

1-1-1984

## Jurisprudential Confusion in Eighth Amendment Analysis

John C. Shawde

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

John C. Shawde, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. Miami L. Rev. 357 (1984)

Available at: <https://repository.law.miami.edu/umlr/vol38/iss2/7>

This Case Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Jurisprudential Confusion in Eighth Amendment Analysis

## I. INTRODUCTION

Early in the morning of April 1, 1975, Sampson and Jeanette Armstrong approached the back door of Thomas Kersey's rural Florida farmhouse, ostensibly seeking water for their overheated car.<sup>1</sup> As Mr. Kersey, aged 86, stepped outside the house, Sampson Armstrong grabbed him and pointed a gun at him. Mrs. Kersey, having heard her husband's cries for help, ran outside with a gun and shot and wounded Jeanette Armstrong. In the ensuing gun battle, Mr. Kersey was shot twice and his wife was shot six times;<sup>2</sup> both died as a result. The Sampsons then dragged the bodies into the house, took the Kerseys' money, and fled.<sup>3</sup>

Witnesses testified that they had seen a man sitting inside a car near the Kersey farmhouse at the time of the shooting.<sup>4</sup> Further testimony indicated that it was the same car in which Earl Enmund had been seen that morning, first as a passenger with Jeanette Armstrong's mother driving, and shortly after the incident as the driver.<sup>5</sup> The State of Florida indicted and tried Enmund and Sampson Armstrong together for first-degree murder and robbery.<sup>6</sup> Although the prosecutor argued that only Sampson Armstrong shot the Kerseys,<sup>7</sup> the trial court found that each defendant must have shot each victim.<sup>8</sup> The trial judge instructed the jury that "[t]he killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder

---

1. The facts are taken from *Enmund v. Florida*, 458 U.S. 782, 783-85 (1982), and *Enmund v. State*, 399 So. 2d 1362, 1363-65 (Fla. 1981).

2. *Enmund v. State*, 399 So. 2d at 1364.

3. *Enmund v. Florida*, 458 U.S. at 784.

4. *Enmund v. State*, 399 So. 2d at 1370.

5. *Id.* at 1364-65. There was, however, no direct evidence presented at trial to prove that Enmund was ever in the car, and the state did not offer any evidence to show that Enmund was ever at the back door of the Kersey house. *Id.* at 1370.

6. *Id.* at 1363. The State of Florida tried Jeanette Armstrong separately; a jury found her guilty of two counts of second-degree murder and one count of robbery, and sentenced her to three consecutive life sentences. *Id.* at 1371.

7. *Enmund v. Florida*, 458 U.S. at 784.

8. *Enmund v. State*, 399 So. 2d at 1372. The court reasoned that since Mrs. Kersey's shot had incapacitated Jeanette Armstrong, and since Mr. and Mrs. Kersey were each shot with bullets from different guns, Sampson Armstrong and Enmund each had fired at the victims. *Id.*

in the first degree even though there is no premeditated design or intent to kill."<sup>9</sup> Additionally, the judge instructed the jury that under Florida law they could convict Enmund of first-degree murder if the evidence showed beyond a reasonable doubt that (1) he was "actually present and was actively aiding and abetting" the attempted robbery, and (2) that the "killing occurred in the perpetration of or in the attempted perpetration of" that robbery.<sup>10</sup> The jury found Enmund and Armstrong guilty of first-degree murder.<sup>11</sup> At the conclusion of a separate sentencing hearing, the jury recommended the death penalty for each defendant.<sup>12</sup> The trial judge found four aggravating circumstances<sup>13</sup> and no mitigating circumstances<sup>14</sup> in Enmund's case and sentenced him to death. Following the trial court's imposition of the death sentence, jurisdiction immediately vested in the Supreme Court of Florida for review of the conviction and sentence.<sup>15</sup>

The Supreme Court of Florida disagreed with the trial court's findings that Enmund actively participated in the robbery and murders. It found that the only evidence of Enmund's participation was "the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes."<sup>16</sup> Never-

---

9. *Enmund v. Florida*, 458 U.S. at 784-85.

10. *Id.* at 785; *see* FLA. STAT. § 782.04(1)(a) (1983).

11. *Enmund v. Florida*, 458 U.S. at 785. Both Enmund and Sampson Armstrong were found guilty of two counts of first-degree murder pursuant to section 782.04(1)(a) (1973) (current version at FLA. STAT. § 782.04(1)(a) (1983)), which crime was punishable as provided in section 775.082 (1973) (current version at FLA. STAT. § 775.082 (1983) and § 921.141 (1975)) (current version at FLA. STAT. § 921.141 (1983)).

12. *Enmund v. Florida*, 458 U.S. at 785. Section 921.141 (1975) provided two sentencing options upon a capital felony conviction. If the jury found that there were insufficient mitigating circumstances to outweigh any aggravating circumstances, then it could recommend that the trial judge impose either the death penalty or life imprisonment. The trial judge maintained discretion to impose either sentence. If the trial judge imposed the death penalty, he had to state in writing his specific factual findings indicating that the aggravating circumstances outweighed any mitigating circumstances.

