditional "harmless error" in the content of convictions at trial.⁶⁵

These harmless error rules ensured that at least some substantively justifiable death sentences would not need to be reversed because of procedural errors, but the practical effect was minimal. Few cases fit within the narrow scope of *Zant v. Stephens* or *Barclay v. Florida*,⁶⁶ so the Court was forced to turn elsewhere.

If a solution to the problem of over-reversal of state death penalty cases could not be found within the Eighth Amendment itself, then perhaps it could be found in greater regulation of the procedural mechanisms by which Eighth Amendment claims were litigated. The primary such mechanism, of course, is federal habeas.⁶⁷ So the Court began judicially restricting access to federal habeas, even though, as a practical matter, habeas review created few problems for the states in non-capital cases.

Beginning in the late 1970s, and accelerating rapidly in the 1980s and early 1990s, the Court imposed numerous new procedural restrictions on the ability of death row inmates (and all other state convicts) to use habeas petitions to obtain review of federal constitutional claims. These procedural restrictions, announced in such cases as *Wainwright v. Sykes*,⁶⁸

63. See *id.* at 347 (noting that although the Georgia Supreme Court previously struck down one of the three statutory aggravating circumstances as unconstitutionally vague, it nevertheless held that the death sentence could stand on the basis of the two other valid circumstances).

64. See *Zant*, 462 U.S. at 884-89.

65. See *Barclay*, 463 U.S. at 956-58 (holding that sentencing a defendant to death on the basis of an improper statutory ground does not mandate reversal).

66. See Weisberg, *supra* note 62 at 358 ("If the Court discovers new disequilibrium in the death penalty, there will be constitutional doctrine consistent with *Zant* and *Barclay* which the Court can use in any effort at regulation.")

67. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), for an explanation of some of the structural reasons why most federal habeas courts are more aggressive in the defense of federal constitutional rights than many state courts.

68. 433 U.S. 72, 87 (1977) (barring federal habeas review based on the failure to raise a claim properly in state court absent a showing of cause and prejudice).

Rose v. Lundy,⁶⁹ *Kuhlmann v. Wilson*,⁷⁰ *Teague v. Lane*,⁷¹ *Butler v. McKellar*,⁷² *McCleskey v. Zant*,⁷³ and *Brecht v. Abrahamson*,⁷⁴ barred the federal courthouse doors to many otherwise meritorious federal constitutional claims in capital and non-capital cases alike.

Once again, however, the Court got into trouble because it insisted on using a procedural solution (procedural habeas restrictions) to try to solve a substantive problem (the over-reversal of substantively deserved death sentences). The new habeas restrictions adopted by the Court barred the doors not only to the many death row inmates whose death sentences were substantively deserved, despite the possible presence of procedural error in their cases, but also to the few death row inmates whose sentences, like those of Lockett and Godfrey, were undeserved. To put it another way, the Court's procedural habeas restrictions threatened to prevent habeas courts from reaching and reversing even those few death sentences that they might have viewed as substantively unjust.

As a result, the Court was forced to create a new substantive exception to these new procedural habeas restrictions, and it did. In the late 1980s and early 1990s, in such cases as *Murray v. Carrier*,⁷⁵ *Kuhlmann v. Wilson*,⁷⁶ *Smith v. Murray*,⁷⁷ *McCleskey v. Zant*,⁷⁸ *Coleman v. Thompson*,⁷⁹ and *Sawyer v. Whitley*,⁸⁰ the Court created an exception to almost every one of the new habeas restrictions based on proof that the petitioner had suffered a "fundamental miscarriage of justice."⁸¹ This

69. 455 U.S. 509, 510 (1982) (requiring that state remedies be exhausted for all claims presented for habeas review).

70. 477 U.S. 436, 454 (1986) (prohibiting successive federal habeas petitions absent some colorable showing of factual innocence).

71. 489 U.S. 288, 311-12, 316 (1989) (holding that new constitutional decisions are not to be applied retroactively in habeas proceedings absent a showing that the new rules place certain kinds of primary, private conduct beyond the scope of criminal law or guarantee procedures implicit in a scheme of ordered liberty).

72. 494 U.S. 407, 414-15 (1990) (announcing that the *Teague* rule applies whenever state courts could have reasonably disagreed over the governing federal standard).

73. 499 U.S. 467, 493 (1991) (holding that the failure to raise a claim in a first federal habeas petition constitutes an abuse of the writ in subsequent habeas claims absent a showing of cause and prejudice).

74. 507 U.S. 619, 623 (1993) (applying the harmless error rule to habeas cases).

75. 477 U.S. 478, 495-96 (1986) (recognizing an exception to the procedural default doctrine).

76. 477 U.S. 436, 454 (1986) (recognizing an exception to the successive petition doctrine under an "ends of justice" standard).

77. 477 U.S. 527, 537-38 (1986) (recognizing an exception to the procedural default doctrine).

78. 499 U.S. 467, 494-95 (1991) (recognizing an exception to the abuse-of-the-writ doctrine).

79. 501 U.S. 722, 750 (1991) (recognizing an exception to the procedural default doctrine).

80. 505 U.S. 333, 339-40 (1992) (recognizing an exception to the procedural default doctrine).

81. The only major habeas restriction for which the Court did not create an exception was the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). See Ellen E. Boshkoff, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651, 667-72 (1990) (arguing for the creation of a "fundamental miscarriage of justice" exception to *Teague*'s rule of non-retroactivity).

substantive exception allowed habeas courts to invite back into the federal courthouse the few death row inmates, as well as the few non-capital convicts, whose cases involved both substantive and procedural errors.

