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Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken

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NOTES

TISON v. ARIZONA: THE DEATH PENALTY AND THE NON-TRIGGERMAN: THE SCALES OF JUSTICE ARE BROKEN

The Supreme Court's struggle to balance the constitutional rights of convicted criminals with society's need to punish them is starkly evident in the Court's application of the eighth amendment's cruel and unusual punishment clause[1] to non-triggermen[2] defendants sentenced to death. The Court's analysis of the non-triggerman death sentence is in flux, and is nearly devoid of any basic principles that can guide lower courts or legislatures in fashioning capital punishment sentencing or statutes. Rather than developing a clear set of rules for lower courts to apply in determining whether an individual's culpability merits the death penalty, the Court instead applies a rough balancing test on a case-by-case basis, weighing the nature of the defendant's crime against the severity of the punishment. When using this test, the Court will find a violation of the eighth amendment's prohibition against cruel and unusual punishment if it finds that the punishment is disproportionate to the crime.[3]

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1 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

2 A non-triggerman is an aider, abettor or co-felon who participates in the felony but who does not participate in the physical act of killing. *See* Wickert, *Eighth Amendment—The Death Penalty and Vicarious Felony Murder: Nontriggerman may not be Executed Absent a Finding of an Intent to Kill*, 73 J. CRIM. L. & CRIMINOLOGY 1553-71 (1982).

3 The Court and some commentators have referred to this analysis as a "proportionality test." *See, e.g.*, Stanford v. Kentucky, 109 S. Ct. 2969, 2972 (1989); *id.* at 2981 (O'Connor, J., concurring); Tison v. Arizona, 481 U.S. 137, 148 (1987); *id.* at 168 (Brennan, J., dissenting); Solem v. Helm, 463 U.S. 277, 292 (1983); Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980); *The Supreme Court—Leading Cases*, 101 HARV. L. REV. 119 (1987); Note, *Redefining a Culpable Mental State for Non-Triggermen Facing the Death Penalty*, 33 VILL. L. REV. 367 (1988) (authored by James J. Holman). The use of the term "proportionality," however, is illusory because it conveys the image of a detailed analysis. Because the "proportionality test" is ill-defined and has not yet become much more than a weighing of components, this Note refers to it as a balancing test.

The eighth amendment concept of proportionality first appeared in Weems v. United States, 217 U.S. 349 (1910), but the Court did not refer to this balancing analysis as a "proportionality test" until fairly recently, beginning with *Solem*, 463 U.S. at 292. This balancing test is essentially based upon "evolving standards of decency" as contemporary society views punishments in relation to the crimes committed. Trop v. Dulles, 356 U.S. 86, 101 (1958). For a critical analysis of the Court's reliance on "evolving standards of decency," see Shawde, *Jurisprudential Confusion in Eighth Amendment Analysis*,

This Note analyzes *Tison v. Arizona*,[4] which articulated a new standard for deciding when execution of non-triggermen is cruel and unusual punishment. *Tison* held that the actor's mere reckless disregard for human life and major participation in the underlying felony is sufficient to justify capital punishment. This new standard essentially reverses the Court's 1982 decision in *Enmund v. Florida*,[5] in which the Court decided that the fact-finder must find intent to kill before imposing the death penalty.

This Note examines the new substantive doctrine in *Tison v. Arizona* and compares it with that of *Enmund v. Florida*. It then considers the implications of *Tison*, and suggests an alternative approach to death penalty cases involving a non-triggerman. Because of the ambiguity inherent in the *Enmund* and *Tison* decisions, and because of the Court's failure to define or apply eighth amendment jurisprudence adequately, this Note concludes that the Court decided *Tison* incorrectly, and that the eighth amendment compels a complete prohibition of the imposition of the death penalty for the non-triggerman defendant.

I
BACKGROUND

A. Death Penalty Jurisprudence Prior to *Enmund*: The Development of the Balancing Approach

The Supreme Court has prohibited punishments so disproportionate to the crimes committed that they violate the cruel and unusual punishment clause of the eighth amendment.[6] The Supreme

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38 U. MIAMI L. REV. 357, 370-72 (1984). *See also* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1030-33 (1978):

> This phrase [evolving standards of decency that mark the progress of a maturing society] has become one of those movable semantic units that acquires a life of its own as courts repeatedly invoke it. Taking the phrase at face value, however, it quite clearly expresses the view that the clause [nor cruel or unusual punishments inflicted] is meant to embody the moral concept of cruelty, and that specific conceptions of cruelty may vary over time. . . .
>
> Once a variable meaning approach to the clause is accepted, it is necessary to face the crucial question in the jurisprudence of the cruel and unusual punishment clause. To what sources should judges turn in seeking contemporary moral insights on cruelty.

Id. at 1033-34.

For an article discussing the history of the proportionality analysis and the development of the eighth amendment, see Schwartz, *supra*, at 378.

4 481 U.S. 137 (1987).

5 458 U.S. 782 (1982).

6 The Supreme Court actually has used the eighth amendment cruel and unusual punishment clause only four times since the adoption of the Bill of Rights to invalidate a punishment rendered by the government. Coker v. Georgia, 433 U.S. 584 (1977) (the

Court, however, never has enunciated a precise test for determining when criminal sentences violate the eighth amendment.[7] Instead of treating the cruel and unusual punishment clause as a static prohibition against a specified set of punishments, the Supreme Court treats it as a living doctrine whose requirements change according to "evolving standards of decency."[8] The Court first formulated the modern eighth amendment balancing test in *Weems v. United States*,[9] where the Court said that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense,"[10] and thus that the eighth amendment is directed " 'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.' "[11] The *Weems* Court also established that the eighth amendment's meaning should be highly elastic.[12]

The Court in the past has examined many general concerns in considering whether the death penalty comports with the requirements of the eighth amendment. Some of these include an examination of: (1) society's views of the crime and the punishment in question;[13] (2) the gravity of the offense and the harshness of the

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application of the death penalty for rape is unconstitutional); Robinson v. California, 370 U.S. 660 (1962) (criminal sanctions for addiction to narcotic drugs violates the cruel and unusual punishment clause); *Trop*, 356 U.S. 86 (the sanction of loss of nationality for native born citizens as applied to wartime deserters is a violation of the cruel and unusual punishment clause); and *Weems*, 217 U.S. 349 (the punishment of *cadena temporal*—hard labor for fifteen years, loss of right to transfer property *inter vivos* and continual surveillance for life—for falsification of governmental records constitutes cruel and unusual punishment).

7 *See* Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) ("The Cruel and Unusual Punishments Clause, . . . is not susceptible of precise definition."); *Trop*, 356 U.S. at 99-101 ("The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. . . . This Court has had little occasion to give precise content to the Eighth Amendment . . . the words of the Amendment are not precise, and . . . their scope is not static."); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.").

8 *Trop*, 356 U.S. at 101.

9 217 U.S. 349 (1910).

10 *Id.* at 367.

11 *Id.* at 371 (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)).

12 *Weems*, 217 U.S. at 373 ("Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."); *see also Trop*, 356 U.S. at 101 (The Court furthered this idea of elasticity and stated that the cruel and unusual punishment clause should be seen in light of the "evolving standards of decency that mark the progress of a maturing society.").

13 Tison v. Arizona, 481 U.S. 137, 152 (1987) ("Like the *Enmund* Court, we find the state legislatures' judgment as to proportionality in these circumstances relevant to this [eighth amendment] constitutional inquiry."); Solem v. Helm, 463 U.S. 277, 291-92 (1983) ("[I]t may be helpful to compare the sentences imposed on other criminals in the

penalty;[14] (3) whether the punishment is disproportionate to the severity of the crime;[15] (4) whether the punishment is an affront to human dignity:[16] (5) whether the punishment contributes to the two social purposes of the death penalty—retribution and deterrence;[17] and (6) the sentences imposed on other criminals in the

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same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . . [C]ourts may [also] find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."); Enmund v. Florida, 458 U.S. 782, 788-89 (1982) ("[T]he Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made. . . . We proceed in a similar manner."); Coker v. Georgia, 433 U.S. 584, 592 (1977) ("[A]ttention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted."); Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . [This assessment requires] that we look to objective indicia that reflect the public attitude toward a given sanction."); *cf.* Stanford v. Kentucky, 109 S. Ct. 2969, 2981 (1989) (O'Connor, J., concurring) ("Because it is sufficiently clear that today no national consensus forbids the imposition of capital punishment in these circumstances, 'the implicit nature of the [Missouri] Legislature's decision [to authorize the death penalty for youths 16 years of age [is] not . . . constitutionally problematic.' ") (quoting Thompson v. Oklahoma, 108 S. Ct. 2687, 2711 (1988)).

14 Penry v. Lynaugh, 109 S. Ct. 2934, 2959 (1989) (Brennan, J., concurring in part and dissenting in part) ("We gauge whether a punishment is disproportionate by comparing 'the gravity of the offense,' understood to include not only the injury caused, but also the defendant's moral culpability, with 'the harshness of the penalty.' ") (quoting *Solem*, 463 U.S. at 292); *Solem*, 463 U.S. at 292 ("In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty."); *Tison*, 481 U.S. at 179 (Brennan, J., dissenting) (quoting *Solem*, 463 U.S. at 292).

15 *Tison*, 481 U.S. at 181-82 (Brennan, J., dissenting) ("States may not impose punishment that is disproportionate to the severity of the offense."); *Solem*, 463 U.S. at 290 ("In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."); *Coker*, 433 U.S. at 592 ("a punishment is 'excessive' and unconstitutional if it . . . is grossly out of proportion to the severity of the crime"); *Gregg*, 428 U.S. at 173 ("[T]he punishment must not be grossly out of proportion to the severity of the crime."); *Weems*, 217 U.S. at 371 (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892)) ("[the cruel and unusual punishment clause is directed] 'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.' "); *Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part and dissenting in part) (A majority of the Court reaffirms the well-established principle that "application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment [if] it 'makes no measurable contribution to the goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering' or [if] it is 'grossly out of proportion to the severity of the crime.' ") (citations omitted).

16 *Gregg*, 428 U.S. at 173 ("But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' ") (citation omitted); *Trop*, 356 U.S. at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

17 *See Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part and dissenting in part) ("We require that a punishment further the penal goals of detterance or retribu-

same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions.[18] *Lockett v. Ohio* suggests that the eighth amendment mandates along with these concerns an individualized consideration of the defendant's culpability.[19]

Recently the Court has made its eighth amendment analysis

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tion"); *Gregg*, 428 U.S. at 183: ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."); *see also* Enmund v. Florida, 458 U.S. 782, 798 (1982) ("Unless the death penalty . . . measurably contributes to . . . these goals [retribution and deterrence], it is 'nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.") (citing *Coker*, 433 U.S. at 592).