13. *Id.* The aggravating circumstances were that the capital felony was committed while Enmund was engaged in or was an accomplice in the commission of an armed robbery, *see* FLA. STAT. § 921.141(5)(d) (1983); it was committed for pecuniary gain, *id.* § 921.141(5)(f); it was especially heinous, atrocious, or cruel, *id.* § 921.141(5)(h); and the defendant had a previous conviction for a felony involving the use of threat or violence, *id.* § 921.141(5)(b). *Enmund v. State*, 399 So. 2d at 1371-73.

14. *Enmund v. State*, 399 So. 2d at 1372; *see* FLA. STAT. § 921.141(6) (1983).

15. *See* FLA. STAT. § 921.141(4) (1983) (providing for automatic review by the Supreme Court of Florida of any death sentence within sixty days after certification of the record by the sentencing court).

16. *Enmund v. State*, 399 So. 2d at 1370. These factual findings differed significantly from those of the trial judge, who found that Enmund planned the robbery and also shot the Kerseys. *See supra* note 8 and accompanying text.

theless, the Florida Supreme Court held that this evidence alone was sufficient to make Enmund a constructive aider and abettor and, affirmed the verdict of murder in the first-degree on the basis of the felony murder provision of section 782.04(1)(a) of the Florida Statutes.<sup>17</sup> More significantly, the Supreme Court of Florida rejected Enmund's argument that "since the evidence does not establish that he intended to take life, the death penalty is impermissible under the eight amendment ban on cruel and unusual punishment"<sup>18</sup> and affirmed Enmund's death sentence. The United States Supreme Court granted Enmund's petition for certiorari, which presented the question "whether death is a valid penalty under the Eighth and Fourteenth amendments for one who neither took life, attempted to take life, nor intended to take life."<sup>19</sup> The Supreme Court of the United States *held*, reversed and remanded: Where a defendant aids and abets a felony in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place, the death penalty is cruel and unusual punishment in violation of the eighth and fourteenth amendments of the United States Constitution. *Enmund v. Florida*, 458 U.S. 782 (1982).

## II. EIGHTH AMENDMENT BACKGROUND

The Court's struggle over the constitutionality of the death penalty itself and the ways in which states may or may not impose that penalty<sup>20</sup> began with *Furman v. Georgia*.<sup>21</sup> Prior to *Furman*,

---

17. 399 So. 2d at 1370 (citing *Pope v. State*, 84 Fla. 428, 446, 94 So. 865, 871 (1922)). Florida law provides that all persons participating in the crime are principals of the first or second degree, or accessories before the fact, in distinguishing between first and second degree felony murder. The actual perpetrator is a principal of the first degree; one who is present (actually or constructively), aiding and abetting the commission of the felonious act, is a principal of the second degree. In a felony murder, both are equally guilty of murder in the first degree. One who is an accessory before the fact is guilty of second degree murder. See FLA. STAT. § 782.04(1)(a) (1983).

18. 399 So. 2d at 1371. The Florida Supreme Court held that there were only two, not four, aggravating circumstances, but nonetheless affirmed the conviction and the death sentence. The Court ruled that the trial judge's findings that the capital felonies were committed in the course of robbery and for pecuniary gain constituted in reality only one aggravating circumstance. The court further held that the crimes were not especially heinous, atrocious, or cruel. *Id.* at 1373.

19. *Enmund v. Florida*, 458 U.S. at 787.

20. Prior to 1962, the Court had decided only nine cases involving the cruel and unusual punishment clause. Legislatures in nine states had abolished the death penalty, and California had judicially abolished it. See Note, *Furman to Gregg: The Judicial and Legislative History*, 22 HOWARD L.J. 53, 63, 84 n.94 (1979).

21. 408 U.S. 238 (1972).

the Court had given implicit constitutional approval to capital punishment by holding that a particular *method* of execution did not violate the eighth amendment.<sup>22</sup> Although the Court had found certain punishments to be cruel and unusual,<sup>23</sup> it had not explicitly ruled on the death penalty. Moreover, the United States Constitution neither prohibits nor authorizes capital punishment.<sup>24</sup> Arguably, the due process clause embodies the notion of permissible deprivation of life.<sup>25</sup>

In *Furman* and the two cases consolidated with it,<sup>26</sup> each defendant was sentenced to death. One defendant was convicted of murder, and the other two were convicted of rape. The statutory schemes of the two states involved allowed the jury total discretion in determining whether or not to impose the death sentence.<sup>27</sup> In a per curiam opinion, the Court held that the imposition of the death penalty was unconstitutional in all three cases.<sup>28</sup> Justices Douglas, Stewart, and White stated that the imposition of the death penalty is cruel and unusual under statutory schemes that leave the sentencing authority with undirected discretion in its im-

---

22. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (execution of convicted murderer, after first attempt failed due to mechanical defect in electric chair, did not constitute cruel and unusual punishment).

23. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958) (revocation of citizenship after conviction by court-martial of deserter held cruel and unusual); see also *Weems v. United States*, 217 U.S. 349 (1910) (15-year prison sentence for falsification of public document held cruel and unusual).

24. See Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 WAKE FOREST L. REV. 737, 740 & n.36. The eighth amendment to the United States Constitution provides that "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." It was made applicable to the states through the fourteenth amendment in *Robinson v. California*, 370 U.S. 660 (1962).

25. The fifth amendment states that no person shall be "deprived of life, liberty, or property without due process of law" (emphasis added).

26. See *Furman*, 408 U.S. 238 (1972) (consolidating *Branch v. Texas* and *Jackson v. Georgia*, both cases involving death sentences for rape convictions).

27. See GA. CODE ANN. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969) (punishment for murder) (current provision at GA. R. CRIM. P. 17-10-31); GA. CODE ANN. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969) (punishment for rape) (current provision at GA. R. CRIM. P. 17-10-31); TEX. PENAL CODE ANN. § 1189 (Vernon 1961) (punishment for rape) (current version at TEX. PENAL CODE ANN. § 12.33 (Vernon 1974) and §§ 21.02, 21.03, 21.09 (Supp. 1982)). Under Georgia's statutory scheme, the jury in *Furman* could choose between life imprisonment and the death penalty following a murder conviction. In Georgia, the jury could choose among imprisonment and labor (for one to twenty years), life imprisonment, and death following a rape conviction. The Texas statutes gave the jury the power to impose imprisonment (for not less than 5 years), life imprisonment, or the death penalty following a rape conviction.

28. 408 U.S. at 239-40.

position, thereby allowing it to be imposed arbitrarily and capriciously.<sup>29</sup> Justices Brennan and Marshall argued in separate opinions that the death penalty is cruel and unusual punishment in all cases.<sup>30</sup>

### III. EIGHTH AMENDMENT ANALYSIS AFTER *Furman*

The Court's post-*Furman* eighth amendment analysis yields two fundamentally different inquiries and methodologies.<sup>31</sup> Employing one mode of analysis, the Court addressed the issue whether the *procedure* used to impose a punishment is cruel in the constitutional sense.<sup>32</sup> Employing the second mode of analysis, the Court addressed the substantive issue of whether a *particular punishment* is cruel.<sup>33</sup>

The Court's focus on procedural safeguards in *Furman* places it within the first analysis enumerated above. The *Furman* decision indicated that total discretion vested in the sentencing authority leads to arbitrariness, thereby violating one of the basic principles of the judicial system—that like cases be treated alike.

29. Three Justices filed a separate opinion in support of his opinion that the death penalty was unconstitutional as applied in these cases. See 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

30. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

31. See *infra* notes 62-66 and accompanying text for the tests' criteria.

32. That is, whether the procedure used to impose the penalty violates the eighth amendment. This analytical approach will be referred to throughout this comment as the "procedural" mode of analysis. Although it is distinguished from a due process analysis under either the fifth or fourteenth amendments, the distinction is not always clear. Compare *Furman* with *McGautha v. California*, 402 U.S. 183 (1971) (jury sentencing without legal standards in capital cases is not a due process violation). As one commentator coyly pointed out,

In 1971, Dennis McGautha argued to the Supreme Court that unfettered jury discretion in imposing death for murder resulted in arbitrary or capricious sentencing and, hence, violated the fourteenth amendment right to due process of law. He lost. . . . In the following year, William Henry Furman argued that unfettered jury discretion in imposing death for murder resulted in arbitrary or capricious sentencing and, hence, violated the eighth amendment right not to be subjected to cruel and unusual punishment. He won. . . .

Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148 (1980) (footnotes omitted). But cf. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 79 n.17 (1972).

33. See, e.g., *Proffitt v. Florida*, 428 U.S. 242 (1976). While the analysis in each inquiry may be different, an individual case may explicitly rule that the procedure used in imposing the punishment is constitutionally acceptable, thereby implicitly ruling that the actual punishment is not cruel in the constitutional sense. *Id.* The converse proposition is not necessarily true; declaring that a particular punishment is not cruel does not necessarily mean that the procedure used to impose it is unconstitutionally acceptable. See *infra* note 52 and accompanying text.

According to *Furman*, a *process* is unconstitutionally cruel in the eighth amendment sense if it enables one individual to be sentenced to die while allowing another individual of equal culpability to live.

As a result of *Furman*, state legislatures and Congress reconvened in a sometimes futile effort to enact statutes that would satisfy *Furman*'s inexact criteria for the procedures under which the death penalty could constitutionally be imposed.<sup>34</sup> State legislatures and Congress eliminated unbridled sentencing discretion from their death penalty statutes either by providing some sentencing guidelines, or by making the death penalty mandatory in certain circumstances.