For habeas petitioners raising claims of factual innocence, the fundamental miscarriage of justice exception proved to be much more significant in theory than in practice since almost no such petitioners qualified for the exception.⁸² In 1992, the Court also virtually ensured that the exception would not apply to most claims by death row inmates that their death sentences were undeserved. In *Sawyer v. Whitley*,⁸³ the Court held that the exception applies to capital sentencing only if the defendant can show by clear and convincing evidence that, absent the alleged constitutional error, no reasonable juror would have found the defendant eligible for the death penalty.⁸⁴ Three years later, however, in *Schlup v. Delo*,⁸⁵ the Court held that the demanding *Sawyer* standard is limited to capital sentencing cases and explained that the proper standard in cases involving claims of factual innocence is simply whether "it is more likely than not that no reasonable juror would have convicted" absent the alleged constitutional error.⁸⁶

By the early 1990s, the Court, now more conservative than before, was no longer issuing many new Eighth Amendment procedural rulings in favor of capital defendants. Moreover, as a result of the Court's 1989 habeas retroactivity decision in *Teague v. Lane*,⁸⁷ most of the few pro-defense rulings that were made did not apply to habeas cases anyway and therefore could not benefit capital habeas petitioners.⁸⁸ In addition, the exceedingly narrow scope of the fundamental miscarriage of justice exception meant that many otherwise valid procedural claims were barred, especially if a capital defendant's lawyers had defaulted the claim by failing to raise it properly in state court. Despite these restrictions, however, three categories of procedural claims remained generally available to capital defendants in habeas.

82. See Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 207-08 (1994) (discussing the narrow scope of the exception).

83. 505 U.S. 333 (1992).

84. *Id.* at 336.

85. 513 U.S. 298 (1995).

86. *Id.* at 327.

87. 489 U.S. 288 (1989). See generally Hoffmann, *New Vision*, *supra* note 56 (discussing the significance of *Teague*).

88. *Teague* and its progeny created exceptions to the non-retroactivity rule for (1) new decisions that render a prior conviction substantively, rather than procedurally, invalid, such as a decision holding that the underlying behavior cannot be criminalized, and (2) new decisions that establish a "watershed rule" of criminal procedure, "the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" See *Teague*, 489 U.S. at 311-14 (quoting *Mackey v. U.S.*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part)).

The first category involved procedural claims that had been properly preserved by the capital defendant's lawyers in state court and that involved so-called "mixed questions" of fact and law. Such mixed claims were governed by a favorable de novo standard of review, which meant that the habeas courts did not need to give any weight to the state court's prior adjudication of the claim.⁸⁹ In *Wright v. West*,⁹⁰ the State of Virginia argued that this de novo standard was inappropriate, given that habeas courts had long been required to defer to state-court findings of fact⁹¹ and could not reverse state-court rulings based on erroneous legal interpretations unless those interpretations were "patently unreasonable" in light of established federal legal precedents.⁹² The Court in *West* declined to adopt Virginia's proposed deferential standard for mixed issues in habeas cases, although three of the Justices agreed with Virginia's argument.⁹³ It would be four years until Congress, in 1996, finally stepped in to limit habeas relitigation of mixed questions.⁹⁴

The second and third categories, while procedural in form, actually represented disguised efforts to relitigate the substance of the case. The second category involved claims that a capital defendant's lawyers had rendered ineffective assistance of counsel in state court, violating the Sixth Amendment.⁹⁵ Any capital defendant whose lawyer had failed to preserve some procedural claim in state court could try to salvage the defaulted claim by arguing ineffective assistance of counsel.⁹⁶ Even defendants

89. See *Wright v. West*, 505 U.S. 277, 301-03 (1992) (O'Connor, J., concurring in the judgment) (arguing that the Court has often addressed the standard of review issue and has consistently applied a de novo standard); *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (stating that a question regarding the constitutional manner in which a confession was obtained "is a matter for independent federal determination"); *Brown v. Allen*, 344 U.S. 443, 458, 463 (1953) (holding that a state court judgment is "not *res judicata*" regarding federal habeas claims and that the federal court should determine whether the state adjudication "has resulted in a satisfactory conclusion"); but see *West*, 505 U.S. at 289-90 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J., announcing the judgment of the Court) (arguing that a de novo standard has never been directly adopted by the Court).

90. 505 U.S. 277 (1992).

91. See generally *Townsend v. Sain*, 372 U.S. 293, 313 (1963) (discussing factors that should lead a habeas court to conduct a factual hearing, later codified at 28 U.S.C. § 2254(d) (1966)).

92. See *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (defining "new" rule to include all rules "susceptible to debate among reasonable minds"); *Teague*, 489 U.S. at 301 (explaining that a "new" rule subject to the non-retroactivity doctrine is one "not dictated by precedent existing at the time the defendant's conviction became final"); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 115 (explaining generally how the *Teague* non-retroactivity doctrine, as modified by *Butler v. McKellar*, effectively requires federal courts to defer to reasonable state court interpretations of federal constitutional law).

93. See *West*, 505 U.S. at 291 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J., announcing the judgment of the Court).

94. See *infra* notes 109-19 and accompanying text.

95. See *Strickland v. Washington*, 466 U.S. 668 (1984).

96. See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986) (holding that a Sixth Amendment claim of ineffective assistance of counsel is cognizable on habeas even though the defense

without much of a procedural claim—such as those whose primary argument was simply that they should get a second opportunity to present a better mitigation case at sentencing—could turn their essentially substantive claim (“I don’t deserve a death sentence”) into a procedural one by characterizing it as an ineffective assistance claim (“I would surely have avoided the death penalty, or perhaps even have been found innocent, if only my defense lawyer had done a better job at my trial and sentencing hearing”).⁹⁷

The third category involved the converse of an ineffective assistance claim—namely, the claim that the prosecutor was responsible for the substantively unjust result by failing to disclose material exculpatory evidence in violation of due process and *Brady v. Maryland*.⁹⁸ Once again, this exception provided capital defendants with a chance to seek a second sentencing hearing or trial by turning an essentially substantive claim (“I don’t deserve a death sentence”) into a procedural one (“I would surely have avoided the death penalty, or perhaps even have been found innocent, if only the prosecutor had not kept material evidence hidden from my lawyer and the factfinder”). Any doubt about the potential value of this kind of claim to capital defendants was eliminated when the Court granted review, and ultimately reversed the defendant’s conviction, in *Kyles v. Whitley*,⁹⁹ a case noteworthy because it fell within none of the Court’s previously recognized parameters for a grant of certiorari.¹⁰⁰

What about death row inmates who believed that their sentences or convictions were substantively unjust, yet could not identify any federal constitutional procedural errors—not even ineffective assistance or *Brady* violations—in their cases? Since the fundamental miscarriage of justice exception did not itself create a separate constitutional claim but only

lawyer’s alleged error consisted of a failure to raise a Fourth Amendment claim properly in an earlier state proceeding).