18 *Solem*, 463 U.S. at 292 ("In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including . . . (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.").

19 *Penry*, 109 S. Ct. at 2946 ("Our decisions subsequent to *Jurek* have reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. In *Lockett v. Ohio*, a plurality of this Court held that the Eighth and Fourteenth Amendments require that the sentencer 'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's charactor or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' ") (citations omitted) (emphasis in original); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence . . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant."); Lockett v. Ohio, 438 U.S. 586, 605 (1978).

In the past two years Justice Scalia, and perhaps other members of the Court, have abandoned the balancing test and the traditional eighth amendment jurisprudence in favor of a revisionist and largely "hands-off" approach. Justice Scalia focuses instead on only one prong of the balancing test: whether or not a national consensus against the imposition of the punishment exists. This national concensus is reflected solely by legislative enactments and jury verdicts. Under Justice Scalia's view, if the government enacts a statute providing for a certain punishment and the jury imposes that punishment then the punishment can be neither cruel nor unusual. *See* Stanford v. Kentucky, 109 S. Ct. 2969, 2979-80 (1989) (Scalia, J., writing for the plurality) ("The punishment is either 'cruel *and* unusual' (*i.e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. . . . We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."); *id.* at 2981 (O'Connor, J., concurring in part) ("I am unable . . . to join the remainder of the plurality's opinion for reasons I stated in *Thompson*. Part V of the plurality's opinion 'emphatically reject[s]' . . . the suggestion that, beyond an assessment of the specific enactments of American legislatures, there remains a constitutional obligation imposed upon this Court to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional."); *id.* at 2986 (Brennan, J., dissenting) ("Justice Scalia forthrightly states in his separate opinion that Eighth Amendment analysis is at an end once legislation and jury verdicts relating to the punishment in question are analyzed as indicators of contemporary values. A majority of the Court rejected this revisionist view as recently as last Term. . . . Justice Scalia's

under the rubric of a balancing test.[20] This balancing test is apparently a mere weighing of the six factors, or some combination thereof, previously mentioned. Reduced to its most elemental definition, the balancing analysis is essentially the weighing of the severity of the crime with the harshness of the punishment in light of contemporary societal views.

B. The Court Finds the Death Penalty Constitutional by Using the Balancing Approach

In the early 1970s, individual Supreme Court Justices began to doubt the constitutionality of the death penalty.[21] In 1972, in *Furman v. Georgia*,[22] the Court granted a writ of *certiorari* to determine whether capital punishment violated the eighth and fourteenth

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approach would largely return the task of defining the contours of Eighth Amendment protection to political majorities.").

20 *See Tison*, 481 U.S. at 148, 152, 155; *id.* at 168 (Brennen, J., dissenting); *Solem* 463 U.S. at 292; Enmund v. Florida, 458 U.S. 782, 788, 812-13 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977); and Weems v. United States, 217 U.S. 349, 371 (1910) (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)).

21 *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring):

> In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

Id. at 369 (Marshall, J., concurring) ("Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.").

Furman was the first time that the constitutionality of the death penalty was seriously questioned by the Court. At the time of adoption of the federal constitution in 1781 and the Bill of Rights in 1789, the Framers did not envision the eighth amendment's cruel and unusual clause as a prohibition of the death penalty. THE DEATH PENALTY IN AMERICA 247 (H.A. Bedau 3d ed. 1982). For general information concerning the origins and development of the cruel and unusual punishment clause, see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975) (authored by Deborah A. Schwartz and Jay Wishingrad); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966); Note, 24 HARV. L. REV. 54 (1910).

As early as the 1870s, the Supreme Court had concluded that the death penalty was constitutional. Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (The court in dicta implies that the death penalty *per se* is not unconstitutional under the eighth amendment, but rather the method of execution might be.); *see also In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution.").

22 408 U.S. 238 (1972).

amendments in a murder case and two rape cases.[23] The Court did not hold that the death penalty *per se* violated the Eighth Amendment, but in a *per curiam* decision the Court agreed that "the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[24] This 5-4 decision each justice rendering a separate opinion, invalidated the death penalty statutes of Texas and Georgia.[25] Justices Brennan and Marshall argued that the death penalty was cruel and unusual in all cases,[26] while Justices Douglas, Stewart, and White held that the death penalty was cruel and unusual where the sentencing authority had total discretion to impose the death penalty on capital defendants, because unfettered discretion leads to arbitrariness and discrimination.[27] As death penalty statutes of Texas and Georgia were typical of almost every other state's death penalty statutes, the legislatures of those states which wished to continue sentencing defendants to death began to revise their statutes to meet the requirements of *Furman*. In all, thirty-five state legislatures reacted by passing two types of death penalty statutes: "mandatory and guided discretion."[28] The mandatory stat-

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23 *Id.* at 239. *Furman* was a consolidation of three cases: Furman v. Georgia (murder conviction); Jackson v. Georgia (rape conviction); and Branch v. Texas, (rape conviction). *Id.*

24 *Id.* at 239-40.

25 The particular statutes at issue were: TEX. PENAL CODE ANN. § 1189 (Vernon 1961) (punishment for rape); 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 (Michie 1982)); 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 (Michie 1982)).

26 *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

27 *Furman*, 408 U.S. at 256 (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups . . . these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."); *id.* at 309-10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 314 (White, J., concurring) ("[P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime.").

28 ALA. H. B. 212 §§ 2-4. 6-7 (1975); ARIZ. REV. STAT. ANN. §§ 13-452 - 13-454

utes provided for the imposition of the death penalty for those found guilty of specified crimes,[29] whereas the guided discretion statutes provided for the weighing of statutory aggravating and mitigating circumstances.[30] In 1976, in *Gregg v. Georgia*,[31] the Court proclaimed that "the punishment of death does not invariably violate the Constitution."[32] Using the balancing test the Court held that

(Supp. 1973); ARK. STAT. ANN. § 41-1302 (Supp. 1975); CAL. PENAL CODE §§ 190.1, 209, 219 (West Supp. 1976); 1974 COLO. SESS. LAWS § 24; CONN. REV. STAT. §§ 53a-25, 53a-35 (b), 53a-46a, 53a-54b (1975); DEL. CODE ANN. tit. 11, § 4209 (West Supp. 1975); FLA. STAT. ANN. §§ 782.04, 921.141 (West Supp. 1988); GA. CODE ANN. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (Supp. 1975); IDAHO CODE § 18-4004 (Supp. 1975); ILL. ANN. STAT. ch. 38, para. 9-1, 1005-5-3, 1005-8-1a (Smith-Hurd Supp. 1976-77); IND. CODE § 35-13-4-1 (1975); KY. REV. STAT. ANN. § 507.020 (Baldwin 1975); LA. REV. STAT. ANN. § 14:30 (West Supp. 1976); MD. ANN. CODE art. 27 § 413 (Supp. 1975); MISS. CODE ANN. §§ 97-3-19, 97-3-21, 97-25-55, 97-17-20 (Supp. 1975); MO. ANN. STAT. § 559.009, 559.005 (Vernon Supp. 1976); MONT. REV. CODE ANN. § 94-5-105 (Spec. Crim. Code Supp. 1976); NEB. REV. STAT. §§ 28-401, 29-2521 to 29-2523 (1975); NEV. REV. STAT. § 200.030 (1973); N.H. REV. STAT. ANN. § 630:1 (1974); N.M. STAT. ANN. § 40A-29-2 (Supp. 1975); N.Y. PENAL LAW § 60.06 (McKinney 1975); N.C. GEN STAT. § 14-17 (Supp. 1975); OHIO REV. CODE ANN. §§ 2929.02-2929.04 (Anderson 1975); OKLA. STAT. ANN. tit. 21, § 701.1-701.3 (West Supp. 1975-1976); 1974 PA. LAWS, ACT. NO. 46; R.I. GEN. LAWS § 11-23-2 (Supp. 1975); S.C. CODE ANN. § 16-52 (Law. Co-op. Supp. 1975); TENN. CODE ANN. §§ 39-2402, 39-2406 (1975); TEX. PENAL CODE ANN. § 1903 (a) (Vernon 1974); UTAH CODE ANN. §§ 76-3-206, 76-3-207, 76-5-202 (Supp. 1975); VA. CODE ANN. §§ 18.2-10, 18.2-31 (1976); WASH. REV. CODE §§ 9A.-32.045, 9A.32.046 (Supp. 1975); WYO. STAT. § 6-54 (Supp. 1975).

29 *E.g.*, LA. REV. STAT. ANN. § 14:30 (West 1974) (then required the death penalty to be imposed whenever jury finds defendant guilty of first-degree murder); N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (required the death penalty to be imposed whenever jury finds defendant guilty of first-degree murder); OHIO REV. CODE ANN. §§ 2929.03, 2929.04 (Baldwin 1975) (death penalty mandatory for defendant found guilty of aggravated murder unless the trial judge found one of three mitigating factors).

30 *E.g.*, GA. CODE ANN. § 26-1101 (1972) (bifurcated trial, judge or jury must find at least one of ten aggravating circumstances before returning death sentence, judge or jury may refuse to impose the sentence of death even if aggravating circumstances found, automatic appeal); FLA. STAT. ANN. § 782.04 (1) (West Supp. 1976-1977) (Judge must weigh eight aggravating circumstances against seven mitigating circumstances to determine whether to impose death penalty, automatic appeal); TEX. PENAL CODE ANN. § 19.03 (Vernon 1974) (Bifurcated trial, requires finding of aggravating circumstances, mitigating circumstances may be presented).

Under the guided discretionary death penalty statutes, the sentencer has the power to balance the aggravating circumstances against the mitigating circumstances and to impose the death penalty when the aggravating circumstances outweighe the mitigating circumstances. The Model Penal Code lists many examples of what should constitute aggravating circumstances and mitigating circumstances. Some aggravating circumstances are: (a) the murder was committed by a defendant under a sentence of imprisonment; (b) the defendant knowingly creates a great risk of death to many persons (c) the murder was committed for pecuniary gain. Some mitigating circumstances are: (a) the defendant has no siguificant history of prior criminal activity; (b) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; (c) the defendant acted under duress or under domination of another person. *See* Gregg v. Georgia, 428 U.S. 153, 193 n.44 (1976) (quoting MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962)).

31 428 U.S. 153 (1976).

