DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 32
Issue 3 *Spring 1983*

Article 9

Enmund v. Florida: The Constitutionality of Imposing the Death Penalty upon a Co-Felon in Felony Murder

Laura L. Kerton

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Laura L. Kerton, *Enmund v. Florida: The Constitutionality of Imposing the Death Penalty upon a Co-Felon in Felony Murder*, 32 DePaul L. Rev. 713 (1983)
Available at: https://via.library.depaul.edu/law-review/vol32/iss3/9

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

ENMUND V. FLORIDA: THE CONSTITUTIONALITY OF IMPOSING THE DEATH PENALTY UPON A CO-FELON IN FELONY MURDER

For over one hundred years, the United States Supreme Court has struggled to define cruel and unusual punishment and to determine what specific punishments are prohibited by the eighth amendment.[1] Although current standards for cruel and unusual punishment are easily articulated, they are difficult to apply.[2] Moreover, these standards fail to resolve the problem fully. The philosophy underlying the eighth amendment's prohibitions has progressed from the view that cruel and unusual punishment means something more than the mere extinguishment of life,[3] to the conclusion that while execution may be a constitutionally permissible penalty for deliberate murder,[4] it is an unconstitutional sanction for rape because the victim's life was not

---

1. As early as 1878, the Court recognized the difficulty in defining the meaning of cruel and unusual punishment. Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); *see also* Furman v. Georgia, 408 U.S. 238, 276-77 n.20 (1972) (Brennan, J., concurring) (stating that the cruel and unusual punishment clause is impossible to define precisely); Trop v. Dulles, 356 U.S. 86, 99 (1958) (the exact scope of cruel and unusual punishment has not been detailed). One commentator explains this difficulty by observing that because the factual situations are so diverse, it is impossible to arrive at one legal definition which can apply to all situations. Consequently, the Court has adopted a definition which permits wide latitude in interpretation, and as a result, its definition of the cruel and unusual punishment clause is difficult to apply and its applications often are inconsistent. Note, *Capital Punishment: A Review of Recent Supreme Court Decisions,* 52 NOTRE DAME LAW. 261, 263 (1976) [hereinafter cited as Note, *Recent Supreme Court Decisions*]. For a detailed history of the cruel and unusual punishment clause, see THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1964); M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).

2. *See infra* notes 15-18 and accompanying text; *see also* Goldberg & Dershowitz, *Declaring The Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773 (1970). In that article, the authors declare that the "cruel and unusual punishment doctrine is not well developed. The Court has not consistently and explicitly applied any one test under the clause." *Id.* at 1777.

3. *In re* Kemmler, 136 U.S. 436, 447 (1890). Kemmler was convicted of first-degree murder and sentenced to die by means of electrocution. *Id.* at 441. Basing his writ of habeas corpus on constitutional grounds, Kemmler argued that the death penalty deprived him of liberty, and threatened to deprive him of life, without due process of law. *Id.* at 438-39. The Court addressed the issue of whether the death penalty was cruel and unusual punishment. In concluding that the death penalty was not unconstitutional, the Court reasoned that the death penalty had a long history of acceptance and that execution was not considered to be torture. *Id.* at 446-47.

It should be noted that in the early history of the Court's interpretation of the eighth amendment, the Court did not attempt to define cruel and unusual punishment exhaustively in the context of existing societal views. Rather, the Court merely examined what was considered cruel and unusual punishment at the time the Bill of Rights was framed. Justice Brennan recognized this fact in *Furman v. Georgia* as he canvassed the history of the cruel and unusual punishment clause. Furman v. Georgia, 408 U.S. 238, 264 (1972) (Brennan, J., concurring).

4. Gregg v. Georgia, 428 U.S. 153, 187 (1976); *see also infra* notes 33-36 and accompanying text.

taken.[5] Until *Enmund v. Florida* was decided,[6] it remained uncertain whether the death penalty was a constitutional punishment for crimes involving a killing that was not deliberate.[7]

In *Enmund,* the Supreme Court addressed the issue of whether the death penalty is a constitutionally permissible punishment for a co-felon who neither caused the victim's death nor intended the death to occur. The evidence introduced in that case showed that Earl Enmund and two accomplices planned the robbery of the Kersey farm. Their plan went awry, however, and while Enmund waited in the getaway car, his two accomplices killed the Kerseys.[8] Although Enmund neither killed anyone nor intended for anyone to be killed, the Florida Supreme Court concluded that his participation in a felony out of which a murder arose was sufficient to warrant the death penalty.[9] Yet, the United States Supreme Court rejected this conclusion. Applying the eighth amendment's cruel and unusual punishment clause, the Supreme Court reversed the Florida court and held that the death penalty could not be imposed upon a co-felon who neither killed nor intended that a killing occur.[10]

The *Enmund* holding effectively limits the use of the felony-murder doctrine[11] because transferred intent, which is at the heart of the felony-murder concept, no longer will be sufficient to warrant capital punishment.[12] Moreover, previous Court decisions established standards to be applied in determining the circumstances under which capital punishment is cruel and unusual.[13] Although the *Enmund* Court purportedly relied on these standards, its analysis was tenuous and inconclusive. Finally, because it appears to adopt a new eighth amendment requirement of proving specific intent, the *Enmund* decision will affect those standards; however, this new requirement may prove difficult to apply.[14]

---

5. Coker v. Georgia, 433 U.S. 584, 592 (1977); *see also infra* notes 46-53 and accompanying text.

6. 102 S. Ct. 3368 (1982).

7. Other issues remain unanswered even after *Enmund. See, e.g.,* Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978) (whether the Constitution requires that the death penalty be imposed by a jury); Roberts v. Louisiana, 431 U.S. 633, 637 n.5 (1977) (whether the death penalty may be automatically inflicted upon any person who commits a murder while already serving a life sentence).

8. 102 S. Ct. at 3370.

9. Enmund v. State, 399 So. 2d 1362, 1371 (Fla. 1981) (per curiam).

10. 102 S. Ct. at 3376-77.

11. *See infra* notes 68-77 and accompanying text.

12. It should be noted that the *Enmund* decision only prohibits transferred intent among co-felons when the punishment is death. Transferred intent continues to support a less severe sanction, such as life imprisonment. *See infra* note 125.

13. For a discussion of the standards for cruel and unusual punishment, see *infra* notes 16-20 and accompanying text.

14. *See infra* notes 151-55 and accompanying text.

BACKGROUND

The Prohibition of Cruel and Unusual Punishment and the Death Penalty

The eighth amendment to the United States Constitution provides, in part, that "cruel and unusual punishment [shall not be] inflicted."[15] Today, the eighth amendment's prohibition against cruel and unusual punishment encompasses four main, independent principles: (1) the punishment must not be inherently cruel;[16] (2) the punishment must not be disproportionate to the crime;[17] (3) the punishment must not affront human dignity;[18] and (4) the punishment must be acceptable to society.[19] Because the cruel and unusual punishment prohibition is not a static provision, these principles are defined according to "evolving standards of decency."[20]

---

15. U.S. CONST. amend. VIII. The eighth amendment also provides that "[e]xcessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

16. Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878). In *Wilkerson,* the method of execution, shooting, was challenged as being unconstitutionally cruel and unusual punishment. *Id.* at 131. Although the *Wilkerson* Court established the first concrete principle of cruel and unusual punishment, it nevertheless held that execution by shooting was not unnecessary cruelty. *Id.* at 135-36. This holding is not surprising considering the Court's examples of what it found to constitute inherent cruelty: embowelling while alive, public dissection, and burning at the stake. *Id.* at 135.

17. The issue of proportionality first was adopted by the Court in Weems v. United States, 217 U.S. 349 (1910). In that case, a Philippine official who was found guilty of falsifying a government document was sentenced to 15 years of hard and painful labor. Furthermore, he was permanently denied his parental, property, and voting rights, and upon his release from prison, he was to be under lifetime surveillance. *Id.* at 351, 357. The Court found this punishment violative of the constitutional prohibition against cruel and unusual punishment and, therefore, held that the eighth amendment prohibits punishments which are excessive or disproportionate to the crime. *Id.* at 380-81. *See generally* Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel,* 71 J. CRIM. L. & CRIMINOLOGY 378 (1980) (explanation of historical and recent application of the eighth amendment proportionality requirement).

18. Trop v. Dulles, 356 U.S. 86, 100 (1958). The petitioner in that case was court-martialed for desertion and sentenced to three years hard labor, forfeiture of pay, and a dishonorable discharge. *Id.* at 88. Moreover, under § 401(g) of the Nationality Act of 1940, the petitioner lost his nationality and all rights of United States citizenship because of the dishonorable discharge resulting from his desertion. *Id.* at 88-90. Based on the belief that the eighth amendment protects human dignity, the Supreme Court held that this punishment was unconstitutional because the state had exceeded the bounds of civilized standards. *Id.* at 100.

Agreeing with the appellate court's concept of human dignity, the *Trop* Court quoted the following passage from the lower court's opinion: "The American concept of man's dignity does not comport with making even those we would punish completely 'stateless'—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all." *Id.* at 101 n.33 (quoting Trop v. Dulles, 239 F.2d 527, 530 (2d Cir. 1956)). Yet, in a dissenting opinion, Justice Frankfurter declared that denationalization was not punishment. *Id.* at 124-26 (Frankfurter, J., dissenting). Moreover, Justice Frankfurter observed that even if it were punishment, it was not cruel and unusual because the statute authorized death as a possible punishment, and denationalization was less severe than death. *Id.*

19. Weems v. United States, 217 U.S. 349, 378 (1910).

20. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

The Supreme Court first articulated the premise that cruel and unusual punishment was a flexible concept which should reflect society's changing values, in *Weems v. United States*.[21] In *Trop v. Dulles*,[22] the Court reinforced the evolving standards of decency idea as essential to determining the meaning of cruel and unusual punishment.[23] *Trop* also articulated objective criteria for determining this standard of decency. The Court indicated that indicia of the standard were the history of the particular punishment and contemporary acceptance of that punishment.[24]

Those advocating abolition of the death penalty employed this evolving standards of decency principle to argue that, because it was no longer accepted by society, the death penalty was unconstitutional.[25] Finding this lack of societal acceptance in the fact that the death penalty infrequently was imposed as a punishment, some commentators maintained that the Supreme Court should hold the death penalty unconstitutional.[26] In the 1972 decision of *Furman v. Georgia*,[27] the Supreme Court had the opportunity to decide whether the death penalty violated the eighth amendment's prohibition against cruel and unusual punishment. The Court, however, did not rule on the constitutionality of the death penalty per se; rather, the *Furman* Court's holding was limited to the constitutionality of the death penalty as applied in that particular case.[28]

Although complicated by the existence of nine separate and confusing opinions,[29] the *Furman* decision essentially declared that statutes which allow

---

21. 217 U.S. 349, 378 (1910). The Supreme Court stated that the cruel and unusual punishment clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." *Id.* For the facts of *Weems*, see *supra* note 17.