97. See, e.g., *T. Williams v. Taylor*, 120 S. Ct. 1495 (2000) [hereinafter *T. Williams v. Taylor*] (reversing a death sentence based on ineffective assistance of counsel where the defendant’s lawyers did not investigate or present substantial mitigating evidence to the sentencing jury).

98. 373 U.S. 83 (1963).

99. 514 U.S. 419, 421-22, 441, 454 (1995) (finding, on habeas review, that the prosecutor’s failure to disclose eyewitnesses’ statements that would have substantially weakened the prosecution’s case raised a reasonable probability that disclosure would have produced a different result; thus, a new trial was in order).

100. See *id.* at 456 (Scalia, J., joined by Rehnquist, C.J., and Kennedy & Thomas, JJ., dissenting) (“The greatest puzzle of today’s decision is what could have caused this capital case to be singled out for favored treatment.”). But see *id.* at 454 (Stevens, J., joined by Ginsburg & Breyer, JJ., concurring) (“Even aside from its legal importance, however, this case merits ‘favored treatment’”).

The Court has recently signaled that *Kyles v. Whitley* should not be read to create a new *Brady* standard that would be more favorable to death row inmates. In *Strickler v. Greene*, 527 U.S. 263 (1999), the Court rejected a claim that undisclosed evidence that could have been used to impeach a key prosecution witness in a capital trial was “material” under *Brady*.

provided a means of salvaging some other constitutional claim that otherwise would have been barred, would a petitioner presenting a “naked innocence” claim be able to obtain habeas review and possibly relief?

This was precisely the question posed by *Herrera v. Collins*.¹⁰¹ In *Herrera*, the defendant premised his habeas petition on allegedly newly discovered evidence of his innocence, evidence that emerged too late to be introduced by means of an appeal or state post-conviction proceeding.¹⁰² Herrera argued that it would violate due process, in the substantive sense, for the state to execute someone who might be innocent.¹⁰³ A majority of the Court agreed in theory, but found no merit in Herrera’s claim because the new evidence was so weak.¹⁰⁴ Herrera was executed shortly thereafter.¹⁰⁵

By 1995, then, only a few broad categories of procedural claims—namely, mixed questions, ineffective assistance claims, and *Brady* claims—held out any meaningful hope for most death row inmates seeking to challenge their convictions or sentences in habeas. The good news for such habeas petitioners was that the Court, in such cases as *Wright v. West*,¹⁰⁶ *Kyles v. Whitley*,¹⁰⁷ and *Schlup v. Delo*,¹⁰⁸ had shown itself unwilling to restrict habeas any further, preferring to preserve the ability of habeas courts to use procedural claims to reach and remedy the rare case of substantive injustice. The bad news, however, was that the other shoe was about to drop.

Enter Congress. In the wake of the Oklahoma City terrorist bombing, Congress enacted, and President Clinton signed into law, the Antiterrorism

101. 506 U.S. 390 (1993).

102. *Id.* at 396-97, 400 (basing an actual innocence habeas claim on affidavits, inadmissible in Texas state courts due to procedural time limits, averring that the recently deceased brother of the convict had committed the crime).

103. *Id.* at 398 (“Petitioner asserts that the Eighth and Fourteenth Amendments . . . prohibit the execution of a person who is innocent of the crime for which he was convicted.”).

104. *See id.* at 417 (noting that even if the Court were to assume that a persuasive demonstration of actual innocence would make an execution unconstitutional, the defendant’s evidence fell far short of the high threshold that would be required).

105. *See Death by Injection for Cop Killer; Alleged Proof of Innocence Too Late to Save Texas Man*, CHI. TRIB., May 13, 1993, at 11, available in 1993 WL 11069991.

106. 505 U.S. 277 (1992). A majority of the Court refused to modify the presumed de novo standard of review for mixed question habeas cases. *See supra* notes 89-93 and accompanying text (discussing the standards of review for mixed questions of fact and law).

107. 514 U.S. 419, 440-41 (1995) (granting a habeas petition in a capital case where the cumulative effect of state-suppressed evidence raised a reasonable probability that its disclosure would have produced a different result at trial); *see supra* notes 98-100 and accompanying text (describing evidence suppression claims).

108. 513 U.S. 298, 324, 327 (1995) (holding that the proper standard in actual innocence claims for capital cases is that it is “more likely than not” that a constitutional violation has resulted in an erroneous conviction, and refusing to apply the “clear and convincing” standard of *Murray v. Carrier*, 477 U.S. 478 (1986)); *see supra* notes 82-86 and accompanying text (describing the evolution of standards for actual innocence claims).

and Effective Death Penalty Act of 1996 (AEDPA),¹⁰⁹ which contained the most significant habeas reforms since 1867. AEDPA was designed to make habeas review and relief even less freely available than it had become as a result of the Court's decisions.¹¹⁰ Among other reforms, AEDPA implemented (1) a one-year statute of limitations on the filing of a first habeas petition;¹¹¹ (2) new and severe restrictions on all second and subsequent petitions;¹¹² and, most significantly, (3) a new "reasonableness" standard of review, similar to the one rejected by the Court in *Wright v. West*, for all habeas claims, including "mixed questions."¹¹³ AEDPA also created a completely separate and even more restrictive form of habeas for capital cases, applicable in any state that chose to implement certain special opt-in procedures, most notably a statewide system for guaranteeing capital defendants qualified and experienced counsel in all state post-conviction proceedings.¹¹⁴

The expressed goal of AEDPA was to end prolonged habeas litigation in capital cases. However, in the first few habeas cases to reach the Court under the new statute, the Court proved quite resourceful at keeping the door of the federal courthouse open to habeas petitioners, at least a crack. In each of these early AEDPA cases—*Felker v. Turpin*,¹¹⁵ *Calderon v. Thompson*,¹¹⁶ *Stewart v. Martinez-Villareal*,¹¹⁷ and *Hohn v. United States*¹¹⁸—the Court rejected the government's claim that AEDPA completely bars habeas review and relief. Instead, the Court emphasized the

109. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C. (Supp. IV 1998)).