*Gregg v. Georgia*<sup>35</sup> employed both the procedural and substantive modes of analysis. In *Gregg*, the defendant was sentenced to death for a murder he deliberately committed during an armed robbery. The state statutory scheme provided that if a defendant was found guilty of murder, a pre-sentence hearing would be held, at which time either side could present any mitigating or aggravating factors it deemed relevant.<sup>36</sup> At least one of ten aggravating factors listed in the state statutory scheme had to be found to exist beyond a reasonable doubt before the defendant could be sentenced to death. The jury could still take into account any mitigating factors in imposing its sentence, but the judge was bound by the determination of the jury. In the Court's procedural inquiry, Justices Stewart, Powell, and Stevens combined with Chief Justice Burger and Justices White, Blackmun, and Rehnquist<sup>37</sup> to uphold Georgia's statutory scheme as in compliance with *Furman*'s guideline that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."<sup>38</sup>

---

34. The capital punishment laws of 39 states, the District of Columbia, and all federal statutory provisions were invalidated. See *Tenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1979-80*, 69 GEO. L.J. 211, 528 n.2514 (1980) (quoting 408 U.S. at 411-13 (Blackmun, J. dissenting)); see also, Note, *supra* note 20.

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

36. See GA. CODE ANN. §§ 26-3102, 27-2503, 27-2534.1, 27-2537 (1978).

37. *Furman* and *Gregg* supply preliminary indications of emerging judicial factions: Justices Brennan and Marshall have consistently argued that the death penalty is unconstitutional per se; Justices Stewart, Powell, and Stevens have frequently voted together when the issue is procedural; and Chief Justice Burger and Justice Rehnquist, sometimes joined by Justice Blackmun, maintain a position of judicial deference. See *infra* note 84 and accompanying text.

38. *Gregg*, 428 U.S. at 189. Thus, the Court addressed the procedural issue of whether this statutory scheme meaningfully distinguished those cases in which the death penalty is imposed from those cases in which it is not.

The *Gregg* Court also directly addressed the substantive issue whether the death penalty is unconstitutional per se, holding that "the death penalty is not a form of punishment that may never be imposed."<sup>39</sup> The Court stated that a punishment would be "excessive" and hence unconstitutional if (1) it involved the unnecessary and wanton infliction of pain, or (2) it was grossly out of proportion to the severity of the crime.<sup>40</sup> A court, when confronted with the possibility of imposing the death penalty, must look to history and precedent as well as to legislative attitudes and the response of juries.<sup>41</sup> In analyzing whether the punishment involves the unnecessary and wanton infliction of pain, a court should consider whether the penalty contributes to the social purposes of retribution and deterrence.<sup>42</sup> Using these factors as guidelines, the court's decision would accord with the "dignity of man," reflecting the "evolving standards of decency that mark the progress of a maturing society."<sup>43</sup> The majority in *Gregg* thus adopted the erroneous proposition that the moral content of the eighth amendment ban on cruelty varies over time.<sup>44</sup>

In the same term that the Court decided *Gregg*, the Court decided four other cases in which the death penalty had been imposed.<sup>45</sup> Examining each statutory scheme in light of *Furman*, the Court upheld those providing for guided discretion by the sentencing authority in its imposition of the death penalty,<sup>46</sup> and struck down those providing for mandatory imposition.<sup>47</sup> This line of cases, employing the procedural mode of analysis, indicates that the Court opposed two sentencing extremes: the extreme of total discretion, with no guidelines for imposing the death penalty, and the extreme of mandatory imposition, where the sentencing authority has no discretion in the imposition of the penalty.<sup>48</sup>

---

39. *Id.* at 187.

40. *Id.* at 173.

41. *Id.* at 176-82.

42. *Id.* at 183.

43. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100, 101 (1958)).

44. For the philosophical implications of this position, see *infra* notes 95-103 and accompanying text.

45. See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

46. See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

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

48. The 1976 cases also reflect the Court's struggle to identify criteria whereby legislatures could draft statutes falling between those extremes. See generally Radin, *supra* note 32, at 1148-55.

*Coker v. Georgia*<sup>49</sup> marked a significant point in eighth amendment history. There the Court struck down the imposition of the death penalty for the rape of an adult woman, where the victim's life had not been taken. Addressing this substantive issue directly, the Court employed the two-part substantive test applied in *Gregg*, using the attitudes of legislatures and sentencing juries as objective indicators of the "public judgment as to the acceptability of capital punishment."<sup>50</sup> Justice White wrote the plurality opinion,<sup>51</sup> which held that even though imposition of the death penalty in rape cases might serve a legitimate end of punishment, such as deterrence or retribution, it was nevertheless a disproportionate, and therefore unconstitutional, penalty.<sup>52</sup> By invalidating imposition of the death penalty in circumstances where the rape victim did not die, the Court subsumed within its constitutional jurisprudence the moral caveat that the society and its judicial constructs shall not take the life of an individual who does not himself take life.<sup>53</sup> This morality reappeared in the cases of *Lockett v. Ohio*<sup>54</sup> and *Enmund v. Florida*.<sup>55</sup>