22. 356 U.S. 86 (1958). For the facts of *Trop*, see *supra* note 18.

23. The importance of the evolving standards of decency notion is that it "mark[s] the progress of a maturing society." 356 U.S. at 101. The *Trop* Court recognized that *Weems v. United States* was the first case to hold that the scope of the cruel and unusual punishment clause is not static. *Id.* at 100-01.

24. *Id.* at 99-100. The *Trop* Court compared the death penalty with the severe punishment of losing citizenship rights under the Nationality Act of 1940 and recognized that, although the death penalty has been a historically accepted means of punishment, civilized society has long abhorred the loss of nationality as a punishment. *Id.* at 99-101.

25. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 297-300 (1972) (Brennan, J., concurring) (one of the reasons the death penalty is unconstitutional is that contemporary society rejects death as an appropriate punishment).

26. *See, e.g.*, Note, *Recent Supreme Court Decisions*, *supra* note 1, at 268.

27. 408 U.S. 238 (1972) (per curiam). *Furman* was the consolidation of three death penalty cases: *Furman v. Georgia* (conviction for murder); *Jackson v. Georgia* (conviction for rape); and *Branch v. Texas* (conviction for rape). *Id.* at 239.

28. *Id.* at 239-40.

29. The holding in *Furman* initially appears simple, but an examination of the nine separate opinions which were filed in that case illustrates the confusing nature of the Court's decision. Five Justices supported the per curiam judgment while four dissented. Three of the five Justices who supported the decision took the position that the constitutionality of the death penalty should not be questioned generally; rather, the issue should be limited to the constitutionality

the jury to decide arbitrarily whether a guilty defendant will receive the death penalty or life imprisonment violate the cruel and unusual punishment clause.[30] Because jury discretion in imposing the death penalty was a nationwide practice, the *Furman* decision required that all existing death penalty statutes be revised.[31] The *Furman* opinion did not indicate, however, whether the death penalty could be held unconstitutional per se.[32]

Four years later, the Supreme Court attempted to answer the question of whether the death penalty was intrinsically unconstitutional. In *Gregg v.*

---

of the death penalty as it was being applied in the three cases at bar. Justice Stewart believed that the death penalty was unconstitutional in these cases because it was being imposed wantonly and infrequently; hence, it was unusual punishment. *Id.* at 309-10 (Stewart, J., concurring). Similarly, Justice White thought that because the death penalty was imposed infrequently, it could not have much retributive or deterrent effect. Moreover, Justice White could not discern the difference between cases in which the death sentence was imposed and cases in which it was not imposed. *Id.* at 311-13 (White, J., concurring). Justice Douglas also did not believe that the death penalty should be held unconstitutional per se, but he did find it unconstitutional as applied. Justice Douglas believed that the death penalty was being applied discriminately. He argued that complete jury discretion was unconstitutional because a defendant could be sentenced to death based on a jury's whim. *Id.* at 253, 255-56 (Douglas, J., concurring).

Both Justices Brennan and Marshall were adamant in their belief that the death penalty is always cruel and unusual punishment. *Id.* at 285-86 (Brennan, J., concurring); *id.* at 359 (Marshall, J., concurring). Justice Brennan observed that

> 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. . . . Death, quite simply, does not comport with human dignity.

Id. at 305.

All four dissenting Justices essentially contended that the legislatures were in a better position to evaluate public opinion and determine the extent of imposing the death penalty. *See id.* at 403 (Burger, C.J., dissenting); *id.* at 443 (Powell, J., dissenting); *id.* at 410 (Blackmun, J., dissenting) *id.* at 468 (Rehnquist, J., dissenting). Moreover, there was criticism that the *Furman* majority was imposing its moral beliefs on the American people. *See id.* at 375 (Burger, C.J., dissenting); *id.* at 467 (Rehnquist, J., dissenting).

30. This was the problem recognized by the three concurring opinions of Justices Douglas, Stewart and White. Jury sentencing without standards meant that a jury could impose the death penalty whenever, and for whatever reason, it saw fit. Jury discretion resulted in capital punishment's infrequent and discriminatory imposition. *See id.* at 253 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

31. *See, e.g.*, Note, *Recent Supreme Court Decisions*, *supra* note 1, at 273 (*Furman* invalidated more than three-fourths of all state death penalty statutes).

32. Justices Brennan and Marshall believed that the death penalty should be held unconstitutional per se. 408 U.S. at 286 (Brennan, J., concurring); *id.* at 359 (Marshall J., concurring). It was unclear, however, what conclusion Justices Douglas, Stewart and Blackmun would have reached if the apparent faults of the death penalty were not remedied. Moreover, if the death penalty were upheld as constitutional in the future, it was uncertain what procedural safeguards were required by the separate *Furman* opinions. *See, e.g.*, *id.* at 256-57 (Douglas, J., concurring) (agreeing that discretionary statutes were unconstitutional, but not reaching the issue of whether mandatory sentencing would be constitutional).

Georgia,[33] the plurality[34] concluded that the death penalty was not unconstitutional per se when the defendant had taken a life.[35] Although the Court recognized that the death penalty was an extreme sanction, it found the punishment suitable for the extreme crime of deliberate murder.[36] Noting the historical acceptance of capital punishment,[37] legislative reenactment of death penalty statutes after *Furman,*[38] and occasional jury imposition of

---

33. 428 U.S. 153 (1976). In *Gregg,* it was established that Gregg and his companion Allen were hitchhiking through Florida when they were picked up by Moore and Simmons. Later, Moore and Simmons picked up another hitchhiker, Weaver, who traveled with the four men to Atlanta. The day after Weaver left the other men's company, Moore and Simmons were found dead. *Id.* at 158-59. Based on Weaver's information, the police arrested Gregg and Allen. *Id.* at 159. Allen testified that Moore and Simmons left the car for a rest, and when they returned, Gregg shot them and took their money. *Id.* Although Gregg insisted that the killings were in self-defense, the jury found him guilty of two counts of murder. *Id.* The jury considered three aggravating factors in determining whether to recommend the death penalty: 1) whether the murders were committed during a felony; 2) whether the purpose of the murders was pecuniary gain; and 3) whether the murders were outrageously wanton and vile. *Id.* at 161. Based on the presence of the first two factors, the death penalty was recommended. *Id.*

34. Justices Stewart, Powell, and Stevens wrote the plurality opinion in which Justices Blackmun, Burger, Rehnquist and White concurred. *Id.* at 153. Consistent with their concurring opinions in *Furman,* which argued that the death penalty always violates the eighth amendment, Justices Brennan and Marshall dissented. *Id.*

35. *Id.* at 187. After determining in *Gregg* that the death penalty was not unconstitutional per se, the Supreme Court addressed the procedural requirements of the cruel and unusual punishment clause. The Court upheld bifurcated death penalty statutes in which guilt was first determined, and in a separate hearing, aggravating and mitigating circumstances were weighed to determine if capital punishment should be imposed. *Id.* at 162-68; *cf.* Proffitt v. Florida, 428 U.S. 242, 248-51 (1976) (jury sentencing procedure upheld as constitutional because jury was given guidelines on which to base a decision). Mandatory death penalty statutes, however, were found unconstitutional. *See, e.g.,* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Under these statutes, if the jury found the defendant guilty of a specific crime, capital punishment was imposed automatically. The Court held such statutory provisions unconstitutional because they allowed jury discretion and failed to take into account particularized aspects of the defendant or the crime. *See Roberts,* 428 U.S. at 331-36; *Woodson,* 428 U.S. at 302-03. *See generally* Tao, *The Constitutional Status of Capital Punishment: An Analysis of* Gregg, Jurek, Roberts *and* Woodson, 54 U. DET. J. URB. L. 345 (1977) (analysis of 1976 Supreme Court cases to determine what questions they answered and whether the opinions were consistent); Comment, *Resurrection of Capital Punishment—The 1976 Death Penalty Cases,* 81 DICK. L. REV. 543 (1977) (discussion of how 1976 cases answered questions left open by *Furman*).

36. 428 U.S. at 187. Writing for the plurality, Justice Stewart stated that "when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes." *Id.*

37. *Id.* at 176. The Court noted that for nearly two centuries the death penalty has been held constitutional. *Id.* at 178; *see also* Furman v. Georgia, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting) (its framers intended the cruel and unusual punishment clause to ban punishment by torture, not by taking of life); Trop v. Dulles, 356 U.S. 86, 99 (1958) (throughout history, the death penalty has been imposed); *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.").

38. *See Gregg,* 428 U.S. at 179. The *Gregg* Court observed that 35 states had reenacted

capital punishment,[39] the plurality concluded that the death penalty was not contrary to evolving standards of decency.[40]

In addition to requiring that punishment be acceptable to society, the *Gregg* plurality determined that punishment must not be excessive.[41] The *Gregg* excessiveness test focused on two factors: first, whether the punishment was grossly disproportionate to the severity of the crime; and second, whether the punishment had some penological justification.[42] On the issue of proportionality, the *Gregg* Court concluded that the death penalty was not a disproportionate punishment for the crime of deliberate murder.[43] The second factor, penological justification, encompassed two possible theories: retribution and deterrence. Data on death penalty deterrence were inconclusive; consequently, the plurality decided that the issue should be deferred to legislative judgment.[44] Retribution, however, was held to be a permissible objective which was not inconsistent with human dignity.[45] Although it did not determine whether the death penalty was constitutional for crimes other than murder, the *Gregg* decision removed any doubt that death was a constitutional penalty for deliberate murder.