32 *Id.* at 169.

the application of the death penalty to one who committed murder was proportionate: "[W]e cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."[33] The *Gregg* Court also explained that the proportionality test required the Court to "look to objective indicia that reflect the public attitude toward a given sanction."[34] However, as the Court felt that "public perceptions" were not conclusive, it actively retained its right to determine whether the death penalty was excessive punishment in a particular case. In a series of decisions handed down that same year, the Supreme Court struck down the mandatory death penalty statutes because they did not allow for an individualized consideration of each particular defendant.[35] It upheld the discretionary statutes because these statutes required lower courts to consider each defendant's culpability on a case-by-case determination.[36]

In 1977, the Court used the balancing test to find that the death penalty was an excessive punishment for the crime of rape.[37] The Court examined the history behind the death penalty, examples of legislatively authorized use of the death penalty, international opinion regarding the death penalty, and the sentencing decisions made by juries, and found that the death sentence for rape was a disproportionate punishment that violated the eighth amendment.[38] One

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33 *Id.* at 187.

34 *Id.* at 173.

35 Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence."); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we 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.") (citation omitted); Roberts v. Louisiana, 428 U.S. 325, 333 (1976) ("The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings.").

36 Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida 428 U.S. 242 (1976); *Gregg* 428 U.S. 153.

37 Coker v. Georgia, 433 U.S. 584 (1977).

38 *Id.* at 592. The Court wrote that the penalty of death for the crime of rape "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." The Court finally addressed the concern raised in *Powell v. Texas* about the necessity of deferring to the standards of state legislatures and others when it declared: "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 597.

year later, in *Lockett v. Ohio*,[39] the Supreme Court reversed a death sentence for a non-triggerman involved in a felony murder because the state death penalty statute did not "permit the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases."[40] The Court found that in capital cases, the need to treat the defendant "with that degree of respect due the uniqueness of the individual" compelled "individualized consideration."[41]

C. Death Penalty Jurisprudence and *Enmund*: Intent to Kill is a Necessary Prerequisite to the Imposition of the Death Penalty

1. *The Majority and Dissenting Opinions*

In 1982, the Supreme Court in *Enmund v. Florida*[42] used a balancing test to decide whether the sentence of death for a non-triggerman defendant who was involved in a felony where a murder took place is constitutional.[43] In the 4-1-4 decision,[44] the Court decided that in the case of a defendant who "neither took life, attempted to take life, nor intended to take life,"[45] imposing the death penalty violates the eighth amendment.[46] The Court thus held that in order to impose the death sentence, the non-triggerman defendant must intend the murder of the decedent.[47]

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39 438 U.S. 586 (1978).

40 *Id.* at 606.

41 *Id.* at 605.

42 458 U.S. 782 (1982).

43 The defendant, Earl Enmund, was a passenger in a car that Sampson and Jeanette Armstrong drove. They all proceeded to the Kersey farmhouse where Sampson and Jeanette got out and went to the farmhouse with the intention of robbing the Kerseys. It is unclear whether Enmund knew about their intentions. At some point during the robbery the Armstrongs decided to kill the Kerseys, an elderly couple. At no point during this time did Enmund leave the car. Enmund did drive the car away from the farmhouse after Sampson and Jeanette murdered the Kerseys. *Id.* at 783-84. The Florida Supreme Court noted that while Enmund did not directly participate in the killing, the jury could have found that he was waiting by the car ready to help the robbers. The dissenting opinion states that Enmund had planned the armed robbery of the Kersey's. *Id.* at 824 (O'Connor, J., dissenting).

44 Justice White wrote the plurality opinion of the Court, joined by Justice Marshall, Justice Stevens, and Justice Blackmun. Justice Brennan concurred, writing that the death penalty violated the cruel and unusual penalty clause under any circumstances. Justice O'Connor dissented joined by Chief Justice Burger, Justice Powell, and Justice Rhenquist.

45 *Id.* at 787.

46 The Court indicated in a footnote that it need not reach the question of whether or not the degree of the defendant's involvement in the murder was enough to satisfy the eighth amendment. *Id.* at n.4.

47 The *Enmund* Court did not define the word "intent." In Cabana v. Bullock, 474 U.S. 376, 386-87 (1986), the Court stated that the eighth amendment does not require that the jury actually determine the felony murderer's state of mind—merely that the

The Supreme Court in *Enmund* used the *Coker v. Georgia* balancing test.[48] The Court began its analysis by examining society's views of the crime and punishment. The Court weighed this factor by looking to state and federal legislation concerning the death penalty. Out of thirty-six jurisdictions that authorized the death penalty, the Court found that only eight jurisdictions authorized the death penalty for participation in a robbery where another robber kills.[49] The Court stated that at most "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die."[50] The Court felt that this legislative judgment rejected the death penalty for cases such as Enmund's.

The Court then looked to jury rejections of the death penalty for accomplice liability in felony murder cases. Of those executed for homicide between 1964 and 1982, only 6 out of 362 were nontriggerman felony murderers.[51] And of 739 inmates under sentences of death for homicide as of October 1, 1981, only three were sentenced to die absent a finding that they killed, participated in the scheme to kill the victim, or solicited someone else to kill the victim.[52] These facts led the Court to conclude that "the statistics . . . are adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within [the defendant's] category."[53]

The Court next decided that it needed to resolve whether the eighth amendment allows the imposition of the death penalty in a case where the defendant did not himself kill, attempt to kill, or intend that a killing take place. Citing *Gregg v. Georgia*,[54] the Court explained that the death penalty should be applied only in situations where it would serve retributive or deterrent goals. Because the Court believed that only intentional murders could be deterred, the Court stated that " 'capital punishment can serve as a deterrent only

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state's appellate process need yield a determination that the defendant possessed the requisite intent to kill.

48 Coker v. Georgia, 433 U.S. 584, 592 (1977).

49 *Enmund*, 458 U.S. at 789. In four states, felony murder was not a capital offense (Missouri, New Hampshire, Pennsylvania, Washington). Eleven other states required some form of culpable mental state. In eight of the eleven intent was required (Alabama, Illinois, Louisiana, New Mexico, Ohio, Texas, Utah, Virginia) and in the other three, reckless or extreme indifference to human life was required before the death penalty could be imposed (Arkansas, Delaware, Kentucky). *Id.* at 789-90.

50 *Id.* at 792.

51 *Id.* at 794.

52 *Id.* at 795

53 *Id.* at 796.

54 428 U.S. 153 (1976).

when murder is the result of premeditation and deliberation."[55] Enmund did not meet the second justification for the death penalty—retribution—because, as the Court said, "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[56] Because the lower court did not meet these two justifications, and because the Court believed that most legislative and jury decisions showed that society rejected capital punishment in cases such as Enmund's, the Court found that imposition of the death penalty against a non-triggerman who did not intend to kill violated the eighth amendment.[57]

Justice O'Conner, writing in dissent,[58] argued that the balancing analysis would support the imposition of death in this case and that the majority holding "interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law."[59] The dissent examined the history of the balancing analysis and essentially concluded that it prohibited the imposition of the death penalty when the magnitude of the punishment was out of proportion to the harm inflicted upon the victim.[60] While this is the same standard that the majority used, the dissent reached a dramatically different result. Justice O'Connor examined the jury statistics that the majority used to show that society rejected the imposition of the death penalty upon one convicted of felony murder, and proclaimed that the meaning of the statistics were "not entirely relevant" because they may merely show that juries are cautious in imposing the death penalty.[61] She then considered the same state statutes that the majority used in its argnment to conclude that society still "embrace[s] capital punishment for [felony murder]."[62]

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55 *Enmund*, 458 U.S. at 799 (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

56 *Id.* at 801.

57 *Id.* at 782. The dissent criticized the majority on two grounds. First, that the Court's opinion needlessly violated the states' power to sentence criminals implicit in federalism: "[T]oday's holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law." *Id.* at 802. Second, that the statistics used by the majority were isolated and not particularly relevant. *Id.* at 818-20. *See also* Note, Enmund v. Florida: *The Supreme Court's Subjective Policy of Death Penalty Limitation*, 1983 DET. C.L. REV. 965, 976-77 (authored by Katharine L. Bradin) (jury and death row statistics supporting the conclusion that society rejects the death penalty for non-triggerman felony murderers may not necessarily be relevant in supporting such a conclusion).

58 Joined by Cbief Justice Burger, and Justices Powell and Rehnquist.

59 *Enmund*, 458 U.S. at 802.

60 *Id.* at 815.

61 *Id.* at 819.

62 *Id.* at 823.

The heart of the dissenting opinion revolves around the belief that other factors beside "intent to kill" may be measured into the balancing approach with the same weight as "intent to kill." Thus, the dissent writes "*mens rea* . . . is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder."[63]

2. *Critique of the Majority Opinion*

The *Enmund* Court held that a non-triggerman who did not take life, attempt to take life, or intend to take life may not be sentenced to death. This holding is presented in a confusing and poorly articulated manner.[64] The "intent" requirement never is defined in a precise manner. Indeed, the Supreme Court defined the "intent" requirement within the actual *Enmund* decision in so many different ways that it is not clear what level of mental culpability is actually needed before a non-triggerman involved in a felony murder may be sentenced to death. The White plurality variously defined intent as: intent to take life,[65] intent that "lethal force will be employed,"[66] "contemplat[ion] that life would be taken,"[67] "contemplat[ion] that lethal force will be employed by others,"[68] or "anticipat[ion] that lethal force would or might be used."[69]

The Court put a further gloss on the intent requirement when it stated that if the likelihood of killing in the underlying felony was "so substantial that one should share the blame for the killing," then the intent standard might be lower.[70] However, the Court also suggested that the defendant must have the requisite intent of "premeditation" and "deliberation."[71]

Because the holding in *Enmund* is so unclear, courts and com-

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63 *Id.* at 825.

64 For a discussion of the many problems implicit in the *Enmund* decision, see Note, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357, 370-71 (1984) (authored by John C. Shawde) ("*Enmund* promotes confusion in several areas," including whether the death penalty could constitutionally be applied to an accomplice who intended the victim to be killed but did not participate in the killing.).

65 *Enmund*, 458 U.S. at 787, 793, 795, 796, 798, 799.

66 *Id.* at 797.

67 *Id.* at 801.

68 *Id.* at 799.

69 *Id.* at 788. For a fuller discussion of the Supreme Court's struggle to define the intent requirement in *Enmund* and a discussion of the possible interpretations, see Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857, 865-66, 869-879 (1985) (authored by Douglas W. Schwartz). In addition to failing to define "intent," the court left the definitions of "lethal force," "contemplate," and "anticipate" unnecessarily vague. *See* Note, *supra* note 3, at 370-71.