In *Lockett*, the defendant was sentenced to death for his participation in a robbery that resulted in a murder, notwithstanding that he did not actually kill, attempt to kill, or intend to kill the victim.<sup>56</sup> The Court's plurality opinion reversed the death sentence, holding that, because Ohio's statutory scheme restricted the sentencing authority to consideration of *only* those mitigating factors identified in the statute, the sentencing authority was unconstitutionally precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>57</sup> The plurality holding in *Lockett* employed the procedural mode of analysis; it invalidated the death

---

49. 433 U.S. 584 (1977).

50. See *id.* at 592-94; *supra* note 40 and accompanying text.

51. Justice White also wrote the majority opinion in *Enmund*.

52. 433 U.S. at 592 & n.4. Thus, *Coker* emphasized that the two prongs of the substantive test established in *Gregg* are disjunctive: it is possible, as in *Coker*, for the punishment to be held unconstitutional on the basis of only one prong of the test. See *supra* text accompanying note 40.

53. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 125 (1977).

54. 438 U.S. 586 (1978); see *infra* notes 56-59 and accompanying text.

55. 458 U.S. 782 (1982); see *infra* notes 67-83 and accompanying text.

56. Under Ohio's statutory scheme, OHIO REV. CODE ANN. § 2929.04 (Page 1975), the jury was permitted to infer the intent to kill on the part of the accomplice. *Lockett*, 438 U.S. at 593. Thus, the facts in *Lockett* are closely related to those in *Enmund*.

57. 438 U.S. at 604 (emphasis in original).

penalty on the basis of the *manner* in which it was imposed, rather than addressing the *substantive* issue whether death is a cruel and unusual punishment where the defendant has not killed, attempted to kill, or intended to kill. In a concurring opinion, Justice White forcefully argued that the Court (1) should have based its holding on the substantive, rather than procedural, analysis; and (2) should have concluded that, absent evidence proving the intent to kill, the death penalty was grossly disproportionate to the severity of the crime and therefore unconstitutional.<sup>58</sup> *Lockett* is of particular importance, because it foreshadowed Justice White's analysis and substantive holding in *Enmund* while implicitly affirming the moral proposition subsumed within *Coker*—that society shall not take the life of one who did not himself take life.<sup>59</sup>

The Supreme Court's analysis of the eighth amendment therefore entails the proposition that a decisionmaking procedure, as well as a specific punishment, can violate the eighth amendment.<sup>60</sup> *Furman* demanded that legislatures be more specific in enumerating the criteria to be used by sentencing authorities to distinguish rationally between individuals sentenced to death and those offenders of equal culpability sentenced only to life imprisonment.<sup>61</sup> The procedural test therefore provides that the death sentence shall not be imposed under procedures creating a substantial risk that the sentencing authority will impose the death penalty arbitrarily and capriciously.<sup>62</sup> The sentencing authority must not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense that the de-

---

58. *Id.* at 623-26 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

59. See *supra* notes 49-53 and accompanying text; *infra* notes 67-77 and accompanying text. In *Beck v. Alabama*, 447 U.S. 625 (1980), the defendant, Beck, participated in a robbery. According to Beck, his accomplice unexpectedly killed the robbery victim. The Alabama statute required the jury either to sentence Beck to death or set him free. ALA. CODE § 13-11-2(a) (1975). The jury could not convict Beck of a lesser offense. The Supreme Court overturned Beck's death sentence, relying on a procedural, rather than substantive, analysis. The statute forced the jury to make an emotional choice between freedom and death. Arguably, the jury might choose to acquit the defendant, despite its belief that the defendant was guilty and should be punished, because it also believed that death was too severe a punishment. This element of unreliability and uncertainty in the decisionmaking process led the Court to declare the punishment unconstitutional.

60. See generally Radin, *supra* note 32.

61. See *supra* note 29 and accompanying text. Demanding more specific criteria for imposing sentences reflects the philosophical position that justice entails treating like offenders in like fashion. See generally Hart, *Principles of Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* (G. Ezorsky ed. 1972).