---

death penalty statutes after *Furman*. *Id.* The plurality concluded that this legislative activity undercut the argument that the death penalty was no longer accepted by the American people and, thus, was contrary to evolving "standards of decency." *Id.*

39. *Id.* at 181. The Court noted that juries impose death sentences relatively infrequently, but concluded that this fact does not mean that the death penalty is not accepted; rather, it merely indicates that juries only impose a severe sentence as a penalty for a severe crime. *Id.* at 181-82. The Court buttressed this argument by noting that 714 individuals had been sentenced to death since *Furman* was decided. *Id.*

40. *Id.* at 181-82. Before reaching this conclusion, the Court stated that courts should play a limited role in assessing eighth amendment constitutionality. The *Gregg* Court noted that when courts assess punishment selected by legislatures, those courts should presume the validity of the punishment and simply ensure that constitutional bounds have not been overstepped. *Id.* at 174-75. Justice Brennan strongly disagreed with this conclusion. *Id.* at 229 (Brennan, J., dissenting). He believed it was the Supreme Court's duty, as the "ultimate arbiter" of constitutional meaning, to determine independently whether the death penalty was per se unconsitutional. *Id.* Justice Marshall dissented on similar grounds. *Id.* at 240 (Marshall, J., dissenting). He articulated his belief that eighth amendment constitutionality cannot be determined solely on the basis of whether society accepts the challenged punishment. *Id.*

41. *Id.* at 173.

42. *Id.* at 173, 183.

43. *Id.* at 187. The Court did not elaborate on why, under the circumstances presented in *Gregg*, the death penalty was not a disproportionate punishment. It merely stated that deliberate murder was a severe crime which justified the imposition of a severe penalty. *Id.*

44. *Id.* at 184-86. *But see* Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. Colo. L. Rev. 17, 39 (1979) (the purpose of the eighth amendment is to protect against legislative misconduct, and courts should ensure that this purpose is fulfilled) [hereinafter cited as Dressler].

45. 428 U.S. at 183. According to the Court, one of the reasons that retribution was a permissible objective was that it allowed the public to vent its outrage at offensive conduct; theoretically, if the law did not punish the offender, the public would resort to self-help. *Id.* Disagreeing with the plurality's conclusion, Justice Marshall stated that "[t]he mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty. . . ." *Id.* at 240 (Marshall, J., dissenting).

The following year, in *Coker v. Georgia*,[46] the Supreme Court addressed the issue of whether the death penalty constituted cruel and unusual punishment when imposed for a crime other than murder. Applying the excessiveness test formulated in *Gregg*,[47] the *Coker* Court analyzed whether the death penalty was a constitutional punishment for the crime of rape. The excessiveness test provides that the punishment must contribute to society's accepted penological goals and must be proportionate to the severity of the crime.[48] Examining public attitudes concerning death as a punishment for rape, the *Coker* plurality noted that during the preceding fifty years, a majority of states had not authorized the death penalty as a sanction for rape.[49] Also, at the time *Coker* arose, only three states permitted the death penalty to be imposed for rape,[50] and juries in those states infrequently imposed the death penalty for that crime.[51] These factors led the plurality to conclude that the death penalty was grossly disproportionate to the crime of rape.[52] While noting that rape was a terrible crime, second only to murder in its severity, the *Coker* Court maintained that rape did not compare with the irrevocability of taking a human life.[53]

Based on the holdings in *Gregg*[54] and *Coker*,[55] it is logical to assume that a death must occur before the death penalty can be imposed.[56] *Gregg*,

---

46. 433 U.S. 584 (1977). Coker escaped from prison where he was serving time for murder, rape, kidnapping, and aggravated assault. On the night that he escaped he broke into the Carver home, tied up Mr. Carver, stole his money, and raped and kidnapped Mrs. Carver. *Id.* at 587. The jury found Coker guilty, and because there were sufficient aggravating circumstances, Coker was sentenced to death. *Id.* at 587-91.

47. *Id.* at 592. For a discussion of the excessiveness test used in *Gregg*, see *supra* notes 41-45 and accompanying text.

48. The *Coker* Court noted that if the challenged punishment were to fail on either ground, disproportionality or penological justification, then the punishment would be unconstitutional. 433 U.S. at 592.

49. *Id.* at 593. In 1925, only 18 states, the District of Columbia, and the federal government authorized capital punishment for the rape of an adult woman. In 1971, the number had declined to 16 states and the federal government. Then, in 1972, *Furman v. Georgia* invalidated all state death penalty statutes. In rewriting their death penalty statutes to satisfy *Furman's* mandate, only three states chose to make the rape of an adult woman a capital offense. *Id.* at 593-94.

50. *Id.* at 595. Florida, Mississippi and Tennessee authorized the death penalty only in rape cases in which the rapist was an adult and the victim was a child. *Id.*

51. *Id.* at 596-97. Because Georgia was the only state to authorize the death sentence for the rape of an adult, the jury sentencing study only examined sentences rendered by Georgia juries. Finding that Georgia juries had sentenced only six rapists to death since 1973, the Court concluded that juries do not impose death sentences in the vast majority of rape cases. *Id.*

52. *Id.* at 598-99.

53. *Id.* at 597-98.

54. *See supra* notes 35-36 and accompanying text.

55. *See supra* notes 52-53 and accompanying text.

56. The *Gregg* Court held that the death penalty is constitutional when imposed for the crime of deliberate murder. 428 U.S. at 187. The *Coker* Court noted that rape was second

however, dealt only with an intentional murder, and left unanswered the question of whether an unintentional killing warrants imposition of the death penalty.

Intent and the Felony-Murder Doctrine

Whether the punishment is death or a less severe sanction, the purpose of criminal sanctions is to prevent harm or undesirable conduct.[57] There can be no crime unless some harm has occurred, or some risk of damage exists.[58] Furthermore, criminal law also requires that a defendant be found personally responsible for the harm before liability can be imposed.[59] Personal responsibility or blameworthiness is determined by an examination into the defendant's state of mind; it must be determined whether the defendant intended to cause the harm resulting from the crime.[60]

Intent is divided into two categories: specific intent and general intent. Specific intent is defined as the intent to commit an act with the specific objective or knowledge that the act *will* produce a given result.[61] In contrast, general intent involves a deviation from reasonable conduct and the actor's ability to foresee that such deviation *might* produce harmful results.[62] Thus, there is an evidentiary distinction between specific and general intent.

---

only to murder in its severity, yet held that the death penalty was an unconstitutional punishment for rape. 433 U.S. at 597-99. The *Coker* Court reasoned that rape does not include the taking of human life; therefore, the crime should not be punished as severely as murder. *Id.* at 600. If rape is second in severity only to murder, but cannot be punished by death because a life has not been taken, logic compels the conclusion that the death penalty can be imposed constitutionally only in crimes involving a killing. *See also* Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder,* 15 HOUS. L. REV. 356, 356 (1978) (*Coker* illustrates the Supreme Court's reluctance to sanction capital punishment for any crime that is not murder) [hereinafter cited as Comment, *Imposing the Death Penalty*]; Comment, *Capital Punishment: Death for Murder Only,* 69 J. CRIM. L. & CRIMINOLOGY 179, 194-96 (1978) (the *Coker* plurality would allow the death penalty for murder, but not for any other crime).

57. *See, e.g.,* M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW § 2, at 75 (1978) (criminal law regulates the conduct of individuals); Dressler, *supra* note 44, at 33 (law tries to prevent harm or undesired conduct by criminalizing that conduct); Ludwig, *Foreseeable Death in Felony Murder,* 18 U. PITT. L. REV. 51, 51 (1956) (preservation of life is the purpose of homicide law).

58. Dressler, *supra* note 44, at 32 (without harm, there is no crime).

59. *See, e.g., id.* at 33 (criminal law is based on personal blame); Westerfield, *The Mens Rea Requirement of Accomplice Liability In American Criminal Law—Knowledge or Intent?,* 51 MISS. L.J. 155, 175-76 (1980) (individual guilt determines liability in criminal law).

60. Dressler, *supra* note 44, at 33 (generally an individual is not criminally liable unless he has the requisite mens rea).

61. *E.g.,* M. BASSIOUNI, *supra* note 57, at 178. The law uses various labels, such as "intent" or "knowledge," to denote specific intent. *Id.* at 177; *see also* White, *Intention, Purpose, Foresight and Desire,* 92 LAW. Q. REV. 569, 572 (1976) (intention is the combination of three elements: purpose, foresight, and desire).

62. *See* M. BASSIOUNI, *supra* note 57, at 179. The labels which sometimes are used to denote general intent include "foreseeability," "recklessness," and "criminal negligence." *Id.* at 177.

In specific intent crimes, there must be proof that the actor knew with certainty that his conduct would produce a certain result.[63] General intent crimes, however, only require proof that it was foreseeable to the actor that his conduct might produce some undesirable result.[64] Although intent is a difficult concept to define and to apply,[65] the law requires that intent must be proven for each crime.[66] The felony-murder doctrine, however, is an exception to this proof of intent requirement.

At common law, murder was defined as the unlawful killing of a person with express or implied malice.[67] If a life was taken unintentionally during the course of a felony, the felony-murder doctrine was used to supply the requisite malice needed to charge the felon with murder.[68] Under this doctrine, the intent to commit the underlying felony was transferred to the homicide. By transferring intent, the malice requirement to prove murder was satisfied.[69]

---

63. *Id.*

64. *Id.*

65. *E.g.,* Packer, *Mens Rea and the Supreme Court,* 1962 SUP. CT. REV. 107, 137 (to articulate or apply the concept of mens rea is a formidable task); *see also* M. BASSIOUNI, *supra* note 57, at 169 (intent is difficult to determine because the subjective state of mind must be determined by objective factors). Throughout this Note, the terms *intent, mens rea, mental element,* and *culpability* will be used interchangeably.