70 *Enmund*, 458 U.S. at 799.

71 *Id.* (" 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation' ") (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

mentators have inconsistently viewed the requirements of *Enmund* as ranging from necessitating a finding of anticipation that lethal force would be used to a complete bar on the imposition of the death penalty for those convicted under a felony murder statute,[72] as well as conclusions falling everywhere in between.[73]

Many lower federal courts have decided that *Enmund* requires more than simply that the defendant anticipate that lethal force might be used or that lives might be taken. The Fourth, Ninth, and Tenth Circuits have adopted a strict "intent to kill" doctrine,[74] while the Eleventh Circuit appears to be torn between a narrow reading of *Enmund* and a more permissive reading.[75] The Fifth Circuit epitomizes the confusion that lower courts have had in trying to apply the *Enmund* standard by interpreting the intent requirement in different ways. In some decisions the court requires that non-triggermen

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72 Comment, 29 N.Y.L. SCH. L. REV. 179, 204 (1984) (authored by Peter R. Schwartz).

73 Comment, *Intent after Enmund v. Florida: Not Just Another Aggravating Circumstance*, 65 B.U.L. REV. 809, 810 (1985) (authored by Margaret Carmody Jenkins) (defendant needs intent to commit homicide); Comment, *Eighth Amendment Prohibits Imposition of Death Penalty on Accomplice to a Felony Murder*, 61 WASH. U.L.Q. 253, 254 (1983) (authored by L.K.S.) (intent to kill); Note, *Cabana v. Bullock: The Proper Tribunal—The Supreme Court Revisits Enmund v. Florida*, 40 U. MIAMI L. REV. 1023, 1030 (1986) (authored by Deborah Sachs) (the Supreme Court did not adequately specify the level of intent); Note, *Enmund v. Florida: The Constitutionality of Imposing the Death Penalty Upon a Co-felon in Felony Murder*, 32 DE PAUL L. REV. 713, 728 (1982) (authored hy Laura L. Keiton) (defendant must have killed or intended to kill); Note, *supra* note 3, at 370-71 (defendant must have killed, attempted to kill, or intended to kill); Note, *Enmund v. Florida: A Nail in the Coffin of the Felony Murder Rule*, 5 GLENDALE L. REV. 248, 254 (1983) (defendant must have killed, attempted to kill or intended that lethal force be employed); Note, *Enmund v. Florida*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 292, 302 (1983) (authored by David V. Weiner) (defendant must kill or intend killing to occur).

74 *See* Andrews v. Shulsen, 802 F.2d. 1256, 1274 (10th Cir. 1986), *cert. denied*, 108 S. Ct. 1091 (1988); McKenzie v. Risley, 801 F.2d 1519, 1530 (9th Cir. 1986) (finding of intent is condition precedent to the imposition of the death penalty), *reh'g granted*, 815 F.2d 1323 (9th Cir.), *vacated in part*, 842 F.2d 1525, *cert. denied*, 109 S. Ct. 250 (1988)); Hyman v. Aiken, 777 F.2d 938, 940 (4th Cir. 1985) (imposition of the death penalty is prohibited unless a finding is made that the defendant killed, attempted to kill, or intended to kill), *judgment vacated*, 478 U.S. 1016 (1986); United States v. Schell, 692 F.2d 672, 675 (10th Cir. 1982) (death penalty unconstitutional when applied to felony murder defendant who did not kill or intend to kill). The Court in *Andrews* affirmed the defendant's conviction, saying that the nature of the jury instructions precluded his conviction without a finding "that he intended the murders."); *but cf.* Chaney v. Brown, 730 F.2d 1334, 1336 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984) (defendant must kill, attempt to kill, or contemplate that life be taken before death penalty can be imposed).

75 *See* White v. Wainwright, 809 F.2d 1478, 1481, 1484 (11th Cir.), *cert. denied*, 483 U.S. 1044 (1987) (The court seems to accept the defendant's contemplation that life be taken or that lethal force be used as satisfying the intent requirement.); Fleming v. Kemp, 748 F.2d 1435, 1454 (11th Cir. 1984), *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) (intent to kill is satisfied by the defendant doing one of four things: (1) directly committing the crime; (2) intentionally causing someone to commit the crime; (3) intentionally aiding or abetting in the commission of the crime; (4) intentionally encouraging another to commit the crime).

have personal intent to kill,[76] and in other decisions the court merely requires that the non-triggermen anticipate or contemplate using lethal force or taking lives.[77] State courts seem split as well in deciding the intent standard necessary to satisfy *Enmund*.[78]

While there is no unanimous agreement about what *Enmund* requires, the strongest trend among the commentaries and the lower courts is that *Enmund* at least requires a determination that the defendant specifically intended for the victim to die.[79] In late 1986 the Supreme Court granted certiorari to *Tison v. Arizona*, perhaps in part to resolve the confusion caused by the ambiguous holding in *Enmund*. The Court essentially overruled *Enmund* and lessened the standard of culpability necessary for imposition of the death penalty. This new standard is just as vague and confusing as that announced in *Enmund*.

II

TISON V. ARIZONA

A. The Facts

On July 30, 1978, three brothers, Donald, Ricky, and Raymond Tison, implemented a plan their relatives had designed[80] to free

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76 *See* Kirkpatrick v. Blackburn, 777 F.2d 272, 286 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1988) (*Enmund* requires that " 'the defendant either participated directly in the killing or personally had an intent to commit murder' ") (quoting Reddix v. Thigpen, 728 F.2d 705, 708 (5th Cir.), *cert. denied*, 469 U.S. 990 (1984)) (court reversed because there was not a "specific finding that [the defendant] either killed, attempted to kill, or intended a killing or the use of lethal force.").

77 *See* Johnson v. McCotter, 804 F.2d 300, 302 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987) (*Enmund* requires that a defendant must at least have contemplated the "act of an accomplice" in the killing); Wingo v. Blackburn, 786 F.2d 654 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987) (*Enmund* requires a finding of "an intention or contemplation that life be taken.").

78 People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265, 275 (1984), *cert. denied*, 469 U.S. 1229 (1985) (defendant must intend to kill or intend to aid in the killing), *rev'd*, People v. Malone, 47 Cal. 3d 1, 762 P.2d 1249, 252 Cal. Rptr. 525 (1988); Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (defendant must intend to kill or contemplate the use of lethal force), *rev'd*, People v. Anderson, 38 Cal. 3d 58, 694 P.2d 1149, 210 Cal. Rptr. 777 (1985).

79 This determination may be made by the jury or the judge or even the State's highest court if it finds, upon review of the trial record, evidence sufficient to conclude that the intent requirement was satisfied. *See* Cabana v. Bullock, 474 U.S. 376, 392 (1986) (eighth amendment does not require tbat a jury make the findings required by *Enmund*. The findings need merely be made by "some appropriate tribunal—be it an appellate court, a trial judge, or a jury.").

80 Gary Tison, the boys' father, Dorothy Tison, the boys' mother, Joseph Tison, the boys' uncle, and other relatives helped to plan the escape. Originally, the three boys were not going to participate in the breakout, but after assurances from their father that no one would be hurt, the boys joined the plan. Indeed, no shots were fired in the escape. *Tison*, 481 U.S. 137, 139 (1987).

For a detailed description of the events that led up to the murder and convictions of

their father, Gary Tison, from prison.[81] That morning the three men entered the Arizona State Prison at Florence with an ice chest loaded with guns and broke their father and his cell mate, Randy Greenawalt,[82] out of prison. The five spent two nights at an isolated house, and then switched cars and headed towards Flagstaff, Arizona. Along the way two tires blew out on their car (a Lincoln), forcing the group to flag down a passing car in order to complete the escape. Raymond stood alone by the side of the road and attempted to flag down a car. Soon a Mazda, containing John and Donnelda Lyons, their infant son, and their niece, pulled over to render assistance. The other members of the group then surrounded the Lyonses.

Raymond drove both cars off the highway and into the desert. The Tison's gear was placed into the Mazda, and then the Lincoln was driven further into the desert and rendered inoperable by a shotgun blast to the radiator. John Lyons begged the Tisons not to kill him, and Gary Tison stated that he was "thinking about it."[83] While everyone was gathered around the Lincoln, Gary Tison told his sons to go back to the Mazda and get a jug of water for the Lyons family. While the three brothers were getting the water, they heard a series of gunshots.[84] Gary Tison and Randy Greenawalt had killed the Lyons family.

Several days later the group ran into a roadblock in Pinal County, Arizona. Ricky Tison, Raymond Tison, and Randy Greenawalt were captured and tried for the capital murder of the Lyons family, armed robbery, kidnapping and theft of a motor vehicle.[85] They were each convicted separately under an Arizona felony-murder law,[86] and the trial judge sentenced them to death.[87] Ricky and Raymond Tison were only nineteen and eighteen years old

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the Tisons, see generally *Tison*, 481 U.S. at 139-41; Brief for the Petitioners at 2-13; Brief for Respondent at 1-8.

81 Gary Tison was serving a life sentence for killing a guard in an attempted prison break.

82 Randy Greenawalt was serving a life sentence for murder.

83 *Tison*, 481 U.S. at 140.

84 There is some ambiguity as to how close the brothers were to the Mazda when the actual shooting took place. The defendants argue that they were either at the Mazda or headed to the Lincoln, Petitioner's Brief at 4, while the prosecution argued that they were positioned back where they had been before going to get the water, Respondent's Brief at 2. *See also* Comment, *Felony-Murder Death Sentence: The Tison Brother's Intent to Kill*, 27 ARIZ. L. REV. 889, 891 (1985) (authored by Darlyre Gallaway) (author, citing Ricky Tison's February 1, 1979 statement, at 36, states that Ricky and Raymond had returned from the Lincoln and had given John Lyons a drink of water right before the Lyons family was murdered).

85 Donald Tison was shot in the head and subsequently died due to the injuries. Gary Tison escaped, but died from exposure in the desert soon after.