110. See, e.g., President William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, (Apr. 24, 1996), in 1996 PUB. PAPERS 630, 631 (1996) ("I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served.").

111. See 28 U.S.C. § 2244(d)(1) (Supp. IV 1998).

112. See *id.* § 2244(b) (requiring (1) the dismissal of all claims in successive habeas applications that were raised in a previous application and (2) creating a presumption of dismissal of all new claims in successive applications with three narrow exceptions).

113. See *id.* § 2254(d)(1) (allowing federal courts to grant habeas applications on behalf of persons in custody pursuant to a state court judgment only when the claim resulted in a decision contrary to clearly established federal law as determined by the Supreme Court).

114. See AEDPA § 107(a), 28 U.S.C. § 2261(a)-(c) (Supp. IV 1998).

115. 518 U.S. 651, 660-61 (1996) (stating that while AEDPA precludes certiorari review of a circuit court's denial of permission to file successive habeas petitions, a petitioner can still file an original habeas petition in the Supreme Court seeking review of his case).

116. 523 U.S. 538, 553-54 (1998) (holding that a circuit court may, under certain circumstances, recall its own mandate sua sponte and grant habeas relief where such relief would otherwise be barred by AEDPA's successive-petition rule).

117. 523 U.S. 637, 644 (1998) (holding AEDPA's successive-petition rule inapplicable to a petitioner whose earlier habeas petition was dismissed because his claim was then premature).

118. 524 U.S. 236, 253 (1998) (holding that the Supreme Court has jurisdiction to review a circuit court's denial of a certificate of appealability).

need to preserve habeas jurisdiction, if only to provide the federal courts with a means of reaching and remedying the rare case of substantive injustice.¹¹⁹ In two very recent AEDPA decisions, *Slack v. McDaniel*¹²⁰ and *Michael Williams v. Taylor*,¹²¹ the Court likewise rejected government suggestions that the statute be interpreted to preclude habeas petitioners from obtaining federal review of their claims.

In the most significant case to date under AEDPA, *Terry Williams v. Taylor*,¹²² the Court addressed the proper construction of section 2254(d)(1) of the Act, which provides that a habeas court may grant relief to a petitioner only if the state court's adjudication of the petitioner's claim (1) "was contrary to," or (2) "involved an unreasonable application of," clearly established federal law as determined by the Court.¹²³ This was the provision intended by Congress to reverse the Court's decision in *Wright v. West*,¹²⁴ which had held that habeas courts need not defer to state-court decisions on mixed issues involving the application of federal law to the facts of a particular case. In *Terry Williams* a narrow majority of the Court held that section 2254(d)(1) makes it more difficult than before for habeas petitioners to obtain relief based on such claims:

The term "unreasonable" is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable.¹²⁵

119. See generally LIEBMAN & HERTZ, *supra* note 58, § 3.2, at 115-18 ("[T]he Court has demonstrated a willingness to use its interpretive powers to moderate restrictions apparently effected by AEDPA and, in situations in which AEDPA undeniably cuts off review, to establish or reaffirm the continuing vitality of alternative means of judicial review to rectify serious systemic malfunctions.").

120. 120 S. Ct. 1595 (2000) (holding that (1) under AEDPA, the denial of habeas relief by a federal district court may be appealed not only on constitutional grounds, but also on non-constitutional federal grounds, and (2) AEDPA's general prohibition on "second or successive" habeas petitions does not apply when the initial petition was dismissed without adjudication on the merits because of the petitioner's failure to exhaust state remedies).

121. 120 S. Ct. 1479 (2000) (adopting the petitioner's interpretation of AEDPA's prohibition on evidentiary hearings in habeas whenever the petitioner "failed to develop the factual basis of a claim" in state court, so that review is not denied unless there was a lack of diligence, or some greater fault, attributable to the petitioner or his counsel). On the same day, the Court also decided an unrelated but identically named AEDPA case, *T. Williams v. Taylor*, 120 S. Ct. 1495 (2000).

122. 120 S. Ct. 1495 (2000).

123. 28 U.S.C. § 2254(d)(1) (Supp. IV 1998).

124. 505 U.S. 277 (1992).

125. *T. Williams*, 120 S. Ct. at 1522 (O'Connor, J., delivering the opinion of the Court with

At the same time, the Court rejected the government's argument that section 2254(d)(1) permits habeas relief only when the federal court determines that the state court has applied federal law "in a manner that reasonable jurists would all agree is unreasonable,"¹²⁶ holding instead that under section 2254(d)(1) the habeas court should simply ask whether the state court's judgment was "objectively unreasonable."¹²⁷ The Court proceeded to reverse petitioner Williams's conviction, even under AEDPA's tougher standard of review, because his lawyer had clearly rendered constitutionally ineffective assistance of counsel and it was therefore unreasonable for the state court to have concluded otherwise.¹²⁸

Among the Court's AEDPA decisions, however, perhaps the most interesting for present purposes was the convoluted procedural saga of *Edwards v. Carpenter*.¹²⁹ In *Carpenter*, the petitioner pled guilty to murder and robbery despite maintaining his innocence, and his convictions were affirmed on appeal. Later, the petitioner—represented by new counsel—filed an application in state court to reopen his appeal, contending that his original appellate lawyer had been constitutionally ineffective for failing to challenge the sufficiency of the evidence supporting his convictions. The state court dismissed the application as untimely. In federal habeas, the petitioner argued that his original appellate lawyer's ineffectiveness was "cause" sufficient (if accompanied by a showing of "prejudice") to excuse the procedural default of his sufficiency-of-the-evidence claim. The Court agreed that such an ineffectiveness claim could satisfy the "cause" requirement—but only if such claim was not procedurally defaulted in its own right, or if such procedural default was, in turn, excused by its own showing of "cause and prejudice." The mere fact that the petitioner had raised his ineffectiveness claim in his application to reopen his appeal—at a stage when the applicable state procedural rules precluded the state court from reaching the merits of the claim—was insufficient, in the Court's view, to overcome the preclusive effects of the procedural default doctrine.