66. M. BASSIOUNI, *supra* note 57, at 168; *see also* Packer, *supra* note 65, at 109 ("to punish conduct without reference to the actor's state of mind is both inefficacious and unjust").

67. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 195 (T. Cooley 3d ed. 1884); *see also* O. HOLMES, THE COMMON LAW 51 (1909) (murder is "unlawful homicide with malice aforethought"); R. PERKINS, CRIMINAL LAW 34 (2d ed. 1969) (murder is "homicide committed with malice aforethought").

68. Lord Coke is credited with creating the felony-murder concept. *E.g.,* 2 WHARTON'S CRIMINAL LAW § 145, at 204 (C. Torcia 14th ed. 1979) (attributing responsibility for the felony-murder doctrine to Lord Coke); Note, *A Survey of Felony Murder,* 28 TEMP. L.Q. 453, 453 (1955) (felony-murder doctrine was postulated initially by Coke) [hereinafter cited as Note, *Survey*]. Coke's exact words were, "[i]f the act be unlawful, it is murder." 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 56 (1628 & photo. reprint 1979). *Contra* M. BASSIOUNI, *supra* note 57, at 247 (felony-murder theory has existed since 1256, and appears in Bracton's *De Legibus et Consuetinibus Anglias*). For a sample of cases illustrating the felony-murder doctrine, see People v. Caldwell, 102 Cal. App. 3d 461, 478, 162 Cal. Rptr. 397, 407 (1980) (accidental killing during robbery will trigger the felony-murder rule); People v. Ross, 92 Cal. App. 3d 391, 402, 154 Cal. Rptr. 783, 788 (1979) (first-degree murder encompasses any intentional or nonintentional killing committed in the perpetration of a robbery or burglary); State v. Battick, 133 Vt. 558, 561, 349 A.2d 221, 223 (1975) (elements of first-degree murder are supplied by the felony-murder doctrine); Wooden v. Commonwealth, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981) (under the felony-murder doctrine, malice needed for murder is supplied by the malice related to the felony).

69. *See* R. PERKINS, *supra* note 67, at 45; *see also* De Loach v. State, 388 So. 2d 31, 32 (Fla. 1980) (homicide plus intent to commit a felony supply the malice aforethought needed for first-degree murder); People v. Burke, 85 Ill. App. 3d 939, 941, 407 N.E.2d 728, 730 (1st Dist. 1980) (whether the victim is killed intentionally, accidentally, or by another is immaterial under the felony-murder doctrine); People v. Till, 80 Mich. App. 16, 29, 263 N.W.2d 586, 592-93 (1977) (intent to commit a felony is equivalent to malice aforethought); 2 WHARTON'S CRIMINAL LAW, *supra* note 68, § 145, at 204 (law transfers malice of the felony to the homicide);

The felony-murder rule also applied to co-felons who did not directly cause the death; if two or more people agreed to commit a felony and a death occurred during its commission, then all co-felons were responsible for the death.[70] The rationale underlying this application was that all the participants should be responsible for the acts of their co-participants, because the killing would not have occurred but for the underlying agreement to commit the felony.[71] This doctrine had little impact at common law, however, because the punishment for both murder and any other felony was death.[72]

Today, the felony-murder doctrine retains vitality in most jurisdictions.[73] Yet, its application has been restricted to felonies which are inherently dangerous or are enumerated by statute.[74] Despite this limited application, many courts and commentators have criticized the doctrine's utility and

---

Comment, *Constitutional Limitations upon the Use of Statutory Criminal Presumptions and the Felony Murder Rule,* 46 MISS. L.J. 1021, 1022 (1975) (the felony-murder theory employs a legal fiction: one who commits a felony has the intent to commit murder) [hereinafter cited as Comment, *Constitutional Limitations*].

70. *See* People v. Medina, 41 Cal. App. 3d 438, 452, 116 Cal. Rptr. 133, 143 (1974) (under the felony-murder theory, an accomplice is guilty, just as the actual killer, of any homicide that occurs during the felony); Mumford v. State, 19 Md. App. 640, 643, 313 A.2d 563, 566 (1974) (even if an unintentional killing occurs during a felony, every person who engaged in the felony is responsible for murder); Alexander v. State, 250 So. 2d 629, 631 (Miss. 1971) (the defendant and others conspired to commit a robbery in which a co-felon killed the victim; because of the felony-murder doctrine, the defendant was guilty of murder); State v. Boggs, 634 S.W.2d 447, 454 (Mo. 1982) (to hold a defendant responsible for a killing by a co-felon, there is no need to prove that the defendant knew that the co-felon was practically certain to commit murder); *see also* D. JONES, CRIME AND CRIMINAL RESPONSIBILITY 132 (1978) (each co-felon is responsible for a death caused by the act of one of them); 2 WHARTON'S CRIMINAL LAW, *supra* note 68, § 145, at 208 (even if the co-felon is not the actual killer, he is responsible for the death).

71. Crum, *Casual Relationships and the Felony Murder Rule,* 1952 WASH. U.L.Q. 191, 192-93; *see also* People v. Muszalski, 260 Cal. App. 2d 611, 619, 67 Cal. Rptr. 378, 382-83 (1968) (the felony-murder doctrine's purpose of deterring killing is achieved by holding co-felons strictly responsible for all killings they commit during one of the enumerated felonies), *cert. denied,* 393 U.S. 1059 (1969); State v. Williams, 254 So. 2d 548, 550 (Fla. Dist. Ct. App. 1971) (the felony-murder doctrine's purpose is to prevent death of innocent persons).

72. *E.g.,* M. BASSIOUNI, *supra* note 57, at 247; *see also* Ludwig, *supra* note 57, at 52 (at common law, doctrine made no difference because all felonies were punishable by death); Comment, *Imposing the Death Penalty, supra* note 56, at 364 (there was no legal significance of the felony-murder doctrine at common law because all felonies were capital crimes).

73. Two states, however, have abolished the doctrine as a basis for liability. *See* HAWAII REV. STAT. § 707-701 & comment at 347 (1976); KY. REV. STAT. § 507.020 (Supp. 1978). Additionally, the British Parliament abolished use of the felony-murder rule in 1957. *See* Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1.

74. *E.g.,* M. BASSIOUNI, *supra* note 57, at 249; *see also Ex parte* Ritter, 375 So. 2d 270, 273-74 (Ala. 1979) (an accomplice's liability for a murder during a felony stems from the accomplice's participation in an inherently dangerous act), *vacated sub nom.,* Ritter v. Alabama 448 U.S. 903 (1980); Comment, *Constitutional Limitations, supra* note 69, at 1035 (when the underlying felony is deemed by the legislature to create a substantial certainty of causing a life-threatening situation, then intent needed for murder is presumed).

fairness.[75] The doctrine has been challenged as violating established principles of criminal law which require punishment to relate to individual intent and culpability.[76] It has been argued that it is unfair to hold a co-felon responsible for a murder that was an unintended and unlikely consequence of the underlying felony.[77]

Prior to its decision in *Enmund,* the Supreme Court had failed to address the felony-murder doctrine's inequitable premise of transferred intent. Nevertheless, in *Lockett v. Ohio,*[78] several Justices discussed the possible requirement of proof of criminal intent. The evidence in that case showed that Sandra Lockett and three others planned the robbery of a pawnshop. During the course of the robbery, the pawnbroker was killed accidentally. At trial, Lockett's participation in the robbery as the getaway driver was held sufficient to sustain a conviction for murder.[79] Furthermore, the trial court found that two aggravating factors existed which warranted imposition of the death penalty.[80] Although it was clear that Lockett neither intended nor foresaw the killings, she was sentenced to death.[81]

Although the Supreme Court vacated Lockett's death sentence on pro-

---

75. *See, e.g.,* People v. Phillips, 64 Cal. 2d 574, 583 n.6, 414 P.2d 353, 360 n.6, 51 Cal. Rptr. 225, 232 n.6 (1966) (the felony-murder doctrine artificially imposes malice); Dressler, *supra* note 44, at 57 (the felony-murder theory is inconsistent with fundamental criminal law because an accomplice can be convicted of murder with a lesser mens rea than is required for conviction of the perpetrator); Moreland, *Kentucky Homicide Law with Recommendations,* 51 KY. L.J. 59, 82 (1976) (modern reasons do not exist for the rationale underlying the felony-murder doctrine). There are two schools of thought on reforming the doctrine. One suggests replacing the automatic transfer of intent with a rebuttable presumption of intent; the other calls for abolishing the doctrine completely. *See, e.g.,* MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962) (rebuttable presumption); Ludwig, *supra* note 57, at 61-64 (the test should be one of probability); Packer, *The Case for Revision of the Penal Code,* 13 STAN. L. REV. 252, 259 (1961) ("[t]he rule is unnecessary in almost all cases in which it is applied"); Note, *Criminal Law—The Felony Murder Doctrine Repudiated,* 36 KY. L.J. 106, 109 (1947) (appropriate punishment can be imposed without use of the felony-murder doctrine) [hereinafter cited as Note, *Repudiated*].

76. *See* Fletcher, *Reflections on Felony Murder,* 12 SW. U.L. REV. 413, 418 (1981) (it is surprising that neither legislatures nor courts have brought the felony-murder doctrine within well-accepted boundaries of criminal law theory); Hall, *Theory and Reform of Criminal Law,* 29 HASTINGS L.J. 893, 907 (1978) (the felony-murder rule is contrary to concept of mens rea); Hogan, *Crime, Punishment and Responsibility,* 24 VILL. L. REV. 690, 693 (1979) (felony-murder is anomalous to a system requiring focus on the defendant's intentions).

77. *See* Note, *Repudiated, supra* note 75, at 108-09 (1947).

78. 438 U.S. 586 (1978).