62. See *supra* note 40 and accompanying text.

fendant proffers" as potentially mitigating factors.<sup>63</sup> Each statutory scheme must be considered individually. The statutory scheme must provide direction to the sentencing authority in considering mitigating or aggravating factors, and consideration of the individual's actions and culpability must not be precluded.<sup>64</sup>

Under the substantive test derived primarily from *Gregg* and *Coker*, a punishment is unconstitutionally cruel if it is (1) nothing more than "the purposeless and needless imposition of pain and suffering," or (2) grossly disproportionate to the severity of the crime.<sup>65</sup> The court is to make its decision with reference to objective factors: (a) the history of the punishment, (b) legislative attitudes, and (c) the sentencing decisions of juries.<sup>66</sup> These objective factors give content to the "evolving standards of decency." It is against this backdrop that the Court decided *Enmund v. Florida*.<sup>67</sup>

#### IV. ENMUND V. FLORIDA

Enmund's petition for certiorari presented the question "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life."<sup>68</sup> The focus of the Court's inquiry was thus on the *penalty* imposed under these circumstances, not on the *procedures* used to impose that penalty. Justice White, writing the majority opinion, correctly cited *Coker* and *Gregg* as supplying the appropriate test, because these opinions contain explicit substantive analyses and holdings on substantive issues.<sup>69</sup>

In examining the objective factors enumerated in the substantive test, Justice White noted that only eight states allowed a defendant to be sentenced to death solely because he participated in a robbery in the course of which a murder occurred.<sup>70</sup> Additionally,

---

63. *Lockett*, 438 U.S. at 604. The potentially mitigating factors thus do not necessarily have to be those specified in the statute.

64. *Id.* at 604, 606. Some Justices feared a return to the pre-*Furman* era of total discretion in the sentencer. See *id.* at 628-36 (Rehnquist, J., dissenting); *id.* at 623 (White, J., concurring). These fears have been partially quelled by subsequent cases. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980) (reversing death sentence where statutory language too broad and vague).

65. See *Coker*, 433 U.S. at 592. To avoid the first charge the punishment must contribute to one or both of two social purposes, retribution or deterrence. See, *Gregg*, 428 U.S. at 183.

66. *Id.* at 592-97.

67. 458 U.S. 782 (1982).

68. *Enmund*, 458 U.S. at 787.

69. See *supra* notes 37-44, 49-53 and accompanying text.

70. 458 U.S. at 792.

Justice White asserted that there were only three prisoners in the entire country who had received the death sentence for homicide absent a finding that they hired, solicited, or participated in the victim's murder.<sup>71</sup> Finally, Justice White stated that not a single person "convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, . . . has been executed."<sup>72</sup> This statistical analysis supported a conclusion under the second prong of the *Gregg-Coker* test that the legislatures and jurors of this country considered death a disproportionate penalty for those offenders falling within the category exemplified by *Enmund*.<sup>73</sup>

Justice White next considered, whether, under the first prong of the substantive test, the death penalty would have either a deterrent or a retributive effect on an offender like *Enmund*. He argued that, because the data supported the proposition that the probability of death during a robbery is extremely low, and because the accomplice has no intent to cause death, the prospect of a death penalty does not enter into his decision to rob; therefore, the death penalty has no deterrent effect on such a person.<sup>74</sup> Justice White also suggested that society has no right to demand retribution through criminal penalties absent intentional wrongdoing;<sup>75</sup> because *Enmund* did not kill, attempt to kill, or intend to kill, putting him to death "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."<sup>76</sup> Therefore, according to Justice White, the imposition of the death penalty in *Enmund* was unconstitutional under either prong of the substantive test distilled from *Gregg* and *Coker*: it is disproportionate to the severity of the crime, and it has neither a retributive nor a deterrent effect.

Justice White also maintained that, as a constitutional requirement, a court must consider the individual's conduct and culpability;<sup>77</sup> then, the Court must *subjectively* approve the punish-

---

71. *Id.* at 795.

72. *Id.* at 796.

73. Recall that the first and second prongs of the substantive test are phrased disjunctively. Therefore, failure under either prong invalidates the punishment imposed. See *supra* text accompanying note 40.

74. 458 U.S. at 799 (quoting *Gregg*, 428 U.S. at 186). Justice White also cited the American Law Institute's MODEL PENAL CODE § 210.2 comment at 38 & n.96 (Official Draft and Revised Comments 1981). 458 U.S. at 799.

75. 458 U.S. 801. The argument is that the punishment must suit the crime.

76. *Id.*

77. *Id.* at 800.

ment.<sup>78</sup> He cited *Lockett v. Ohio*<sup>79</sup> and *Woodson v. North Carolina*<sup>80</sup> in support of this addition to the *Gregg-Coker* substantive test.<sup>81</sup> Reliance on *Lockett* and *Woodson* as authority for this new requirement was misplaced, however, for neither of those cases employed the substantive mode of analysis.<sup>82</sup> The plurality in *Lockett* did not adopt Justice White's substantive position that, absent proof of an intent to kill, death is an unconstitutional punishment.<sup>83</sup> The plurality did adopt the position that the process by which death is imposed must focus on the uniqueness of the individual, but this was a criterion employed in a procedural analysis.<sup>84</sup> Hence, Justice White confused the two tests and their respective criteria.