Carpenter represents the apex, for now, of the Court's pyramid of excessive proceduralism in habeas law. Justice Breyer's opinion concurring in the judgment perhaps said it best:

Although the question [presented in this case], like the majority's opinion, is written with clarity, few lawyers, let alone unrepresented

respect to Part II, concurring in part and concurring in the judgment) (emphasis in original).

126. *Id.* at 1521 (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), in which the Fourth Circuit adopted the position advocated by the government in *T. Williams*).

127. *Id.* at 1521.

128. *Id.* at 1516 (Stevens, J., announcing the judgment of the Court and delivering the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Parts II and V).

129. 120 S. Ct. 1587 (2000).

state prisoners, will readily understand it. The reason lies in the complexity of this Court's habeas corpus jurisprudence—a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure. Today's decision unnecessarily adds to that complexity¹³⁰

Justice Breyer also grudgingly acknowledged that “this system of rules has a certain logic, indeed an attractive power for those who like difficult puzzles.”¹³¹

In the end, despite all of the attempts by the Court and Congress to read the habeas writ into oblivion, habeas survives. The real question, however, is whether habeas survives in the proper form. The endless and vicious cycle of excessive proceduralism, which began as a direct result of *Furman*, *Gregg*, and the post-*Gregg* “super due process” interpretation of the Eighth Amendment, continues to plague the law of habeas, as evidenced by cases like *Edwards v. Carpenter*. If habeas is truly to be saved, if it is to continue to perform its historic role of preventing substantive injustice, then the cycle must be broken. Substance must become the primary focus of habeas review in capital cases.

III. The Importance of Substantive Review in Capital Habeas Cases

The cycle of excessive proceduralism in habeas corpus law, which (as I have explained) is largely a by-product of the Court's procedural interpretation of the Eighth Amendment, is not merely a matter of academic interest. In the all-too-real world of capital litigation, this cycle has contributed to serious practical problems that threaten to undermine the very foundations of some state capital punishment systems.

The primary practical problem with federal habeas corpus in death penalty cases today is that habeas courts are limited to dealing with procedural issues. Although such issues are important, they should properly be seen as secondary, especially in capital cases, to the overriding importance of ensuring that substantive justice is done. It is intolerable for a habeas court reviewing a state death penalty case to be unable to consider directly the possibility of the defendant's factual innocence or the sense that the defendant, even though guilty, does not deserve to die for his crime;¹³² yet this is the way it is.

130. *Id.* at 1593 (Breyer, J., concurring in the judgment).

131. *Id.* at 1595.

132. See Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 *IND. L.J.* 7, 13-16 (1996) (providing a reviewing judge's sentiments when faced with the possibility that a convicted defendant facing execution might be factually innocent, but not being allowed to grant a retrial under governing standards).

Current events highlight this shocking defect. The recent, highly publicized revelations about substantive errors in the application of the death penalty in Illinois not only have led the governor of that state to suspend all executions pending a comprehensive review of the Illinois capital punishment system,¹³³ but also have prompted introduction of at least five bills in Congress designed to ensure that death row inmates have access to, and can introduce in court, DNA evidence that might establish their factual or legal innocence.¹³⁴

The issue of post-trial admissibility of DNA evidence, however, is only one specific example of a general and extremely troubling problem. There is something seriously wrong with our legal system when it takes federal legislation to authorize reviewing courts to consider probative evidence of a death row inmate's innocence. Such authority should be given in virtually any civilized system of justice. Moreover, why should such authority be limited to the narrow category of DNA evidence—shouldn't any sufficiently probative evidence of innocence be equally admissible? Finally, why should the reviewing court's substantive consideration of a death penalty case be limited to the sole issue of guilt or innocence—why shouldn't the court also consider whether the death penalty is morally justified on the facts of the particular case? The proposed federal DNA legislation has already garnered substantial bipartisan support,¹³⁵ but does not go nearly far enough to ensure substantive justice in death penalty cases.

Our entire criminal justice system seems implicitly premised on the belief that perfect procedures can guarantee substantively perfect outcomes. For example, in *Herrera v. Collins*,¹³⁶ the aforementioned case involving a capital habeas petitioner with a "naked innocence" claim, Justice O'Connor acknowledged that the execution of a "legally and factually innocent person would be a constitutionally intolerable event."¹³⁷ But she asserted that the Court need not be deeply concerned about such an unthinkable problem, because it will probably never happen:

[T]he Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the

133. See Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure"; Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1, available in 2000 WL 3632094.

134. See Accuracy in Judicial Administration Act, H.R. 3623, H.R. 4162, 106th Cong. (2000); Innocence Protection Act, S. 2073, H.R. 4078, H.R. 4167, 106th Cong. (2000).

135. See Mike Dorning, *Death Penalty Reforms Gain Backers in D.C.*, CHI. TRIB., Mar. 31, 2000, at 1, available in 2000 WL 3651265 (reporting on bipartisan support for proposed federal DNA legislation).

136. 506 U.S. 390 (1993).

137. *Id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring).

Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.¹³⁸

Such blind faith in the substantive effectiveness of perfect procedures is absolutely mystifying and can be downright deadly for death row inmates. Recent developments in Illinois and elsewhere suggest that substantive mistakes, even in capital cases, are much more commonplace than previously suspected.¹³⁹ Although it would be comforting to be able to say that such mistakes are always the result of someone's reversible procedural misconduct, like the prosecutor's or the police's, surely it is also possible for such mistakes to be simply the product of an honest factual—or, in the case of capital sentencing, moral—misjudgment by the jury or trial judge. Why is it so hard for us to admit that factfinders and sentencers—being human, and thus fallible—sometimes make mistakes, just like prosecutors and police do?¹⁴⁰

Once one admits the possibility of substantive error that is not attributable to reversible procedural misconduct, the nature of the problem becomes clear. Most capital cases do not involve substantive error—the defendant is in fact guilty, and, as measured by the moral standards of the community, deserves to die. If constitutional procedural error occurs in such cases, and if such error has been properly preserved for review, then it should of course be corrected.¹⁴¹ The current system of habeas review is, in theory, designed to do exactly that.¹⁴²

But what of those capital cases involving substantive error—where the defendant is, in fact, innocent, or where (again, as measured by the community's moral standards) the defendant, even though guilty, does not deserve to die? Fortunately for the defendant, in some such cases,

138. *Id.* at 427 (O'Connor, J., joined by Kennedy, J., concurring).