79. *Id.* at 589-91. At trial, Lockett's counsel argued that Lockett knew nothing about the robbery plans. Instead, he asserted that Lockett believed that her codefendants simply were going to the pawnshop to pawn a ring. *Id.* at 592.

80. *Id.* at 589. The first aggravating factor was that the murder was committed for the purpose of escaping punishment. The second was that the murder was committed during an armed robbery. *Id.* These factors are two of seven which render aggravated murder punishable by death in Ohio. *See* OHIO REV. CODE ANN. § 2929.03-.04 (Page 1975).

81. 438 U.S. at 594. Unable to find the existence of any mitigating factors, the sentencing judge concluded that, whether he approved of the law or not, he had no alternative but to sentence Lockett to death. *Id.*

cedural grounds,[82] several Justices discussed the possible requirement of proof of specific intent.[83] Justice White took the position that without proof of specific, individual intent to kill, the death penalty was an unconstitutional punishment.[84] Disagreeing, Justice Blackmun stated that eighth amendment constitutionality should not be determined solely on the basis of lack of intent.[85] Under this view, lack of intent could be incorporated into the eighth amendment requirements as a mitigating factor.[86] Moreover, Justice Blackmun disagreed that only specific intent to kill could satisfy the eighth amendment; lesser degrees of intent, such as intent to commit great bodily harm or recklessness, would be sufficient.[87] Four years after *Lockett,* in *Enmund v. Florida,* the full Court explicitly considered whether the death penalty was a constitutional punishment for a co-felon who neither killed, nor intended that a killing occur.

THE *ENMUND* DECISION

The Facts of Enmund v. Florida

On April 1, 1975, Thomas and Eunice Kersey were robbed and killed at their Florida farmhouse.[88] Earl Enmund and Sampson Armstrong were tried as codefendants and, subsequently, convicted of the Kersey robbery and murder.[89] The evidence at trial established that on the morning of April 1, Sampson and Jeanette Armstrong[90] approached the Kersey farm on the pretense of obtaining water for an overheated radiator. When Mr. Kersey went to get the water, Sampson grabbed him and told Jeanette to retrieve his wallet. Responding to her husband's cry for help, Mrs. Kersey came from the house carrying a gun and shot Jeanette. Gunfire was exchanged and both Thomas and Eunice Kersey were killed. Sampson, and perhaps Jeanette,[91] took the money and dragged the bodies into the farmhouse. Thereafter, they fled to the getaway car where Earl Enmund was waiting to drive them away.[92]

82. The *Lockett* Court held that at sentencing a judge must consider, as a mitigating factor, any evidence of character or circumstance that the defendant offers as a reason for imposing a sentence less severe than death. *Id.* at 604-05. Because the Ohio death penalty statute did not permit individualized consideration of mitigating factors, Lockett's death sentence was reversed. *Id.* at 606-09.

83. For a discussion of the specific intent principle, see *supra* note 61 and accompanying text.

84. 438 U.S. at 624 (White, J., concurring in part, dissenting in part).

85. *Id.* at 614-15 n.2 (Blackmun, J., concurring in part).

86. *Id.* at 615-16.

87. *Id.* at 614-15 n.2.

88. 102 S. Ct. at 3370.

89. *Id.*

90. Jeanette Armstrong was tried separately. She was found guilty of two counts of second-degree murder and one count of robbery, and was sentenced to three consecutive life sentences. *Id.* at 3370 n.1.

91. The Florida trial court reasoned that because Jeanette's gunshot wounds were so serious, in all probability, she was incapacitated immediately. *See id.* at 3381 n.12 (O'Connor, J., dissenting).

92. *Id.* at 3370.

At trial, the jury found Earl Enmund guilty of first-degree murder and robbery,[93] and recommended that the death sentence be imposed.[94] During the sentencing proceeding, the trial judge found the existence of four aggravating factors: the murders were committed during the course of a felony,[95] the murders were committed for monetary gain,[96] the murders were particularly "heinous, atrocious, [and] cruel,"[97] and the defendant previously had been convicted of a felony.[98] These factors, coupled with the absence of any mitigating factors, led the judge to sentence Enmund to death.[99]

On appeal, the Florida Supreme Court affirmed Enmund's death sentence.[100] Although it observed that the evidence did not support the trial court's presumption that Enmund had participated in the murders,[101] the state supreme court found that his participation in planning the robbery[102]

---

93. Sampson Armstrong also was found guilty of two counts of first-degree murder and one count of robbery, and the jury recommended the death penalty. *Id.*

94. *Id.* Under Florida law, the jury advises the judge on whether the death penalty should be imposed. *Id.; see also* FLA. STAT. § 921.141(2) (Supp. 1981). Capital punishment trials are bifurcated proceedings in Florida. In the first hearing, the defendant's guilt is determined. If a guilty verdict is rendered, the second hearing consists of an examination of aggravating and mitigating factors in an effort to determine whether the death penalty should be imposed. *See id.* § 921.141(1).

95. 102 S. Ct. at 3370; *see also* FLA. STAT. § 921.141(5)(d) (Supp. 1981).

96. 102 S. Ct. at 3370; *see also* FLA. STAT. § 921.141(5)(f) (Supp. 1981).

97. 102 S. Ct. at 3370; *see also* FLA. STAT. § 921.141(5)(h) (Supp. 1981).

98. 102 S. Ct. at 3370; *see also* FLA. STAT. § 921.141(5)(b) (Supp. 1981).

99. 102 S. Ct. at 3371.

100. Enmund v. State, 399 So. 2d 1362, 1373 (Fla. 1981) (per curiam).

101. *Id.* at 1370. In the sentencing order, the trial judge stated that Enmund had been present and had aided in the murders. *Id.* at 1373. The state supreme court, however, held that because there was no direct evidence to support this statement, the inference was impermissible. *Id.* at 1370. The appellate court upheld Enmund's conviction, though, because the jury could have inferred that Enmund was the getaway driver; this inference was sufficient to support the murder verdict on the basis of felony murder. *Id.*

The Florida Supreme Court's findings concerning Enmund's presence at, and aid in, the murders could have been the basis for a remand for resentencing. This was the view of Justice Overton, who concurred in upholding the conviction, but believed that a resentencing hearing was necessitated by the state supreme court's findings. *Id.* at 1373 (Overton, J., concurring in part, dissenting in part).

These findings also led the dissenters in the United States Supreme Court to conclude that a new sentencing hearing was required. 102 S. Ct. at 3392-94 (O'Connor, J., dissenting). The dissent contended that the trial court's misunderstanding of the facts violated the *Woodson* mandate, requiring a court's consideration of individual circumstances before imposing a sentence. *Id.* at 3394. Furthermore, the dissent was concerned that the impermissible finding had affected the trial judge's decision. *Id.*

102. The Florida Supreme Court did not expressly discuss Enmund's involvement in planning the robbery. The majority of the United States Supreme Court, however, concluded that the Florida court had negated this trial court finding when it noted that the only permissible inference regarding Enmund's participation was that he was the getaway driver. 102 S. Ct. at 3371 & n.2. Yet, the dissent disagreed with the majority's conclusion. *Id.* at 3391. The Florida Supreme Court had upheld the trial court's finding that there were no mitigating circumstances. 399 So. 2d at 1373. It was determined that the one possible mitigating factor, minor involvement, was not applicable to Enmund because his role had been major—Enmund had planned

and driving the getaway car was sufficient to hold him responsible for the acts of his co-felons under the felony-murder doctrine.[103] Rejecting Enmund's argument that the death sentence was cruel and unusual punishment when imposed upon a co-felon who neither killed nor intended to kill, the Florida Supreme Court noted that transferred guilt in felony murders had a long history of acceptance.[104] Even though the state supreme court found that only two of the four aggravating factors identified by the trial court were present, it concluded that those factors were sufficient to affirm Enmund's death sentence.[105]

On July 2, 1982, the United States Supreme Court reversed the Florida Supreme Court's decision.[106] The Court held that the death penalty was disproportionate and unconstitutional when imposed upon an aider and abettor to a felony murder unless there was a showing that the co-felon took life, intended that life be taken, or contemplated the taking of life.[107]

The Supreme Court Opinion

The majority's[108] analysis began with a reiteration of the well-established principle that the eighth amendment protects against excessive punishments. The Court stated that the excessiveness test, formulated in *Gregg*[109] and *Coker,*[110] would be used to determine whether Enmund's punishment by death was excessive in relation to his crime. The first prong of the excessiveness test, disproportionality, required a consideration of the expressions of legislative judgment and jury response. The Court examined the thirty-five state statutes[111] which authorized the death penalty as indications of legislative judgment. The *Enmund* majority found that only nine states[112] permitted

---

and participated in the robbery. *Id.* Additionally, Enmund's counsel conceded at sentencing that Enmund had initiated the robbery. *Enmund,* 102 S. Ct. at 3381 n.10, 3301 n.40.

103. *Enmund,* 399 So. 2d at 1369-70.

104. *Id.*

105. *Id.* at 1373. The trial court found four aggravating factors: the murders were committed in the course of a felony (armed robbery), the felony was committed for monetary gain, the murders were heinous, and Enmund had a previous felony conviction. *Id.* at 1371-72. The Florida Supreme Court considered the first two factors as a single aggravating circumstance because the circumstances of robbery and monetary gain consisted of one factor. *Id.* at 1373. The aggravating factor that the murders were heinous was rejected because there was no proof that the Kerseys had been killed to eliminate them as witnesses. *Id.* Finally, Enmund's prior felony conviction was upheld as an aggravating circumstance. *Id.*

106. 102 S. Ct. 3368, 3379.

107. *Id.* at 3376-77.

108. Justice White wrote the majority opinion in which Justice Brennan, writing separately, concurred. *Id.* at 3368. Chief Justice Burger, and Justices Powell and Rehnquist joined Justice O'Connor's dissent. *Id.*

109. *See supra* notes 41-45 and accompanying text.

110. *See supra* notes 47-53 and accompanying text.

111. 102 S. Ct. at 3372-74.