86 ARIZ. REV. STAT. ANN. § 13-452 (1956) (repealed 1978).

87 The brothers were sentenced to death even though the Chief Adult Probation

when the murders took place, and neither had any prior felony convictions.[88]

B. The Arizona State Court Opinion

On direct review, the Arizona Supreme Court affirmed the decision of the trial court,[89] although the Arizona Supreme Court found that the defendants (1) did not "specifically intend" the deaths; (2) did not plot in advance that the homicides would take place; and (3) did not actually pull the triggers on the guns which inflicted the fatal wounds. The United States Supreme Court denied the defendants' petition for certiorari.[90] Two years later the defendants made a collateral attack on their death sentences by filing for post-conviction relief alleging that the imposition of the death sentence would violate *Enmund v. Florida*. The trial court denied the petitions, and the Arizona Supreme Court, in a divided decision, held that the intent requirement of *Enmund* was satisfied because Raymond Tison "could anticipate the use of lethal force during [the] attempt to flee confinement."[91] In Ricky's case, the court held that *Enmund*'s intent requirement was fulfilled because, "[i]ntent to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be . . . taken in accomplishing the underlying felony."[92]

The Arizona Supreme Court essentially reformulated the *Enmund* requirement into a "species of foreseeability."[93] To satisfy this "foreseeability" test, the prosecution had only to prove that the defendants anticipated that lethal force might be used. The United States Supreme Court then granted certiorari to decide whether or not the Arizona Supreme Court's decision comported with the requirements of *Enmund*.[94]

Officer would not recommend the death penalty. Indeed, the Court-appointed clinical psychologist told the court that the boys could be rehabilitated. Petitioner's Brief at 8-9.

88 In fact, their only previous brush with the law involved their conviction for petty theft of a case of beer. Petitioner's Brief at n.2.

89 State v. (Ricky Wayne) Tison, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981).

90 *Tison*, 459 U.S. 882 (1982).

91 State v. (Raymond Curtis) Tison, 142 Ariz. 454, 456, 690 P.2d 755, 757 (1982). The court split 3-2.

92 State v. (Ricky Wayne) Tison, 142 Ariz. 446, 447, 690 P.2d 747, 748 (1982). In a sharply worded dissent, Justice Feldman and Vice Chief Justice Gordon wrote: "[T]here is no direct evidence that either of the brothers intended to kill, actually participated in the killing or was aware that lethal force would be used against the kidnap victims." State v. (Ricky Wayne) Tison, 142 Ariz. 446, 451 (1982) (Feldman, J. concurring in part and dissenting in part; Gordon, V.C.J., joining in the dissent).

93 *Tison*, 481 U.S. 137, 150 (1987).

94 *Id.* at 158.

C. The Supreme Court Opinion

1. *The Majority Opinion*

The Supreme Court vacated and remanded the sentence of death for the Tison brothers because the Arizona Supreme Court erroneously used the *Enmund* intent standard.[95] According to the majority opinion, the Arizona Supreme Court did not attempt to argue that the facts of the case supported "an inference of 'intent' in the traditional sense," but instead broadened the *Enmund* intent requirement into a "restatement of the felony-murder rule itself."[96] Any participant in a felony could have anticipated or contemplated that lethal force might be used in accomplishing the underlying felony and therefore that person, by anticipating or contemplating the possibility of lethal force, met the *Enmund* "intent" requirement under the Arizona Supreme Court's formulation.

The Supreme Court rejected this reformulation of the *Enmund* "intent" standard and stated that it accepted as true that the defendants did not "intend" to kill the Lyons family.[97] At this point, the Court could simply have reversed the death sentences against the Tison brothers in accordance with *Enmund*; however, the Court proceeded to create a completely new substantive standard for capital liability.

While the Court stated that defendants did not fall within the "intent to kill" category of felony murderers for which *Enmund* would allow execution, the Court also ruled that the defendants did not fall within the category of offenders for whom *Enmund* would preclude execution: those who did not kill, attempt to kill, or intend to kill. Instead, the Supreme Court created a new category of offenders—those who have a "major participation in the felony committed, combined with reckless indifference to human life . . . ."[98] The Court stated that for some offenders, a determination of reckless disregard for human life, combined with the conduct that causes the lethal result, is equivalent to "intent to kill."[99]

The Court then reviewed its own decision in *Enmund* and stated

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95 481 U.S. 137 (1987). Justice O'Connor wrote for the majority, joined by Chief Justice Rehnquist and Justices White, Powell, and Scalia. Justice Brennan dissented, joined in part by Justices Marshall, Blackmun, and Stevens.

96 *Id.* at 150.

97 The *Tison* Court used "intend" in the *Enmund* sense. *Id.* at 151 ("Petitioners do not fall within the 'intent to kill' category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.").

98 *Id.* at 158.

99 *Id.* at 157. The Court cites the Model Penal Code as well as the common law as two examples where reckless behavior culminating in a lethal end result is treated the same as purposeful and knowing killing. However, the Court does not address the fact that it is the principal, and not an accomplice, for whom this equivalency exists.

that the reasoning in *Enmund* did not apply to the defendants in *Tison* because they belonged to a middle category of offenders. The majority drew support for its new standard from a quote taken from the *Enmund* opinion which suggests that if the defendant were to participate in crimes in which the risk of death were substantial, then the defendant should share in the blame for the killing.[100] The majority's reliance on this language, however, is misplaced because by its own language *Enmund* meant to prevent the sentence of death for anyone who did not kill, attempt to kill, or intend to kill. The Tison brothers, by the Court's own admission, did none of these acts.[101] Moreover, the majority opinion does not even discuss how it derives the various "categories" of felony murderers; it merely states that *Enmund* "explicitly" dealt with only two subsets of all felony murderers; at one extreme there was Enmund, a minor actor in an armed robbery, who could not be sentenced to death, and at the other extreme there was the felony murderer who actually killed, attempted to kill, or intended to kill, and who could be sentenced to death.[102] Thus, between these two extremes, the Court found a middle category. Within this middle category were defendants who participated to a major degree in the underlying felony and who exhibited a reckless indifference toward human life, and who thus could be sentenced to death.

Next, the Court considered state death penalty statutes. The *Tison* Court concluded that the statutes "powerfully suggest[] that our society does *not* reject the death penalty as grossly excessive under these circumstances."[103] The *Enmund* Court used essentially those same death penalty statutes in its determination that the death penalty should not be applied to the non-triggerman.[104] The majority then noted that a number of lower courts interpreting *Enmund* had upheld the imposition of the death penalty in circumstances where aggravated felony murders took place but did not apply the strict interpretation of "intent to kill."[105] This evidence, the Court said, was enough to demonstrate a consensus that "substantial participation in a violent felony under circumstances likely to result in

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100 *Id.* at 149 (quoting *Enmund*, 458 U.S. at 799 ("[i]t would be very different if the likelihood of a killing in course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony.")).

101 *Id.* at 151 ("Petitioners do not fall within the 'intent to kill' category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.").

102 *Id.* at 149 ("*Enmund* explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment.").

103 *Id.* at 154 (emphasis in original).

104 *Id.* at 152 n.4.

105 *Id.* at 154.

the loss of innocent human life may justify the death penalty even absent an "intent to kill."[106] The Supreme Court thus used the failure of lower courts to apply accurately the dictates of *Enmund* to justify the expansion of the *Enmund* intent to kill requirement.

The Court remanded *Tison* for a hearing in accordance with its new standard that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[107] The Supreme Court stated that the Tisons fell well within the range of this new category and could be sentenced to death in compliance with the re-defined *Enmund* standard.[108]

2. *The Dissent*

Justice Brennan, dissenting, characterized the conviction of the Tisons for first degree murder as an application of the felony-murder rule.[109] Under the felony-murder doctrine, Ricky and Raymond Tison were liable for the murders that occurred during the robbery, regardless of whether they actually intended or committed murder. The actions and intent of their co-felons was imputed to them.[110] The dissent labeled the felony-murder doctrine as a "curious" "living fossil" surviving from an era in which all felonies were punishable by death.[111] The majority's broadening of the death penalty justifications from intent to degree of culpability upset the dissent. Without intent, the degree of personal culpability must necessarily be minimal.

Brennan concluded that the *Enmund* Court had, in formulating the personal intent to kill requirement, rejected the felony-murder

106 *Id.*

107 *Id.* at 158.

108 *Id.* Following remand from the Supreme Court the Arizona Supreme Court remanded the case to the Yuma County Superior Court for resentencing. The Superior Court judge ruled that both Ricky and Raymond Tison possessed a "reckless indifference to human life," and resentenced each to death without permitting either to present any additional mitigating circumstances. Both defendants appealed. On May 2, 1989 the Arizona Supreme Court sitting *en banc* vacated the sentences and remanded for an evidentiary hearing on "Enmund/Tison issues" and for resentencing. 774 P.2d 805, 806 (Ariz. 1989).

109 Justice Marshall joined Justice Brennan's dissent in its entirety. Justices Blackmun and Stevens joined Justice Brennan's dissent, except for the portion in which he repeated his view that all forms of capital punishment were cruel and unusual.

110 Although the majority did not discuss it, this imputation of intent from the principal to the co-felon seems to violate the "individualized consideration" mandated by Lockett v. Ohio, 438 U.S. 586, 605 (1978). *See Tison*, 481 U.S. at 160 n.3 (Brennan, J., dissenting). Justice Brennan would leave it open to the state courts to consider the constitutionality of Arizona's aggravating factors).

111 *See Tison*, 481 U.S. at 160 n.3 (Brennan, J., dissenting); *see also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 560-61 (1972).

doctrine.[112] Moreover, the dissent stated that *Enmund* "cast considerable doubt on the constitutionality of the death sentences imposed on [the defendants] in this case"[113] because the defendants had no intent to kill. Next, the dissenting opinion argued that after concluding that the Arizona Supreme Court had misconstrued *Enmund*, the Court should have vacated the sentences of the defendants and reversed the judgment rather than "announc[ing] a new substantive standard for capital liability."[114] Brennan explained that the actions of the Tisons amounted to no more than the actions of Enmund. Because the Tisons were only as culpable as Enmund, Brennan felt that the Tisons should not be put to death. Indeed, Brennan asserted that the Court should have taken the defendant's mental state (no intent to kill) into consideration before announcing that the defendants' mental states demonstrated a reckless disregard for human life.[115] In addition, Brennan lashed out at the majority for failing to use the proportionality analysis required by precedent and implicit in the Constitution.[116] Brennan stated that it was unfair to punish the defendants who did not kill or intend to kill as harshly as those "whose culpability is greatest"—the actual killers of the Lyons family.[117]

Justice Brennan concluded that the *Tison* decision was inconsistent not only with *Enmund*, but also with the only legitimate justifications for the imposition of capital punishment—deterrence and retribution.[118] The majority opinion at best addressed only one aspect of the proportionality test—the gravity of the offense and the harshness of the punishment—and ignored the other two.[119]

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112 *Tison*, 481 U.S. at 162 (Brennan, J., dissenting) ("The [*Enmund*] Court then explained, and rejected, the felony-murder doctrine as a theory of capital culpability.").