139. See *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at 1, available in 1999 WL 2932178 (reporting on mistaken convictions in Illinois death penalty cases). See generally Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 LAW & CONTEMP. PROBS. 193 (1998) (examining the quality of appellate review of death penalty cases in Illinois).

140. Americans seem to need to believe in the infallibility of the jury. This belief, based on faith rather than empirical evidence, seems to be one form of American "civic religion." See Frank E. Reynolds, *Dhamma in Dispute: The Interactions of Religion and Law in Thailand*, 28 L. & SOC. REV. 433, 441 (1994) (discussing the general concept of "civic religion"); Joseph L. Hoffmann, "Truth" and the Japanese Code of Criminal Procedure, 1148 JURISTO 178 (1999) (special issue of a leading Japanese law journal honoring the 50th anniversary of the Japanese Code of Criminal Procedure) (contrasting the Japanese belief in "factual truth," that the legal system can always uncover an objectively true factual account of what happened, with the American belief in "legal truth," that whatever "truth" emerges from a legitimate legal proceeding, especially the version of the "truth" spoken by the jury, is sufficient).

141. Cf. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 15 (1997) (noting that process, as well as substance, matters).

142. But see *id.* at 28-31 (describing cases in which courts declined to remedy procedural errors).

properly preserved procedural error also clearly exists, perhaps even as the cause of the substantive error. Again, the current habeas system is designed to deal, albeit indirectly, with the substantive problems in these kinds of cases.

The current habeas system provides no solution at all, however, for capital cases involving possible substantive error in the absence of clear and properly preserved procedural error. In cases such as *Herrera v. Collins*¹⁴³ (in the context of guilt determinations) and *Lockett v. Ohio*¹⁴⁴ and *Godfrey v. Georgia*¹⁴⁵ (in the context of capital sentencing decisions), only two things can happen—and both of them are bad. One possibility is that the habeas court, faced with a persuasive claim of substantive injustice, strains to find a constitutional procedural error sufficient to reverse the conviction or death sentence, thereby contributing to the subsequent over-reversal of other death penalty cases and perpetuating the cycle of excessive proceduralism described above. The other, more horrific possibility is that the habeas court is compelled, in the absence of clear procedural error, to affirm the defendant's conviction and death sentence, thus allowing a possibly innocent defendant, or one deserving only a life sentence, to be executed.

What is sorely needed is a reinterpretation of the Eighth Amendment that places substantive limits on the imposition of the death penalty in individual cases. As was originally urged in *Herrera*, the Eighth Amendment should be reinterpreted to require that the imposition of the death penalty is based not only on a procedurally valid guilty verdict at trial, but also on the continuing moral certainty—at every stage of the post-trial proceedings—that the defendant is, in fact, guilty.¹⁴⁶ Moreover, as was argued more than twenty years ago in *Lockett* and *Godfrey*, the Eighth Amendment should further be reinterpreted to require the imposition of the death penalty in every individual capital case to be consistent with the moral standards of the community.¹⁴⁷

Such a proposal—which would likely require action by both the Court and Congress to implement¹⁴⁸—would force federal habeas courts to

143. 506 U.S. 390 (1993) (holding that a death row inmate's claim of innocence did not entitle him to federal habeas relief).

144. 438 U.S. 586 (1978) (holding that the limited range of mitigating circumstances a sentencing court could consider under the Ohio death penalty statute was incompatible with the Eighth and Fourteenth Amendments).

145. 446 U.S. 420 (1980) (holding that the Georgia Supreme Court's broad construction of the state's death penalty statute violated the Eighth and Fourteenth Amendments).

146. See *Herrera*, 506 U.S. at 431-35 (Blackmun, J., dissenting) ("The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced.")

147. See *Lockett*, 438 U.S. at 604-05; *Godfrey*, 446 U.S. at 428-29.

148. AEDPA's new "reasonableness" standard of review for mixed fact-and-law claims and limitations on the power of habeas courts to conduct evidentiary hearings would block meaningful

review the merits of every individual death sentence.¹⁴⁹ In order to uphold the death sentence, each court sitting in habeas would have to conclude, to a moral certainty, that the defendant is guilty. Each habeas court would also have to conclude, to its own moral satisfaction, that the defendant's death sentence is deserved because it is consistent with the community's moral standards. These two substantive tests would apply independently of any constitutional procedural issues that also might be present in the particular case.

Four important aspects of this proposal must be emphasized. First, the substantive review contemplated would differ from the "proportionality review" contained in some state death penalty statutes.¹⁵⁰ Proportionality review generally compares an individual capital case with one or more similar cases from the same jurisdiction to determine whether the instant death sentence is consistent with the results in the other similar cases. The current proposal, on the other hand, asks the habeas court to make its own determination about whether the individual death sentence is deserved in terms of prevailing community norms. Such a determination might take into account results in other similar capital cases, but it need not. The habeas court could simply decide for itself whether the death penalty is morally justified in the particular case itself, so long as the court's decision is based on its view of the community's moral standards rather than on its own personal moral views.

Second, the proposal would require habeas courts to make fact-specific judgments that would be difficult, if not impossible, to distill into legal rules. Indeed, in my view, it would be unwise even to attempt to derive such rules from the substantive outcomes of individual death penalty habeas cases.

Long ago, in *Furman*, the Supreme Court succumbed to the temptation to compel quasi-codification of the myriad factors that make the death penalty appropriate or inappropriate in specific cases. As Justice Harlan predicted in *McGuatha*, this effort has failed, in two important ways. On one hand, it has failed to produce the desired rationality and predictability in death sentencing; on the other hand, it has largely deprived the jury's capital sentencing decision of its proper character as a fundamentally irreducible and personal moral judgment. In the words of Robert Weisberg:

substantive review, even if the Court were to reinterpret the Eighth Amendment in the manner suggested.