112. The nine states were California, Florida, Georgia, Mississippi, Nevada, South Carolina, Tennessee, Washington and Wyoming. *See* CAL. PENAL CODE §§ 189, 190.2(a)(17) (West Supp. 1981); FLA. STAT. ANN. §§ 775.082(1), 782.04(1)(a), 921.141(5)(d) (West 1976 & Supp. 1982);

the death penalty to be imposed for a nontriggerman's participation in a robbery in which a murder was committed.[113] The Court noted that this legislative study was not as conclusive as the one conducted in *Coker*;[114] nevertheless, it concluded that the study weighed against imposing death in Enmund's case. The other objective indicator, jury opinion, showed that in the last twenty-five years, only six out of the 362 individuals executed in the United States were nontriggermen in a felony murder.[115] According to the *Enmund* majority, Florida's sentence of death, imposed on a nontriggerman co-felon, was disproportionate when compared to sentences imposed in other jurisdictions.[116]

The second prong of the excessiveness test, penological justification, required the Court to determine the values of deterrence and retribution for a nontriggerman in a felony murder. The *Enmund* majority concluded that the death penalty could not possibly deter felons who did not contemplate the taking of life.[117] The majority reasoned that deterrence might be a valid factor if the likelihood of killing during a felony was substantial, but statistics proved that the chance was slight.[118] In addition, retribution would not be achieved by executing Enmund because the value of retribution depended on culpability, and the Court did not consider Enmund to be personally culpable of the murders. The majority maintained that punishment under the eighth amendment must be tailored to personal responsibility and moral guilt; the death penalty was not tailored to suit a co-felon who neither killed nor intended a death to occur.[119]

After determining that the death penalty for Enmund's crime was disproportionate and without penological justification, the majority stressed that while the judgment of legislatures, juries, and prosecutors is important, the Supreme Court is the ultimate arbiter of whether the eighth amendment permits imposition of the death penalty.[120] The *Enmund* Court concluded

---

GA. CODE ANN. §§ 26-1101(b)(c), 27-2534.1(b)(2) (Supp. 1980); MISS. CODE ANN. §§ 97-3-19(2)(e), 99-19-101(5)(d) (Supp. 1981); NEV. REV. STAT. §§ 200.030(1)(b) to -.033(4) (1981); S.C. CODE ANN. §§ 16-3-10, -3-20(C)(a)(1) (Law. Co-op. Supp. 1981); TENN. CODE ANN. § 39-2-203(a), -203(i)(7) (1982); WASH. REV. CODE ANN. §§ 9A.32.030(1)(c)(1), -.32.040(1) (1977 & Supp. 1982); WYO. STAT. §§ 6-2-101, -2-102(h)(iv) (Supp. 1981).

113. 102 S. Ct. at 3372.

114. *Id.* at 3374. In *Coker*, the Court found that four states allowed the death penalty as punishment for rape; in three of these states, to impose the death penalty, the victim had to have been a child. *See supra* notes 50-51 and accompanying text.

115. 102 S. Ct. at 3375-76. Additionally, the Court noted that at the time the *Enmund* opinion was written, only 40 of the 739 individuals on death row had not actually participated in the murders for which they were sentenced. *Id.*

116. *Id.* at 3376.

117. *Id.* at 3377-78.

118. The statistics relied upon by the *Enmund* majority were collected by the American Law Institute and demonstrated that only one-half of one percent of all robberies resulted in homicide. *Id.* at 3378 & n.23. Out of the 548,809 robberies that occurred in the United States in 1980, death resulted in approximately 2,361 instances. *Id.* at 3378 n.24.

119. *Id.* at 3378.

120. *Id.* at 3376-76.

that although robbery is a serious crime, it is not serious enough to warrant imposition of the death penalty.[121] Emphasizing that the focus must be on individual culpability, the majority found that it was impermissible to punish Enmund in the same manner as his co-felon killers.[122] The Court announced that Enmund's death sentence violated the eighth amendment's bar against cruel and unusual punishment because Enmund did not have the requisite intent, and the culpability of his co-felon could not constitutionally be transferred to him.[123]

Analysis and Criticism

The Inconclusive Excessiveness Test

Applying the excessiveness test formulated in *Gregg,*[124] the Supreme Court determined that sentencing Enmund to death for a murder committed by his co-felon constituted cruel and unusual punishment. In analyzing disproportionality, the first element of the excessiveness test, the *Enmund* Court examined state statutes and jury verdicts. Theoretically, if these indicia demonstrate that society disfavors the particular punishment for the crime in question, then the punishment is excessive and unconstitutional.[125] In considering these criteria, the *Enmund* Court drew tenuous conclusions regarding societal opinion. These conclusions were considerably weaker than the Court implied.

After examining state statutes that authorize the death penalty, the *Enmund* majority concluded that only nine states would impose the death penalty on a nontriggerman for his participation in a robbery during which a victim was killed.[126] Although the Court conceded that another nine states might permit the imposition of a death sentence based on vicarious liability, it observed that in six of these nine states minor participation is a mitigating factor,[127] and in the remaining three states felony murder is not considered

---

121. *Id.* at 3377.

122. *Id.* The Court stated that "[t]he question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims. . . ." *Id.* (emphasis in original).

123. Individual culpability is given special treatment only in capital punishment cases; therefore, *Enmund*'s mandate that co-felon culpability cannot be transferred only applies to death penalty cases. *Id.* (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

124. *See supra* notes 41-45 and accompanying text.

125. Some commentators have criticized the objective tests used by the Court as being unacceptable for evaluating legislative judgments. *See, e.g.,* Dressler, *supra* note 44, at 41 (the objective tools are unacceptable and the Court should use its own judgment).

126. 102 S. Ct. at 3372-74; *see supra* notes 111-12 and accompanying text.

127. *See* Ariz. Rev. Stat. Ann. § 13-703(G)(3) (1978) (minor participation may be considered as a mitigating circumstance); Conn. Gen. Stat. Ann. § 53a-46(a) (West 1960) (same); Ind. Code Ann. § 35-50-2-9(c)(4) (Burns 1979) (same); Mont. Code Ann. § 46-18-304(6) (1981) (court may consider "any evidence . . . deem[ed] to have probative force"); Neb. Rev. Stat. § 29-2523(2)(e) (1979) (minor participation may be considered as a mitigating circumstance); N.C. Gen. Stat. § 15A-2000(f)(4) (1978) (same).

an aggravating factor.[128] Because consideration of such factors is required before imposition of capital punishment, the Court concluded that these nine states would not impose the death penalty on a co-felon in factual circumstances similar to those presented in *Enmund*. The Court, however, erred in reaching this conclusion.

The *Enmund* majority implied that six states would not sentence Enmund to death because those states consider minor participation in a felony to be a mitigating factor. This implication presents two problems. The first problem is that these states do not define minor participation.[129] Thus, it is difficult to determine whether these six states would characterize Enmund's participation as "minor." It is clear, however, that these states do not automatically characterize as a "minor participant," a co-felon who was not the triggerman in a felony murder.[130]

The second problem with the Court's analysis is its failure to explain how the mitigating factor of minor participation was relevant to the decision to impose capital punishment on Enmund. Both the trial court and the Florida Supreme Court found that Enmund's participation in the felony was "major."[131] Therefore, because the mitigating factor of minor participation

---

128. *See* IDAHO CODE § 19-2515(f) (1979) (felony murder is not enumerated as an aggravating factor); OKLA. STAT. ANN. tit. 21, § 701.12 (West 1981) (same); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (1979) (same).

129. Minor participation was not defined in any of the state statutes, and its definition was not apparent from case law. It appears that the question of whether an accomplice's participation was relatively minor is determined solely by judicial discretion based on the facts of the particular case. *See, e.g.*, State v. Bishop, 118 Ariz. 263, 270, 576 P.2d 122, 129 (1978) (an accomplice's participation was held to be relatively minor because all he did was help dispose of the victim's body).

130. *See, e.g.*, State v. Collins, 111 Ariz. 303, 307, 528 P.2d 829, 833 (1974) (a defendant can be punished for first-degree murder and robbery even if that defendant did not actually shoot the victim); Brewer v. State, ___ Ind. ___, 417 N.E.2d 889, 904 (1981) (a death sentence may be imposed constitutionally upon one who is an accessory to murder), *cert. denied*, 102 S. Ct. 3510 (1982); *see also* State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981). In that case, the defendant and his two brothers helped their father and another convict escape from prison. While the five men were fleeing from the police, four people were murdered. The defendant argued that he did not deserve the death sentence because the murders had been committed by the convicts and his own participation was minor. Disagreeing with this proposition, the court held that the mere fact that the defendant did not shoot the victim did not mean that his participation was minor. *Id.* at 545, 633 P.2d at 354. Furthermore, the *Tison* court noted that even if it considered the defendant's participation to be minimal, this mitigating factor would have been outweighed by the existence of two aggravating factors: 1) murder for monetary gain; and 2) the defendant's previous felony conviction. *Id.* at 542-44, 633 P.2d at 351-54.

Tison substantially weakens the *Enmund* Court's rationale. Even assuming that Enmund's participation was minor, Enmund was found to possess the same aggravating factors present in *Tison*. *See supra* note 105. According to the *Tison* court, these aggravating factors outweighed the single mitigating factor of minor participation and, consequently, the death penalty was an appropriate punishment. 129 Ariz. at 555-56, 633 P.2d at 364-65; *see also* Lewis v. State, 380 So. 2d 970, 977 (Ala. Crim. App. 1979) (existence of mitigating factors does not automatically mean no death sentence; such factors must be weighed against aggravating factors).

131. 399 So. 2d 1362, 1373 (Fla. 1981) ("The evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major.").

does not apply to Enmund's conduct, the Court's reliance on this factor was misplaced.