It is equally unclear whether failure under this new requirement of the substantive test, is sufficient to result in a judicial nullification of a death sentence. Given the manner in which the substantive test now appears to be formulated, it is logically possible for a punishment to be unconstitutional under both original prongs of the *Gregg-Coker* test, yet be constitutionally approved by the subjective judgment of the Court. The suggestion that the constitutionality of a particular class of punishment could turn solely on the subjective judgment of a majority of the Court is jurisprudentially unsound and contrary to Justice White's previous position.<sup>85</sup> Thus, the functional importance of this new requirement to the substantive test is ambiguous.

Justice O'Connor, dissenting in *Enmund*,<sup>86</sup> stated that the appropriate methodology for analyzing the issue before the Court is to inquire

[1] whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, [2] whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime, and [3] whether the procedures under which the peti-

---

78. *Id.* at 797.

79. 438 U.S. 586 (1978).

80. 428 U.S. 280 (1976).

81. *Id.* at 798 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) and *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

82. See *supra* notes 45, 57-58 and accompanying text.

83. See *Lockett*, 438 U.S. at 623-26 (White, J., concurring in part, dissenting in part, and concurring in the judgment); *supra* text accompanying note 58.

84. See *id.* at 604; *supra* text accompanying note 57.

85. See *Coker*, 433 U.S. at 592 (1977).

86. Chief Justice Burger, and Justices Powell and Rehnquist joined in the dissent. 458 U.S. at 801 (O'Connor, J., dissenting).

tioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in *Lockett*.<sup>87</sup>

Justice O'Connor thus commingled criteria from both the substantive and procedural tests, as did Justice White.<sup>88</sup> Apparently, she either confused the issue by unknowingly combining the two modes of analysis or she knowingly proposed a new substantive test and analysis. Textual passages suggest confusion: one passage stated that the issue was not "whether a particular *species* of death penalty statute is unconstitutional," but whether a particular statutory *scheme* is unconstitutional.<sup>89</sup> Elsewhere, she stated that the issue was "to determine whether the penalty imposed on Earl Enmund is unconstitutionally disproportionate to his crimes."<sup>90</sup>

After her own examination, Justice O'Connor concluded that "the available data do not show that society has rejected conclusively the death penalty for felony murderers."<sup>91</sup> Justice White correctly pointed out that this conclusion regarding the available data resulted from an inaccurate and broad reading of the issue.<sup>92</sup> Justice O'Connor also argued that, because the defendant was at least partly responsible for the murders, due to his involvement in the robbery, and because the Court had previously approved the death penalty for murder, the penalty in *Enmund* was not disproportionate even if the defendant did not intent to kill or actually kill the victim.<sup>93</sup> Despite her position on the substantive issue, Jus-

---

87. *Id.* at 816 (O'Connor, J., dissenting) (emphasis added). Justice O'Connor mistakenly characterized the prongs of the texts as being conjunctive rather than disjunctive.

88. This analytical mistake in enumerating the criteria for the substantive test would impel the dissent to remand the case for a new sentencing hearing, because of the trial judge's alleged procedural mistake in not considering the "circumstances of the particular offense" in imposing sentence. *See id.* at 827 (O'Connor, J., dissenting) (quoting *Woodson*, 428 U.S. at 304).

89. *See id.* at 823 (O'Connor, J., dissenting) (emphasis added). This suggests that the issue is not the constitutionality of the punishment itself, but rather the constitutionality of the "statutory scheme," or procedures, by which Enmund was punished. This is simply not the issue raised by Enmund's petition for certiorari. *See supra* note 67 and accompanying text.

90. *Id.* at 812 (O'Connor, J., dissenting). This passage correctly suggests that the issue is the constitutionality of the imposition of the death penalty itself under these factual circumstances.

91. *Id.* at 816 (O'Connor, J., dissenting).

92. *See id.* at 793 n.15. The substantive inquiry is addressed to the situation in which the defendant did not kill, attempt to kill, or intend to kill; it is not addressed to unqualified felony murders.

93. *See id.* at 825 (O'Connor, J., dissenting). Justice O'Connor incorporated into the premise of her argument the notion that Enmund was "at least partially responsible" for the deaths; this placed her conclusion inside one of her premises, thereby begging the question.

tice O'Connor recommended vacating and remanding for a new sentence hearing due to violations of the procedural rules set forth in *Lockett* and *Woodson*.<sup>94</sup>

#### V. INFIRMITIES OF THE DECISION

This comment argues that *Enmund* falls into the same class of eighth amendment cases as *Gregg* and *Coker*; that is, the issue is whether the particular punishment imposed for Enmund's crime is unconstitutional. While the Court remained unwilling to hold the death penalty unconstitutional *per se*, it was nevertheless willing to invalidate its imposition for certain offenses. At the same time, the Court continued to embrace the ethical proposition that it is immoral to take the life of an individual who did not himself take a life. Interestingly, Justice Marshall joined the majority opinion without writing separately that capital punishment is unconstitutional *per se*. Given the fact that the decision achieved a five to four majority, Justice Marshall's vote may indicate the Court's willingness to adopt a *per se* rule where the defendant has neither taken a life nor intended that it be taken.