149. The proposal, because it is based on the reinterpretation of the Eighth Amendment, would also require state appellate and post-conviction courts to conduct similar substantive review on direct appeal and in state post-conviction proceedings; but this effect is beyond the scope of both this Article and this Symposium.

150. See, e.g., *Pulley v. Harris*, 465 U.S. 37 (1984).

Harlan's famous statement that a comprehensive and intelligible death penalty law is beyond human ability bears careful reading in the context of the whole opinion. Harlan does not say that a jury's [discretionary] decision to kill is inevitably irrational. He says with some confidence as jurors face so obviously awesome a decision they will naturally act with appropriate moral seriousness, guided by at least intuitive moral rationality. Harlan says that we cannot mitigate our inevitable moral ambivalence about condemning people to death by dignifying our decision in the illusory language of legal science. . . . Once we recognize moral choice as more art than science, we can achieve a reasonable amount of harmony and consistency in the course of our moral choices, so that at least in retrospect we can say that we have acted in some sense "rationally." The call for something more reassuring—a verifiable formula of moral decision that prescribes future choices—comes not from moral philosophy, but from the need of "public order" for political symbols of rationality. . . . The development of the formal model, at least in the long run, suppresses more than it answers the moral and political questions that ought to be addressed before we execute people.¹⁵¹

Having already allowed jurors to hide their moral ambivalence about the death penalty behind the comforting language of law, we must not make the same mistake twice. Habeas judges, in their substantive review of death sentences, must not be permitted to resort to "legal science" to avoid confronting the terrible truth of the moral judgments they are being asked to make. They must grapple with the thorny "moral and political questions" that underlie each capital sentencing decision. They should strive to stand in the shoes of society at large, setting aside personal idiosyncrasies in favor of a more objective judgment based on an interpretation of the community's moral standards. But, in the end, what is most crucial is for habeas judges to act with "appropriate moral seriousness, guided by . . . intuitive moral rationality."¹⁵² Legal rules can only get in the way of such moral judgments. Although such a moral responsibility does not now rest upon the shoulders of habeas courts, there are good reasons to place it there. Perhaps the best reason is that habeas courts seem to be in the best position to fulfill this responsibility. For one thing, federal judges are not elected, unlike most of their state counterparts, and therefore are not subject to the political pressures that make it difficult for state judges to reverse convictions or sentences in capital cases.¹⁵³

151. Weisberg, *supra* note 62, at 312, 395.

152. *Id.* at 312.

153. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776-79 (1995)

More importantly, recent empirical research reveals that the legal actors who now make all of the key substantive decisions in capital cases—namely, the juries who convict capital defendants and recommend or impose their death sentences—do not always feel appropriately morally responsible for the outcome of the cases.¹⁵⁴ They often assume that (1) the law compels them to render a particular sentencing verdict (they make this assumption even in the face of contrary jury instructions), (2) the trial judge shares moral responsibility for the outcome, or (3) state and federal appellate and habeas courts will ensure that any mistakes they make will be corrected later.¹⁵⁵ The jury can easily make these assumptions because its role is performed at the very beginning of the capital case—in point of fact, there will typically be many levels of judicial review after the jury has completed its task, even if none of those reviews will revisit the substantive justice of the jury's conviction and sentencing decision.

Habeas courts, on the other hand, know that there is nowhere else for a capital case to go; once a death sentence makes it past the habeas courts, only an executive pardon or clemency will keep the defendant from being executed. Thus, of all the legal actors in a capital case, habeas courts are the most likely to take seriously their own moral responsibility to ensure that no innocent or life-deserving defendant is subjected to the ultimate punishment.¹⁵⁶

Third, it is also important to note that the substantive review this proposal contemplates would not be limited solely to the evidence presented at trial, but would include any new evidence that might be introduced during the habeas proceeding. Of course, each habeas court would have to decide whether to allow the introduction of new evidence based on that

(noting that in 42 states, and in 32 of the 38 states with the death penalty, state judges must stand for election or retention).

154. See generally Joseph L. Hoffmann, *Where's the Buck?—Juror Misperceptions of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L. J. 1137, 1155-60 (1995) [hereinafter Hoffmann, *Where's the Buck?*], (discussing empirical research indicating that death penalty juries seek to avoid the perception that they bear personal responsibility for their decision by convincing themselves they are choiceless).

155. See *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (holding that a death sentence may not rest on the determination of a jury that has been misled by the prosecutor about the extent of their sentencing responsibility); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); Hoffmann, *Where's the Buck?*, *supra* note 154 (discussing the findings of the Capital Jury Project); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (reporting findings from the Capital Jury Project).

156. One possible negative side effect that should be mentioned is that the proposed substantive review of death penalty cases by habeas courts may further diminish the jury's sense of moral responsibility for its sentencing verdict. This may not be a big problem, however, for two reasons. First, as noted previously, capital juries often manage to avoid such feelings of moral responsibility even in the absence of substantive habeas review. Second, and more importantly, if the overriding goal is to provide for meaningful substantive review of death penalty cases at some point in the review process, then a further diminution of the jury's role would be a relatively small price to pay.

court's considered judgment about the likelihood of such new evidence affecting the application of the two substantive tests. If, for example, the habeas court felt new evidence about the crime such as DNA evidence would help resolve the defendant's guilt or innocence, then the court could hold an evidentiary hearing. Similarly, if the habeas court felt new evidence on aggravation and mitigation would help determine the deservedness of the defendant's death sentence, the court could permit the introduction of such new evidence.

Moreover, as a general matter, we should not allow habeas procedural restrictions to stand in the way of ensuring substantive justice in capital cases. The procedural default doctrine, for example, which holds habeas petitioners responsible for most procedural errors of their lawyers,¹⁵⁷ seems inappropriately harsh when applied to substantive review of a capital case. Only in the rare situation where a defendant has made a fully informed and voluntary choice to bypass a fair opportunity to present a claim of substantive injustice to the state courts should the habeas courts subsequently decline to review such a claim.¹⁵⁸ Likewise, the exhaustion doctrine¹⁵⁹ should not apply to substantive claims in capital cases. Nor should the successive-petition¹⁶⁰ or abuse-of-the-writ¹⁶¹ doctrines apply to such claims, although of course the fact that an earlier habeas court has rejected a particular substantive claim should, on the merits, discourage a

157. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (barring federal habeas review based on a defendant's failure to raise a claim properly in state court absent a showing of "cause" for the procedural default and "prejudice" resulting therefrom).