113 *Id.*

114 *Id.* at 163.

115 *Id.* at 163-68.

116 *Id.* at 168.

117 *Id.* at 171.

118 *Id.* at 172-73.

119 As announced in Solem v. Helm, 463 U.S. 277, 292 (1983), the proportionality test under the eighth amendment has three prongs: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *See supra* note 3.

Brennan also disputed the results of the majority's survey of state statutes authorizing the death penalty for felony murder. Rather than supporting the majority opinion, this survey data, Brennan claimed, was contrary to the Court's view because it showed that only a minority of the statutes would authorize the imposition of the death penalty in this case. Brennan marshalled further evidence that the country and the world do not support executing the type of defendant for which *Tison* would authorize the death penalty. *Tison*, 481 U.S. at 177 (Brennan, J., dissenting). Brennan cited statistics showing that between 1954 and 1982 there were only 6 of 362 possible cases where a nontriggerman felony murderer was executed. Indeed, of all those convicted of felony murder

Justice Brennan's dissenting opinion also stated that *Tison* exemplified an irrational system of justice. The system of justice the majority imposed cannot rationally distinguish the few cases in which the death penalty was applied from the majority of cases where it was not.[120] Brennan concluded that the application of the death penalty against non-triggermen who participate to a major extent in the underlying felony and who have a reckless indifference toward human life is unconstitutional. Moreover, even if *Tison* were the correct rule, Justice Brennan stated that the defendants could not meet the *Tison* test because he did not believe that there was enough evidence to prove that actions of the defendants demonstrated reckless disregard toward human life.[121]

III
ANALYSIS

A. *Tison* Cannot be Reconciled with *Enmund*

1. Tison *Departs from the Substantive Policies Underlying Enmund*

It is not possible to reconcile the Supreme Court's decision in *Tison v. Arizona* with its decision five years earlier in *Enmund v. Florida*. *Tison* is essentially a refined and reworked version of the dissent in *Enmund*. In *Enmund*, the dissent stated that a constitutionally allowable imposition of the death penalty did not require a finding of the defendant's intent. Rather, the defendant must possess "knowledge that [the felony committed] . . . involve[s] substantial risk of death or serious injury to other persons"[122] and that the defendant had to be a major participant in the felony.[123] The *Tison* Court creates an intermediate category of defendants by allowing the state to execute a defendant who exhibits reckless disregard toward human life and who participates to a great extent in the underlying felony. Thus, *Tison* eliminates the *Enmund* intent requirement, as the *Enmund* dissenting opinion would have liked, and in so doing increases the likelihood that other defendants will be eligible for capital punishment.

In addition to expanding dramatically the area in which the state constitutionally can apply the death penalty, *Tison* also departs from the substantive reasoning underlying *Enmund*. The *Enmund* Court required a determination of intent to kill because the death

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in the last quarter century, not one has been executed who did not kill, attempt to kill, or intend the death of the victim. *Id.* at 179-80 (Brennan, J., dissenting).

120 *Id.* at 171.

121 *See id.* at 179.

122 *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting).

123 *Id.* at 825-31.

penalty is a severe and irrevocable punishment to be used only as a last resort where the criminal actions of the defendant constitute so "grievous an affront to humanity" that they demand the imposition of the death penalty.[124] The *Enmund* Court refused to impute the actions or intent of another to the defendant because its theory of the eighth amendment revolved around the defendant's personal culpability. The *Tison* Court had no such qualms. Because the *Tison* Court viewed the death penalty as a legitimate punishment to protect society from criminals who knowingly take acts which might result in the loss of life,[125] the *Tison* Court did not need to "narrowly focus" on intent, but instead could look to the surrounding circumstances of a criminal's conduct. Culpability for the *Tison* Court rested on a combination of knowledge and action. A defendant is culpable if she acts with reckless disregard toward human life. The *Tison* Court viewed this combination as equivalent to "purposeful and knowing killing,"[126] thus justifying the death penalty.

2. Tison's *New Category of Defendants: Intention to Kill No Longer Necessary*

Enmund explicitly held that death is not a valid punishment under the eighth and fourteenth amendments for one who neither took life, attempted to take life, nor intended to take life. The holding of *Enmund* is unambiguous: those felony murderers who kill, attempt to kill, or intend to kill may be put to death; those who do not, may not.[127] The *Tison* Court created a third category of felony murder defendants and devised a new substantive standard by which to judge this newly developed category. This category comprises defendants who participated in the underlying felony to a major degree and who acted with reckless indifference towards human life. The *Tison* Court held that the state could constitutionally put individuals falling into this grouping to death without ever having to meet the *Enmund* criteria.

Tison argues that *Enmund* explicitly dealt with only two distinct subsets of all felony murderers, and that the Tison brothers did not fit into either of the two subsets, but rather into a third. The third category, however, is wholly illusory, created as a subterfuge to evade the dictates of *Enmund*. There are only two possible, but unsatisfying, explanations of where in *Enmund* this third category could be found. The first stems from a footnote in *Enmund* which states: "The petitioner argues a second question: whether the degree of

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124 *Id.* at 797 (quoting Gregg v. Georgia, 428 U.S. 153, 184 (1976)).
125 *Tison*, 481 U.S. at 157-58.
126 *Id.* at 158.
127 *Enmund*, 458 U.S. 781, 787, 796-99 (1982).

Enmund's participation in the killings was given the consideration required by the Eighth and Fourteenth Amendments. We need not deal with this question."[128] This could be construed by the *Tison* Court to mean that the eighth amendment analysis would have been different had Enmund's degree of participation in the killing been greater or lesser. Under this construction, the *Tison* Court could, consistent with *Enmund*, fashion a new substantive standard for the defendant whose participation in the underlying felony exceeded Enmund's. This analysis, however, does not survive careful scrutiny for two reasons. First, the *Tison* Court never mentioned this footnote in its opinion, probably because the holding of *Enmund* precluded even a cursory examination into the extent of the defendant's participation where the defendant did not kill, attempt to kill, or intend to kill.[129] Second, the *Enmund* opinion did not provide the slightest hint of an undefined third category of felony murder defendants. *Enmund* provided a blanket prohibition against the imposition of the death penalty in all cases where the non-triggerman did not possess the requisite intent requirement.

The *Tison* Court calls the Arizona Supreme Court's foreseeability test—whether the defendant anticipated that lethal force might be used in accomplishing the underlying felony[130]—an unacceptable definition of the intent to kill concept because it is "broader than that described by the *Enmund* Court."[131] The majority in *Tison*, however, goes to great lengths to show that killing with reckless indifference toward human life is equivalent to killing with purpose and knowledge, thus broadening *Enmund*'s intent requirement.[132] Just as intent to kill is a highly culpable state allowing imposition of the death penalty under *Enmund*, acting with reckless indifference toward human life is a highly culpable state allowing a sentence of death under *Tison*. Now, some individuals who do not meet the intent to kill requirement of *Enmund* may still be put to death.

In concluding that the Tisons met the reckless indifference towards human life requirement, the Court engaged in foreseeability analysis. To determine whether a defendant had a mental state of reckless indifference toward human life, the Court looked to see whether the defendant "knowingly engag[ed] in criminal activities

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128 *Id.* at 787.

129 This footnote creates a second hurdle for the prosecution to meet once it has shown that the defendant has intended to kill. The prosecution must next show that the defendant participated significantly enough in the killings that the imposition of the death penalty would not conflict with the eighth amendment.

130 *Tison*, 481 U.S. at 150-51.

131 *Id.* at 150.

132 *Id.* at 157-58.

known to carry a grave risk of death."[133] Thus, the imputation of "reckless disregard for human life" depends solely on a foreseeability test, for the Court stated that reckless indifference toward human life exists whenever one engages in conduct known to carry a grave risk of death.[134] The Court used foreseeability reasoning to show not only that the Tison brothers acted with reckless indifference toward human life, but also to show that they were major participants in the underlying felony. The Court stated that "[they] could have *foreseen* that lethal force might be used,"[135] and that "they both subjectively appreciated that their acts were likely to result in the taking of innocent life."[136] Using as evidence the contention that the Tison brothers could have or should have *anticipated* that lethal force might be used, the Court concluded that the Tison brothers met both prongs of the *Tison* test, and that the state may carry out their death sentences if the Arizona State courts so decide. The *Tison* test thus does not differ too much from the Arizona Supreme Court's requirement that the defendant "contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."[137]

3. *The* Enmund *Requirement Applied to the* Tison *Facts*

If the *Tison* Court would have strictly applied the *Enmund* intent to kill requirement to the Tison brothers, the Court would have found, as the dissenting Justices did, that the imposition of the death penalty to the Tison brothers violated *Edmund*. The similarities between Enmund's actions and the Tisons' actions are substantial.[138] Both were convicted of serious crimes which posed a serious risk to human life—robbery and robbery/kidnapping. Enmund and the Tisons were both convicted of murder despite the fact that they did not kill, attempt to kill, or intend to kill. No proof was offered by the prosecution to show that Enmund or the Tisons killed or attempted to kill the victims. The evidence tended to show that both Enmund and the Tisons were not present when their companions murdered the victims. Indeed, the evidence also showed that Enmund and the Tisons did not even know that their companions were going to kill the victims.

Several other factors combine to show that the Tisons were in fact less culpable than Enmund. For instance, Enmund had been

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133 *Id.* at 157.
134 *Id.*
135 *Id.* at 152 (emphasis added).
136 *Id.* (emphasis added).
137 State v. (Ricky Wayne) Tison, 142 Ariz. 446, 447, 690 P.2d 747, 748 (1982).
138 *See* Brief for the Petitioners at 17-19; *Tison*, 481 U.S. 137.

convicted of a prior felony involving the use or threat of violence;[139] the Tisons never had been convicted of a felony. While the *Enmund* Court found that it had to reverse Enmund's conviction because the evidence did not establish that Enmund intended to kill, the Tisons' record includes a great deal of evidence that the Tisons affirmatively did not intend to kill.[140] If the Supreme Court, or any of the lower courts, had faithfully followed the precedent of *Enmund*, they would have overturned the sentence of death imposed upon the Tisons. Indeed, the *Tison* Court stated that the Tisons did not satisfy the "intent" requirement of *Enmund*: "Petitioners [Ricky and Raymond Tison] do not fall within the 'intent to kill' category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment."[141]

4. *The Tison Brothers Did Not Have the Requisite State of Mind of "Reckless Indifference Toward Human Life"*

The Supreme Court stated that the *Tison* "record would support a finding of the culpable mental state of reckless indifference to human life."[142] This statement, however, is questionable. Although the defendants participated in the prison break and the kidnapping/robbery of the Lyons family, no objective evidence indicated that the defendants appreciated the possibility of their father and Randy Greenawalt suddenly murdering the Lyons family. The defendants merely acted in furtherance of the underlying felonies—prison break, robbery, and kidnapping. The defendants' actions were aimed at and consistent with these goals, and not murder.