Despite these reaffirmations of the Court's previous positions, *Enmund* promotes confusion in several areas. As the arguments in this comment suggest, the Court did not delineate between the substantive and procedural classes of eighth amendment cases and their respective tests. Consequently, lower courts and legislatures are left with scant guidance regarding the appropriate test of constitutionality to be applied to cases and statutes. The holding of *Enmund* is narrow and limited to cases where the defendant did not intend to kill, attempt to kill, or actually kill the victim.

It is unclear whether the death penalty could constitutionally be applied to an accomplice who did not participate in the actual killing of the victim but who intended that the victim be killed. It is possible that an accomplice could unwillingly participate in the killing of the victim. *Enmund* does not indicate whether death would be a constitutional punishment for that accomplice. Given these uncertainties, Justice O'Connor may be correct in her dissenting view that the majority's decision effectively interferes with the states' right to define legal guilt for certain offenses.<sup>95</sup> Arguably, however, the decision does not interfere with the states' right to define legal guilt, but it merely restricts the degree of punish-

---

94. *Id.* at 830-31, (O'Connor, J., dissenting).

95. *Id.* at 824-25 (O'Connor, J., dissenting).

ment that may be imposed for that guilt.

A more disturbing aspect of the decision is the Court's continued reliance on "evolving standards of decency"<sup>96</sup> as the barometer for eighth amendment decisions.<sup>97</sup> When the Constitution plays a vital role in the decision to take someone's life, it functions as a document of ultimate moral, as well as legal, principles. By positing that society's standards of decency "evolve," the Court committed itself to the view that the moral content of the Constitution and, more specifically, the eighth amendment, changes with time.<sup>98</sup> This commitment entails the proposition that the principles upon which the court bases its decisions also change with time. The Court's position is epistemologically unsound. Plato argued that one can only know that which does not change, because it is impossible to know something that is in a constant state of flux.<sup>99</sup> If the Court asserts that its moral decisions are based upon standards that change over time, it is compelled to conclude that these standards are unknowable. If these standards are unknowable, the legitimacy of the Court's moral decisions is greatly impaired.<sup>100</sup>

The content of any moral concept cannot be supplied by a *posteriori* factual judgments derived from public opinion or other data. For example, if a representative crosssection of citizens asserted the view that torture was an acceptable means of punishing shoplifters, would the morality of torture change? It would not, because torture is a type of punishment that is always immoral. The passage of time does not alter its inherent immorality. Assuming *arguendo* that the most accurate representations of the moral positions of a country's citizenry are those legislative enactments promulgated by its representatives, one would conclude that a punishment is constitutional under the eighth amendment if it has been promulgated by a legislature.<sup>101</sup> But such a proposition aban-

---

96. *See id.* at 789-97.

97. A complete philosophical analysis of the implications of the Court's position is beyond the scope of this comment. *See generally* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Ellis, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification*, 34 OKLA. L. REV. 567 (1981); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

98. *See* Radin, *supra* note 97, at 1033.

99. *See generally* J.E. RAVEN, *PLATO'S THOUGHT IN THE MAKING: A STUDY OF THE DEVELOPMENT OF HIS METAPHYSICS* (1965); G.M.A. GRUBE, *PLATO'S THOUGHT* (1935).

100. *But cf.* Radin, *supra* note 32 at 1157-58. (implying that pre-*Coker* rapists were unjustly executed because the "evolving standards of decency" did not evolve quickly enough).

101. These arguments are posed in J.G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY*,

dons any means of "checking majoritarian excesses" and makes the Bill of Rights a meaningless document.<sup>102</sup>

Even assuming that the moral content of the eighth amendment is to be determined, not by majority preference, but by society's "truly informed, educated, and morally sensitive"<sup>103</sup> members, absurdity results. Such an argument would necessarily be circular, because one would determine which individuals were "truly informed, educated, and morally sensitive" by examining whether they held the moral views one wanted them to hold. If everyone finally agreed on who the "truly enlightened" people were, the "enlightened" ones could only find a punishment objectionable if it possessed some objectionable property; in such a case, the punishment is condemned not because of the consensus among the truly enlightened but because the punishment possesses the objectionable property.<sup>104</sup> Thus, the appeal to a consensus of truly enlightened individuals becomes pointless, and the propriety of the Court's reliance on the notion of moral standards that evolve over time is seriously undermined. In its analysis of cruel and unusual punishment, the Court must strive to develop an ethical theory that avoids the logical pitfalls of majority preference and total subjectivity.

There remains, after *Enmund*, a disturbing lack of unanimity among the Justices on the metaethical justifications for its decisions regarding the circumstances under which a state may constitutionally impose the death penalty.

JOHN C. SHAWDE

---

223-26 (1979); see also Radin, *supra* note 32, at 1147 n.11.

102. J.G. MURPHY, *supra* note 99, at 225.

103. *Id.* at 226.

104. *Id.*