158. Such a standard would be similar to the "deliberate bypass" standard for the review of constitutional claims set forth in *Fay v. Noia*, 372 U.S. 391 (1963):

We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. . . . If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default.

Id. at 438-39. *Fay v. Noia* was overruled by *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (replacing the "deliberate bypass" standard with the "cause" and "prejudice" standard in the context of failure to raise a claim in an earlier state proceeding), and *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (same holding, in the context of failure to file a state-court appeal at all). See also *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-8 (1992) (same holding, in the related context of failure to develop the facts necessary to support a claim in an earlier state proceeding).

159. See *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (requiring that state remedies be exhausted for all claims presented for habeas review).

160. See *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (prohibiting successive federal habeas petitions absent some colorable showing of factual innocence).

161. See *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (holding that the failure to raise a claim in a first federal habeas petition constitutes an abuse of the writ in subsequent habeas claims absent a showing of cause and prejudice).

later habeas court from engaging in protracted review of the same claim.

The point is that, at the end of the day, the habeas court needs to be in a position to make an informed decision about the substantive justice of each defendant's conviction and death sentence, based on a review of all available facts and circumstances. The habeas court should be morally responsible for ensuring that each individual death sentence is imposed upon a defendant who is actually guilty and deserves to die. This is the least we should expect before allowing a state to execute one of its citizens.

A fourth and final point worth emphasizing is that my proposal would be limited to capital habeas cases only. That the same kind of substantive problem may also exist in non-capital cases is true, but beside the point. No matter how wrong it may be to keep a prisoner in custody when he may be innocent or to keep him beyond the time he deserves, such injustices pale in comparison to the horror of a substantively wrongful execution. Both supporters and opponents of capital punishment should be able to agree that a wrongful execution is the single worst injustice our legal system is capable of inflicting.

As a legal matter, the Eighth Amendment certainly permits distinguishing between direct habeas review of substantive issues in capital and non-capital cases. The Supreme Court has long recognized, in terms of Eighth Amendment procedural issues, that "death is different," meaning that the irrevocability of the death penalty sometimes requires that special procedures be employed to minimize the risk of substantive error.¹⁶² The same argument, that "death is different," can be made even more forcefully when the issue involves substance directly. Substantive Eighth Amendment habeas review is a special protection that need not be extended to non-capital convictions or sentences.

Would substantive Eighth Amendment habeas review of death sentences infringe on states' rights? Would federalism stand in the way of such an otherwise desirable proposal? I think not. Frankly, it is hard to imagine how any review system could disrupt state prerogatives more than the current procedural mess of capital habeas litigation. The states spend millions of dollars litigating each capital case to execution,¹⁶³ and for the most part these millions are wasted on issues that do not directly involve

162. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed.")

163. It has been estimated that the costs associated with a death penalty case range from three to six times the total cost of maintaining that same person in prison for life. See Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 356 n.106 (1996). For example, in California alone, a recent study concluded that taxpayers could save an estimated \$90 million per year by abolishing the death penalty. See Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 136 (1989) (citing Stephen Magagmini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at 1, col. 1).

the substance of the case. The cycle of excessive proceduralism in habeas virtually guarantees that most capital cases will take many years to litigate to conclusion. Not even the best recent efforts by the Court and Congress have managed to reduce these delays substantially.

Substantive habeas review, on the other hand, is likely to produce two positive effects for the states. First, habeas courts will eliminate substantively weak capital cases early in the post-trial review process, saving states considerable time and money. Second, substantively strong capital cases will also be identified at an early stage of the review process, thus greatly reducing the odds that a habeas court will later feel pressured to find a procedural error where none really exists.

IV. Conclusion

In his classic article, *Violence and the Word*, the late Professor Robert Cover wrote:

Capital cases . . . disclose far more of the structure of judicial interpretation than do other cases. Aiding this disclosure is the agonistic character of law: The defendant and his counsel search for and exploit any part of the structure that may work to their advantage. And they do so to an extreme degree in a matter of life and death.¹⁶⁴

Capital litigation will never cease. Death row inmates will always seek to prolong their lives through litigation. The only thing that will change, over time, is the nature of the litigation. As Professor Stuntz has explained, all litigants alter their claims depending on the costs and probabilities of success of the various alternatives.¹⁶⁵ In capital habeas cases, do we really want to continue to encourage the parties to focus their energies on the litigation of procedural claims that often have little or no relation to the substantive justice of the defendant's conviction and death sentence? Would it not be much better, for both the defendant and society, if at least some significant portion of the inevitable litigation in a capital habeas case were refocused on substantive instead of procedural issues?

Professor Cover also wrote:

To any person endowed with the normal inhibitions against the imposition of pain and death, the deed of capital punishment entails a special measure of the reluctance and abhorrence which constitute the gulf that must be bridged between interpretation and action. Because in capital punishment the action or *deed* is extreme and

164. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1623 (1986).

165. See Stuntz, *supra* note 18, at 22 ("If the market functions as it should, lawyers raise claims when their *ex ante* [probability of success] value . . . is positive.").

irrevocable, there is pressure placed on the *word*—the interpretation that establishes the legal justification for the act.¹⁶⁶

For the past twenty-five years, we have required habeas courts to use procedural words to justify the imposition of death in capital cases. Such procedural words are simply not up to the task. We need to empower habeas courts to use substantive words when dealing with death penalty cases. Sometimes they will use those substantive words to justify reversing the defendant's conviction or death sentence. Sometimes they will use those substantive words to justify upholding them and sending the defendant on to his execution. Either way, however, we should rightly feel better about the substantive justice of the outcome.

166. Cover, *supra* note 164, at 1622.