Additionally, the Court reasoned that three of the states which allowed imposition of the death penalty based on vicarious liability would not sentence Enmund to death because those states' statutes do not list felony murder as an aggravating circumstance. This reasoning is subject to criticism, however, because all three states define first-degree murder as any killing which occurs during the perpetration of an enumerated felony.[132] Thus, felony murder in those states is not an aggravating factor; rather, it is a form of first-degree murder. Accordingly, imposition of the death penalty on Enmund would not be foreclosed in those states because one aggravating factor existed, and there were no mitigating factors to outweigh it.[133]

Furthermore, three states which the Court concluded required a showing of intent before subjecting a nontriggerman to capital punishment only require proof of a minimal level of intent. These states do not require proof of intent to kill, but merely proof of recklessness or grave risk of death.[134] Arguably, this lower requirement of intent was present in the planned robbery of the Kersey farm,[135] making imposition of the death penalty on Enmund a possibility in these three states. Hence, a non-killer co-felon may receive a death sentence absent evidence that he either took life, or intended that life be taken, in twenty-one of the thirty-five states which provide for

132. *See* IDAHO CODE § 18-4003(d) (1979) (arson, rape, robbery, burglary, kidnapping, or mayhem); OKLA. STAT. ANN. tit. 21, § 701.7(b) (West Supp. 1982) (arson, rape, robbery, burglary, kidnapping, or escape); S.D. CODIFIED LAWS ANN. § 22-16-4 (1979) (arson, rape, robbery, burglary, kidnapping, or unlawful use of explosives); *see also* Tilford v. Page, 307 F. Supp. 781 (D. Okla. 1969) (each participant in felony murder is guilty of murder arising during the felony whether or not the felon actually committed the killing), *vacated in part on other grounds,* 408 U.S. 939 (1972); Lewis v. State, 451 P.2d 399, 400 (Okla. 1967) (defendant was merely a getaway driver who did not participate in the assault and beating; yet, as a principal under the felony-murder rule, the defendant was guilty of murder).

133. *See supra* note 95-105 and accompanying text.

134. *See* ARK. STAT. ANN. § 41-1501(1)(a) (1977) (death resulting during commission of a felony because of extreme indifference to life is considered capital murder); DEL. CODE ANN. tit. 11, § 636(a)(2) (1979) (recklessly caused death occuring during a felony is first-degree murder); KY. REV. STAT. ANN. § 507.020(1)(b) (Bobbs-Merrill Supp. 1978) (a person is guilty of murder if he either causes death because of extreme indifference to human life, or creates a grave risk of death); *see also* Stewart v. State, 257 Ark. 753, 761, 519 S.W.2d 733, 738, *cert. denied,* 423 U.S. 859 (1975) (all participants in robbery are equally guilty of murder).

135. For example, Delaware statutes provide that "[a] person acts recklessly . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from his conduct." DEL. CODE ANN. tit. 11, § 231(c) (1979). It may be argued that Enmund's conduct was reckless because, when he supplied his co-felons with loaded guns, he knew that there was a risk that they might use them. *See also* M. BASSIOUNI, *supra* note 57, at 169 (if an individual acts voluntarily, the assumption is that the person intends the natural and probable consequences of his conduct); *cf.* MODEL PENAL CODE § 210.2(1)(b) (Proposed Official Draft 1962). The Model Code states that criminal homicide constitutes murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in . . . robbery, rape, . . . arson, burglary, kidnapping or felonious escape." *Id.*

capital punishment.[136] It thus appears that the *Enmund* majority misconstrued state statutes and drew tenuous conclusions about those statutes to support its decision.

The Court's further reliance on jury sentencing in felony-murder cases does not substantiate its conclusion that, in such instances, the death penalty contravenes societal standards. The *Enmund* Court's conclusion, that society disfavored the death penalty, was based on a survey which indicated that out of the 362 individuals executed since 1954, only six were nontriggermen; moreover, of the 739 people then on death row, only forty did not participate in a killing.[137] Although these statistics are impressive, they are not conclusive of jury response.[138] Because there is no indication of how often states unsuccessfully seek the death penalty for an accomplice to felony murder, the percentage of juries that reject capital punishment in such cases cannot be determined. Furthermore, there is no indication of the number of accomplices who could have been tried and convicted for murder, but were not so tried because they agreed to testify against the triggermen.[139] The statistics also might mean that juries only impose the death penalty on accomplices when serious implication in the homicide is clear.[140] Accordingly, the statistics proffered by the Court do not necessarily indicate that juries disfavor death as a punishment for co-felons who do not intend a killing to occur.

In scrutinizing the second criterion of the excessiveness test, penological justification, the *Enmund* Court utilized the traditional guidelines of deter-

---

136. These 21 states include the nine states that the Court conceded would sentence Enmund to death. *See supra* note 112. Additionally, there are nine other states that allow vicarious liability and whose aggravating and mitigating factors would not effect Enmund's death sentence. *See supra* notes 127-35 and accompanying text. Finally, there are three more states which require a very minimal level of intent, a level which arguably was present in Enmund's circumstances. *See supra* notes 134-35 and accompanying text. The *Enmund* dissenters characterized the states' positions differently. They concluded that 24 states would impose the death penalty on Enmund even though he neither actually committed the killings nor intended them to occur. 102 S. Ct. at 3390 (O'Connor, J., dissenting).

137. *Id.* at 3375-76.

138. One commentator has criticized the analysis of jury verdicts as being speculative; he argued that it is unclear whether jury decisions are rendered because the penalty is too severe for the crime, or simply because the evidence is insufficient. Dressler, *supra* note 44, at 40-41; *see also* Y. KAMISAR, HOW TO USE, ABUSE,—AND FIGHT BACK WITH—CRIME STATISTICS, *reprinted in* CONGRESSIONAL RESEARCH SERVICE, RESOLVED: THAT U.S. LAW ENFORCEMENT AGENCIES SHOULD BE GIVEN SIGNIFICANTLY GREATER FREEDOM IN THE INVESTIGATION AND/OR PROSECUTION OF FELONY CRIMES, H.R. DOC. No. 230, 95th Cong., 1st Sess. 128 (1977) (statistics can be manipulated to prove almost any point) [hereinafter cited as Y. KAMISAR].

139. *See, e.g.,* Comment, *Imposing The Death Penalty, supra* note 56, at 376 ("prosecution saves its strongest felony-murder cases for jury trial by refusing to plea bargain them").

140. This was argued in the *Enmund* dissent. 102 S. Ct. at 3388 (O'Connor, J., dissenting). The dissent also contended that jury sentencing was not a conclusive rejection of capital punishment because of jury response to mandatory sentencing. *Id.* at 3387 (O'Connor, J., dissenting). Moreover, the *Enmund* dissent concluded that no matter what these statistics showed, they did not prove that juries only impose the death penalty when it has been proven that the defendant possessed an intent to kill. *Id.* at 3388 (O'Connor, J., dissenting).

rence and retribution; if the punishment promotes neither deterrence nor retribution, it will be held unconstitutionally excessive.[141] Prior to *Enmund*, the Supreme Court declared that retribution was an acceptable reason for imposing the death penalty.[142] The *Enmund* majority, however, limited the applicability of retribution to cases in which specific individual culpability is proven.[143] Noting that culpability is based on individual intent to cause a specific result,[144] the Court concluded that retribution is an acceptable reason for imposing the death sentence only in cases involving such culpability.

The severity of the death penalty renders this a just conclusion. Moreover, because the Court did not extinguish nontriggerman co-felon liability,[145] society can continue to punish such offenders. The *Enmund* decision only mandates that the killing cannot be punished by death unless the defendant killed, attempted to kill, or intended that a death occur.

Only six years before deciding *Enmund*, the Court stated that it was uncertain whether the death penalty deters crime; thus, the issue of deterrence was left to state legislatures to decide.[146] The *Enmund* majority retracted this position and concluded that deterrence was useless unless the defendant intended the crime.[147] Based on available statistics,[148] the Court reasoned that the likelihood of killing during a robbery was so slight that the threat of the death penalty would not deter the criminal from committing the robbery. Even assuming this reasoning is substantiated, the focus should be on the factors of the specific robbery, rather than on an examination of robberies in general. For instance, if a robber carries a loaded gun into a store, the likelihood of a death resulting would be greater than if the robber carries an unloaded gun, or no gun at all.[149] Additionally, the cornerstone con-

---

141. *See supra* notes 44-45 and accompanying text.

142. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

143. 102 S. Ct. at 3378.

144. *Id.*

145. A few cases decided since *Enmund* have recognized that the *Enmund* holding only applies to capital punishment situations. *See, e.g.*, Godbolt v. State, 429 So. 2d 1131 (Ala. Crim. App. 1982) (*Enmund* held inapplicable because the appellant was faced with a life sentence; *Enmund* applies only to death penalty cases), *cert. denied*, No. 82-579 (Ala. Sup. Ct. Apr. 29, 1983); People v. Dotson, 137 Cal. App. 3d 288, 186 Cal. Rptr. 905 (1982) (*Enmund* does not affect the proportionality of a life sentence for felony murder).

146. Gregg v. Georgia, 428 U.S. 153, 184-86 (1976).

147. 102 S. Ct. at 3377.

148. *See supra* note 118 and accompanying text.

149. One commentator surveying general crime statistics made these observations:

> Guns play an increasingly deadly role in aggravated assault and robbery. . . . One of every three robberies . . . is committed with a gun. . . . There is no hard evidence to prove or disprove the thesis that lacking a gun, an enraged person will resort to a knife or other weapons. But there is evidence demonstrating that the fatality rate of firearm attacks is more than four times greater than the fatality rate for knife attacks (knives being the next most frequent and lethal weapon used in homicides). Thus, even if the number of violent attacks did not go down, the number of fatalities resulting from violent attacks would be substantially reduced if the attackers did not have guns.

Y. KAMISAR, *supra* note 138, at 136.

cept of the felony-murder doctrine is that some felonies are inherently so dangerous to human life that, for purposes of deterrence, punishment for participation in these felonies should be severe.[150] Hence, based on a single statistical study, the *Enmund* Court undercut the rationale for the felony-murder doctrine.