A necessary element for the application of the death penalty is the exhibition of reckless indifference toward human life. The prosecution did not proffer independent evidence of state of mind. The defendants' involvement in the underlying felonies served as the sole proof of state of mind. The prosecution should have been required to prove a mental state of reckless indifference toward human life based upon more than mere participation in the underlying felony. The only evidence before the Court with respect to the defendants' mental state was the Arizona Supreme Court's conclusion, not supported by any facts, that the defendants could have anticipated that lethal force might be used during the escape. The Supreme Court should have remanded the case for a determination

139 *Enmund*, 458 U.S. at 785.

140 *See* Brief for the Petitioners at 18.

141 *Tison*, 481 U.S. at 151. The Court also said: "As petitioners point out, there is no evidence that either Ricky or Raymond Tison took any act which he desired to, or was substantially certain would cause death." *Id.* at 150.

142 *Id.* at 151.

on the question of the defendants' state of mind. The lower court did not show that the defendants possessed this necessary element of the *Tison* "reckless indifference toward human life" requirement. Thus, the Supreme Court misinterpreted the facts of *Tison* when it concluded that the Tisons could constitutionally be sentenced to death.

B. *Tison* and the Lower Courts

Tison's impact upon lower court decisions is unpredictable because the *Tison* decision is ambiguous. The Supreme Court did not define the requisite *mens rea* and conduct requirements necessary to yield a constitutionally approved sentence of the death penalty against a non-triggerman. The Supreme Court stated: "We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here."[143] The Court's failure to define adequately the new class of defendants and its refusal to explain adequately the key elements in its decision will allow for the discretionary application of *Tison* by lower courts, and will result in a cacophony of opinions.[144] Indeed, *Tison*'s ambiguity is already causing diverging lower court decisions. In a recent case, one court totally neglected consideration of the requirement of major participation in the underlying felony.[145]

Another feature of *Tison* is that the Supreme Court defined the actions of the Tison brothers as "fall[ing] *well within*" the required degree of participation of the felony.[146] If, as the Court suggests, the Tisons' action were more than sufficient to find that they met the "major participation" requirement of the *Tison* test, then courts may find that future defendants who participate in a felony to a lesser degree satisfy the participation requirement. This will probably lead to a collapse of the two prongs (major participation and reckless indifference to human life) into one.[147] That is, if the defend-

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143 *Id.* at 158.

144 The ambiguity of the *Tison* decision will give lower courts a great deal of discretion in applying the ruling of *Tison* to future cases. Lower courts inevitably will adopt different criteria to try and apply the standard announced in *Tison*. Splits in the circuits and among the states will arise in applying *Tison*. An individual's life may depend on which state and which circuit hears her case. Thus the Supreme Court will have to make new decisions in this area in order to unify disparate and inequitable applications of *Tison*.

145 Glass v. Butler, 820 F.2d 112, 113 (5th Cir. 1987) ("*Tison* . . . refines the rule of *Enmund* . . . to provide that the eighth amendment does not prohibit the imposition of the death penalty on one who does the killing, intends the killing, participates in the killing, or demonstrates a reckless indifference to the welfare of the victims.").

146 *Tison*, 481 U.S. at 158 (emphasis added).

147 The Court itself anticipates this collapse in a footnote:

> Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which

ants are major participants in the underlying felony, then the courts will automatically find that they were acting with reckless indifference toward human life. For example, suppose that defendant *A* accompanied defendant *B* in a robbery of a bank and that *B* had assured *A* that no one would get hurt. *A* merely sat in the car while *B* went in and actually robbed the store. All seemed to go as planned. *B* got the money, but then for some reason decided to kill the teller. *A* could be sentenced to death if a court found that she was a major participant in the robbery. It is possible that the court would never even examine the second prong of the *Tison* test, simply assuming that anyone who participated to a major extent in a bank robbery automatically exhibited a reckless indifference toward human life. The *Tison* Court suggests this interpretation when it states: "we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life."[148]

Thus, lower courts are left with the responsibility to determine which crimes carry a grave risk of death. Once the courts make this determination, they need merely engage in a "matching" analysis. If the defendant committed felony *X* she exhibited reckless indifference, but if she committed crime *Y* she did not. At a minimum, courts should examine the actions and mental state of each defendant to determine whether they show a reckless indifference toward human life. The mere fact that the defendant engaged in a felony, albeit a felony that carried a grave risk of loss of human life, should not suffice to prove reckless indifference toward human life. The relevant facts should be the defendant's mental state and the actions taken by the defendant that indirectly caused the victim's death. For example, someone purchasing gasoline to be used by an arsonist to destroy an empty theater may not exhibit a reckless indifference toward human life, whereas someone purchasing gasoline so that an arsonist may destroy a theater that is filled to capacity does exhibit a reckless indifference toward human life.

C. *Tison* Departs from Traditional Death Penalty/Cruel and Unusual Punishment Clause Analysis

The *Tison* majority did not faithfully use the balancing approach in its determination that the Tison brothers' sentence of death com-

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one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.

Id. at 158 n.12.

148 *Id.*

ported with the cruel and unusual punishment clause of the eighth amendment. At best, the majority only addressed one factor—societal views on the crime and punishment in question. The majority essentially ignored or distorted other factors traditionally considered in a balancing approach, including: (1) the gravity of the offense and the harshness of the penalty; (2) an individualized consideration of the defendant's culpability; (3) whether the punishment is disproportionate to the severity of the crime; (4) whether the punishment is an affront to human dignity; and (5) whether the punishment contributes to the two social purposes of the death penalty—retribution and deterrence.

The Court looked to state legislative judgments and state court decisions in order to examine societal views on the death penalty and felony murder where the defendant did not kill, attempt to kill, or intend to kill. Based upon this evidence, the Court concluded that there was an "apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' "[149] The Court, however, misapplied this factor when it did not take into consideration the fact that the Tisons are the only non-triggermen felony murderers in Arizona who have been sentenced to death without a finding that they killed or intended to kill.[150] Indeed, from 1954 through the summer of 1987, only six non-triggermen felony murderers have been executed in the United States. All six were executed in 1955.[151] Thus, as the dissent in *Tison* stated, imposing the death penalty on the Tisons for killings they neither committed nor intended is an aberration not only in Arizona, but also nationally and internationally. The *Tison* Court simply ignored this aspect of the balancing test.[152]

The majority began to make an individualized determination of the culpability of the Tisons when it recognized that the Tisons did not have an intent to kill and that American jurisprudence traditionally has accorded harsher punishment for those who act with intent as opposed to those who act unintentionally or accidentally.[153] But then the majority rejected a consideration of this factor, calling it an unsatisfying means of determining the most culpable and dangerous defendants.[154]

The Court focuses on the act, or the crime committed, as the

149 *Id.* at 154.
150 *Id.* at 178 (Brennan, J., dissenting).
151 *Id.* at 176.
152 *See The Supreme Court—Leading Cases*, *supra* note 3, at 147 (noting that the *Tison* Court largely avoided a proportionality analysis).
153 *Tison*, 481 U.S. at 150-51.
154 *Id.* at 157.

most important element in deciding upon the defendant's sentence. The Court, however, does not recognize that the Tisons did not kill anyone. The Tisons are treated as if they were the actual murderers of the Lyons family. Because the Tisons did not kill, the severity of their punishment—death—must be weighed against the gravity of their crime—breaking into prison, aiding an escape, and kidnapping. The application of the death penalty for committing these felonies is disproportionate. Finally, the Court nowhere mentions how executing the Tisons for murders that they did not commit will contribute to the two "social purposes"—deterrence and retribution—which the Court has accepted as justifications for the death penalty.

D. *Tison* Will Have an Adverse Public Impact

The *Tison* decision essentially condones the application of the felony murder rule at a time when the rule is being questioned and rejected. Although only three states have abolished the felony murder doctrine,[155] nearly all other states have attempted to modify the rule.[156] The United States is virtually the only western nation to follow the rule.[157] Many commentators have predicted its eventual demise because of its conflict with basic principles of criminal justice.[158] The primary criticism of the felony murder rule is that it ignores considerations of culpability in imposing criminal liability.[159] Criminal liability attaches through the legal fiction of trans-

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155 Kentucky and Hawaii have abolished the felony murder rule by legislative action, while Michigan has done so by judicial decision. HAWAII REV. STAT. §§ 707-701 (1972); KY. REV. STAT. § 507.020 (1975); People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980).

156 W. LAFAVE & A. SCOTT, *supra* note 111, at 545, 547; Roth & Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446-47 (1985).

157 Roth & Sundby, *supra* note 156, at 447.

158 *See* W. LAFAVE & A. SCOTT, *supra* note 111, at 560-61 ("The rational of the [felony murder] doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended. Yet it is a general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results."); Roth & Sundby, *supra* note 156, at 492 ("[I]t is impossible to conceptualize felony murder in a manner that does not run afoul of constitutional guarantees.").

159 Note, *Should Courts Use Principles of Justification and Excuse to Impose Felony-Murder Liability?* 19 RUTGERS L.J. 451, 477 (1988) (authored by John S. Anooshian) ("the primary vice of the felony murder rule is that it 'erodes the relation between criminal liability and moral culpability' by 'punish[ing] all homicides, committed in perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional, or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind." (quoting People v. Washington, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965) (*en banc*) and from People v. Aaron, 409 Mich. 672, 708, 299 N.W.2d 304, 317 (1980)).

ferred intent—that is, intent to commit the underlying felony is transferred to the murder itself.[160] Thus, *mens rea*, a concept at the foundation of American jurisprudence,[161] is not even considered in felony murder cases. The American Law Institute has even proposed to do away with the felony murder rule.[162] While the *Tison* decision does not purport to affirm the felony murder rule *in toto*, it does provide a prop for an intellectually sagging doctrine that should be allowed to crumble. The Supreme Court's decision that capital punishment may be imposed against the non-triggerman convicted under the felony murder theory serves as notice that the Supreme Court does not view the felony murder rule and the consequences it produces as unconstitutional.

The felony murder rule and the *Tison* decision allow an inequitable apportionment of culpability. This inequitable apportionment not only allows the non-triggerman to be punished as severely as the triggerman, but also allows the imposition of the death penalty for what may have been an accidental killing.[163] It is disturbing that the most severe punishment available under the American judicial system can be imposed on the mere basis of the legal theory of accomplice liability.[164]

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160 Roth & Sundby, *supra* note 156, at 453 ("The felony murder rule may be conceptualized as a theory of 'transferred or constructive intent.' This theory posits that the intent to commit the felony is 'transferred' to the act of killing in order to find culpability for the homicide."). For a discussion of the felony murder rule as a legal fiction, see Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule*, 46 MISS. L.J. 1021, 1022 (1975) (authored by William M. Beasley and Joe P. Coleman).

161 Note, *Reckless Indifference as Intent to Kill: The Disproportionality of Punishment after Tison v. Arizona*, 20 CONN. L. REV. 723, 725 (1988) ("The Supreme Court accepts that *mens rea* is the rule of, rather than the exception to, principles of Anglo-American jurisprudence," (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)).

162 MODEL PENAL CODE § 210.2 (Official Draft 1980) [hereinafter "MPC"]. The American Law Institute would require that homicides committed during a felony be prosecuted under the intent-to-kill or the depraved heart theory. *See* W. LAFAVE & A. SCOTT, *supra* note 111, at 535, 554. The depraved heart theory is very similar to the requirements necessitated by *Tison*. MPC § 210.2 provides a rebuttable presumption of a depraved heart for certain crimes: robbery, forcible rape, forcible sodomy, arson, burglary, kidnapping, or felonious escape. *But see* Roth & Sundby, *supra* note 156, at 492 (arguing that the MPC's rebuttable presumption does not overcome the felony murder rule's constitutional infirmities).

163 *See* Note, *Enmund v. Florida: The Constitutionality of Imposing the Death Penalty Upon a Co-felon in Felony Murder*, 32 DE PAUL L. REV. 713 (1983) (authored by Laura L. Kerton) (felony murder doctrine imposes guilt inequitably). *But see* D. JONES, CRIME AND CRIMINAL RESPONSIBILITY 132 (1978) (each co-felon is responsible for the acts of the other); Crum, *Causal Relationships and the Felony Murder Rule*, 1952 WASH. U.L.Q. 191, 192-93 (1952) (felony murder rule protects the innocent by preventing agreement to commit the underlying felony).

164 Note, *supra* note 159, at 477 ("An enlightened society cannot condone the execution of a human being on the basis of legal principles that operate more like a game of chance than a rational scheme of punishment). For a discussion of accomplice liability,

E. Requiring Some Combination of Participation in the Actual Murder and an Intent to Kill Better Comports with the Eighth Amendment

Because an individualized examination of responsibility dictates that an intentional act be punished more severely than an unintentional act,[165] any balancing test must include a determination of intent. To preserve the protections of the eighth amendment's cruel and unusual punishment clause, the Supreme Court should have clarified its intent requirement under *Enmund* and added a second criterion. The intent requirement should explicitly necessitate a finding of a "desire" to bring about the death of another. In addition to the requirement of intent,[166] the imposition of the death penalty should be predicated upon a finding of direct physical action leading to the decedent's murder.[167] The second criterion would require evidence of the defendant's participation in the actual murder. Under this two pronged test the court would first ask whether the defendant took actions that directly caused the defendant's death. If so, the court would then determine whether the defendant had the intent or desire to kill the decedent. If the answer to either of these questions is no, then the court could not sentence the defendant to death. Under this proposed standard, a court could only rarely sentence a non-triggerman to death because in most cases the non-triggerman does not take the requisite actions necessary to directly cause another's death. This two pronged test will restore the

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see Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L. REV. 91 (1985); Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985); Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

165 *Tison*, 481 U.S. at 155-56 ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). *See also id* at 171 (Brennan, J., dissenting) ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' ") (quoting United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978)); *id.* at 172 ("[S]ociety has made a judgment, which has deep roots in the history of the criminal law . . . distinguishing at least for the purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy life.") (quoting Lockett v. Ohio, 438 U.S. 586 (1978)); H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968) ("causing harm intentionally must be punished more severely than causing the same harm unintentionally").

166 *Cf.* Note, *supra* note 57, at 982 (intent should not be made a matter of federal constitutional law because the sentencer is best able to evaluate each defendant's unique culpability).

167 A narrow exception could be created in the case of the non-triggerman defendant who had the authority (either legal or as recognized through some organized hierarchical, power structure) to order the triggerman to commit the crime (this would allow the imposition of the death penalty for leaders in crime organizations or terrorist organization who precipitate the death of others by ordering their underlings to commit certain crimes).

proportionality between the harm caused by the defendant's actions and the defendant's sentence, resulting in a punishment that fits the crime. Unlike the previous tests of the Supreme Court, under this test each actor will be held responsible solely for her own actions. Intent, act, and responsibility will not be imputed to the defendant through a legal fiction.

If the Supreme Court announced this standard, the disparity between similar defendants who are and are not executed for similar crimes will be reduced dramatically. At a minimum, the resulting higher standard of proof necessitated by the proposed standard will result in a lower percentage of innocent people being executed. While this standard would certainty constitute an improvement over the present *Tison* or even *Enmund* standards, the law could be improved even more.

F. Abolishing the Imposition of the Death Penalty for Non-Triggermen Felony Murderers Best Comports with the Requirements of the Eighth Amendment

The proportionality analysis and the Court's reasoning in *Enmund*, if carried to their logical end, should have compelled the Court to take the next analytic step: holding that a defendant cannot be sentenced to death, even if she intended the death of another, unless the defendant took some causal action toward that end.[168] There is no logical reason for holding the non-triggerman to a different standard than common law murderers when adjudicating the death penalty.[169] Most theories of responsibility adopt the view that people should only be punished for actions which they intentionally commit, not acts done under compulsion, and certainly not acts done by others.[170] Implicit in the jurisprudential theories underlying Anglo-American criminal law and eighth amendment cruel and unusual punishment clause analysis is the belief that punishment is determined based upon the defendant's actions and their casual connection to the crime committed. The analysis of the *Enmund* and *Tison* Courts, however, contains no similar requirement. A

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168 *See* Dressler, *supra* note 164, at 136.

169 This standard is usually similar to the intent to kill standard. *See generally* W. LAFAVE & A. SCOTT, *supra* note 111, at 535 ("Conduct, accompanied by an intent to kill, which legally causes another's death constitutes murder. . . .").

170 Morissette v. United States, 342 U.S. 246, 250-51 (1952) ("The contention that an injury can amount to a crime only when influenced by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."); Note, *supra* note 159, at 477 (The requirement that " '[a] relation between some mental element and punishment for a harmful act exist stand as a land mark in the criminal law.' "). *See generally* J. GLOVER, RESPONSIBILITY 1-20 (1970).

causal connection to the murder is not necessary to bring about application of the death penalty under the reasoning in these cases.[171] The imposition of punishment should be based upon personal, rather than vicarious, criminal liability, because the only way to accurately calculate this personal responsibility is through causation. But the Supreme Court has rejected personal responsibility, instead adopting the imputation of culpability. This completely goes against the grain of most death penalty cases where the Court traditionally has recognized a "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."[172] The Supreme Court cannot treat an individual as unique and make an individualized consideration of her culpability and at the same time impute guilt from the actions of another.

Causation and legal responsibility are one and the same concept, but the Court has severed them, dispensing for the most part with causation, and imputing legal responsibility to the defendant from the acts of another. True cruel and unusual punishment clause analysis requires that the defendant's punishment be proportional to her culpability. Simply because the nontriggerman has been involved in a heinous act that resulted in the death of another does not mean that the requirements necessary for conviction of murder should be lowered or that a legal fiction should be imposed to enable those requirements to be met.[173] The judicial system should not allow itself to be twisted or contorted by its desire to exact its most severe punishment upon an individual whose culpability is not as great as those for whom the death penalty is normally reserved. Indeed, it should comport with the underlying rationale of *Enmund*.[174]

Abolishing the death penalty for non-triggermen would satisfy the dictates of the cruel and unusual punishment clause. This abolition would also prevent the miscarriage of justice inherent in *Enmund*, where a non-triggerman originally received the death penalty and the actual triggerman merely received a prison sentence; or *Tison*, where two tangential actors are sentenced to death for the murder of a family they did not kill. If the Supreme Court abolished the

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171 Dressler, *supra* note 164, at 99, 102 ("Anglo-American law ascertains the legal guilt and calibrates the appropriate punishment for accomplices in a manner that differs fundamentally from that applied to perpetrators. Unlike the person who commits the crime the accomplice need not be causally tied to the harm for which she is punished.").

172 Lockett v. Ohio, 438 U.S. 586, 605 (1978).

173 For an argument that accomplice liability should be measured solely by the accomplices' actions that causally result in the harm, see Dressler, *supra* note 164, at 91.

174 *Id.* at 136 ("The [*Enmund*] Court's reasoning, at least in terms of proportionality analysis, is correct as far as it goes. . . . The logic of the Court's reasoning should take the Court further . . . . It is also unconstitutional to execute accomplices even if they did intend that a death ensue, if their assistance did not cause the death to occur").

application of capital punishment in the case of the non-triggerman, it not only would be following its own precedent and traditional cruel and unusual punishment analysis, but it also would eliminate the ambiguity and resulting confusion created by *Enmund* and *Tison*.

CONCLUSION

The Supreme Court in *Tison v. Arizona* announced that non-triggermen must be judged by a new standard in determining whether they can be sentenced to death in compliance with the eighth amendment's prohibition against cruel and unusual punishments. This new standard implicitly abandons the doctrine of *Enmund v. Florida* while pretending merely to be filling in a gap not provided for by the *Enmund* decision. An analysis of the textual, substantive, or practical consequences of *Tison*, however, reveals great differences between *Enmund* and *Tison*.

The arbitrary and goal-oriented *Tison* decision dramatically heightens the ambiguity of *Edmund*. The *Tison* Court was less interested in following precedent and applying the proportionality test, implicit in cruel and unusual punishment clause jurisprudence, than it was in finding a way to broaden the context where courts could justifiably apply the death penalty. The better view—and one that fully comports with the eighth amendment's cruel and unusual punishment clause—is a complete prohibition against applying the death penalty to a non-triggerman who cannot satisfy the common law's requirements for murder.

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