On the basis of tenuous conclusions regarding legislative statutes, jury sentencing, and retribution and deterrence, the *Enmund* Court held that the death penalty is an excessive punishment for a co-felon who neither took a life nor intended that a life be taken. Therefore, under such circumstances, the Court found that capital punishment violates the eighth amendment. Clearly, the evidence was not as conclusive as the majority suggested, and based on traditional standards, a contrary decision might have been reached. The *Enmund* majority, however, buttressed its position by requiring a new eighth amendment standard: proof of specific intent to kill.

The New Standard of Intent

Although contrary to felony-murder precepts, the *Enmund* Court's requirement of proof of individual, specific intent to kill is consistent with basic criminal law theory.[151] Moreover, by requiring proof of intent, the *Enmund* decision addresses criticism that the felony-murder doctrine is inequitable because of its failure to concentrate on individual intent and culpability.[152] Despite the merits of imposing an intent requirement, the *Enmund* decision is problematic because the Court did not clearly articulate a requisite level of intent.

Intent is a nebulous concept which has been difficult to apply in several criminal areas.[153] It has been viewed as perhaps the most complex issue in criminal law.[154] In addition, courts and legislatures have been criticized for their inability to define and apply the concept of intent.[155] The inherent problems in defining the notion of intent, however, do not justify a rejection of the Court's position that a finding of intent is requisite to imposing the

150. *See, e.g.*, D. Jones, *supra* note 70, at 131 (the felony-murder doctrine encompasses deaths which are the natural and probable result of the felony, or the result of an inherently dangerous felony); Note, *Survey, supra* note 68, at 455 (the felony-murder doctrine is restricted to felonies which produce risk of death or great bodily harm, or crimes committed with dangerous force and reckless disregard for human life).

151. *See supra* notes 57-66 and accompanying text. Even though this new requirement of intent is consistent with criminal law theory, the Court never explained exactly why prosecutors in capital felony-murder cases suddenly are required to prove intent. One commentator's observations may serve as a possible explanation: "[T]he Supreme Court regards *mens rea* as constitutionally unimportant except when it serves as a convenient peg on which to hang a result that it thinks desirable but is unwilling or unable to defend on other grounds." Packer, *supra* note 65, at 127.

152. *See supra* notes 75-77 and accompanying text.

153. *See supra* note 65 and accompanying text.

154. *See* M. Bassiouni, *supra* note 57, at 169.

155. *See* Packer, *supra* note 65, at 137.

death penalty on a nontriggerman in a felony murder. Indeed, proof of intent, despite being difficult to apply and define, is required in most areas of criminal law.[156] Nevertheless, the problems of intent will be compounded in capital felony-murder cases because the *Enmund* Court failed to articulate the requisite *level* of intent which must be proven before a nontriggerman can be sentenced to death.

Although the Court did not specify the necessary level of intent, by stating that the death penalty is unconstitutional if the defendant did not kill, attempt to kill, or intend that a killing occur, the *Enmund* majority seemed to require a finding of specific intent.[157] Moreover, based on the Model Penal Code ("Model Code") definitions of intent, it appears that the *Enmund* Court was imposing a higher level of intent than mere general intent.[158] Application of the Model Code[159] to *Enmund* is justified because the Supreme Court itself has employed the Model Code definitions in other criminal cases.[160] The Model Code lists four levels of intent or culpability: purposeful, knowing, reckless, and negligent.[161] In analyzing *Enmund* under these levels of intent, it appears that Enmund possessed one of the lower levels of reckless

---

156. *See supra* note 60 and accompanying text.

157. 102 S. Ct. at 3376-77. The following additional language also seems to mandate proof of specific intent: "We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." *Id.* at 3377. The words *intent* and *purpose* are usually used to refer to specific intent. *See supra* note 61 and accompanying text.

158. Another fact which seems to indication that *Enmund* requires proof of specific intent is the fact that Justice White, who wrote the *Enmund* majority opinion, previously took the position that the eighth amendment requires a finding of specific intent before the death penalty can be imposed constitutionally. Lockett v. Ohio, 438 U.S. 586, 624-25 (1978) (White, J., concurring in part, dissenting in part).

159. The Supreme Court did not mention the Model Penal Code in the *Enmund* opinion. Nevertheless, the Court is familiar with the Model Code's definitions of culpability, and an examination of these definitions demonstrates that the Court was applying a high level of intent.

160. *See, e.g.,* United States v. Bailey, 444 U.S. 394, 403-09 (1980) (examination of the Model Penal Code and doctrine of mens rea); United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) (Supreme Court approved of § 2.05 of the Model Penal Code); *see also* Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law,* 9 AM. J. CRIM. L. 163 (1981). Erlinder argues, through an examination of case law, that the Model Penal Code definitions of mens rea have been accepted by the Supreme Court, and that the Model Code provides a basis for a constitutional doctrine of mens rea. *Id.* at 175-91.

161. The Model Code provides:

> (1) *Minimum requirements of culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
>
> (2) *Kinds of culpability defined.*
>
> (a) *Purposely.* A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence

or negligent intent.[162] Because Enmund's conduct would have satisfied only the Model Code's two lower levels of intent, it is arguable that by refusing to apply the death penalty, the *Enmund* Court was demanding that one of the higher levels of intent be present.[163]

Despite its apparent mandate that proof of a higher level of intent exist before a nontriggerman in a felony murder can be sentenced to death, the *Enmund* opinion contains no explicit statement concerning the appropriate level of intent. There are two plausible reasons for the Court's failure to make such a statement. First, it is possible that the Justices were not in complete accord on the level of intent required by the eighth amendment to impose the death penalty on a nontriggerman. This position is illustrated by contrasting the opinions of Justices White and Blackmun.[164] In *Lockett v. Ohio,*[165] Justice White declared that the Constitution should be interpreted as requiring proof of a conscious purpose to kill before the death penalty can be imposed.[166] In contrast, Justice Blackmun argued in a concurring opinion that intent should play a more limited role in imposing capital punishment. Justice Blackmun disagreed that proof of specific intent to kill should be required and suggested that lesser standards of intent would be sufficient.[167]

> of such circumstances or he believes or hopes that they exist.
>
> (b) *Knowingly.* A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
>
> (d) *Negligently.* A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Model Penal Code § 2.02(1)-.02(2) (Proposed Official Draft 1962).

162. *See supra* note 161. Enmund's conduct could be considered reckless because he knew his co-felons were carrying guns, and he ignored the substantial and unjustifiable risk that someone possibly could be hurt or killed.

163. *See id.* The definitions of purposely or knowingly require that the defendant either consciously desire a result, or that the defendant know that such a result will be produced by his conduct. Applying these definitions to Enmund's conduct, Enmund either had to desire the Kerseys' deaths or know with certainty that the Kerseys would die.

164. *See supra* notes 84-87 and accompanying text.

165. 438 U.S. 586 (1978).

166. *Id.* at 624-25, 628 (White, J., concurring in part, dissenting in part).

167. *Id.* at 614-15 n.2 (Blackmun, J., concurring). Justice Blackmun believed that proving

A second explanation for the Court's failure to articulate the constitutionally mandated level of intent could be the federal judiciary's fear of intruding into the traditional right of states to define crimes and their corresponding elements.[168]

Regardless of the reason for the Court's failure to articulate the level of intent that must be proven before a nontriggerman in a felony murder can receive the death penalty, that failure presents a problem for lower courts which must interpret *Enmund*. Presumably, the underlying aim of the Supreme Court's opinion in *Enmund v. Florida* was the abolition of the

---

individual intent to kill would be too difficult a task. It is interesting to note that one of the hypotheticals posed by Justice Blackmun to illustrate his point concerned a robbery accomplice who sits in the getaway car knowing that his co-felon is brandishing a loaded gun, a fact pattern similar to that in *Enmund*. Justice Blackmun wondered how the state would prove intent for the getaway driver even if the accomplices had agreed to use the gun if necessary. *Id.*

168. Customarily, state legislatures determine what constitutes a crime. It may be argued that the Court intruded into an area of state discretion by requiring proof of intent in capital felony-murder cases. *See, e.g.*, Comment, *The Eighth Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQ. L. REV. 434, 439-40 (1982). This was one of the reasons that the dissent disagreed with the *Enmund* majority. "The Court's holding today is especially disturbing because it makes intent a matter of federal constitutional law. . . ." 102 S. Ct. at 3391 (O'Connor, J., dissenting). The dissent's position may be viewed as an argument that the Supreme Court should interpret the Constitution according to the intent of the Framers. *See generally* Berger, *The Role of the Supreme Court*, 3 U. ARK. LITTLE ROCK L.J. 1, 11 (1980) (constitutional interpretations differing from the Framers' intent should be allowed only by amendment to Constitution). Judicial activism in criminal matters also has been criticized as weakening the states' tenth amendment right to define and administer criminal law. *See* R. BERGER, DEATH PENALTIES 28 (1982).

Yet, this criticism may be challenged on several grounds. First, it is the prevailing belief among commentators that the intent of the Framers should not be the sole guide to constitutional interpretation. *See, e.g.*, Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HASTINGS CONST. L.Q. 487, 496-500 (1979) (framers' intent is an inadequate framework for constitutional interpretation); Lusky, *"Government by Judiciary": What Price Legitimacy?* (Book Review), 6 HASTINGS CONST. L.Q. 403, 403-10 (1979) (history is only one factor in the examination of legitimate judicial review). These commentators argue that the Constitution is not a static document, but rather a viable, living document that must be interpreted in light of changes in society. *See, e.g.*, Miller, *supra*, at 508. If the Constitution was unable to respond to evolving social values, it would have been discarded long ago. *Id.* Moreover, these commentators recognize that society has come to accept and expect an active judiciary. *See, e.g.*, Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L.Q. 511, 524-25 (arguing that legislatures often are unresponsive to societal needs, and that courts can force examination of issues that society otherwise might ignore).

Second, even assuming the Supreme Court should take a passive role in interpreting the Constitution, requiring proof of specific intent before the death penalty can be imposed in the felony-murder situation is a limited exception to this position. The felony-murder doctrine is a unique fictitious device. *See supra* notes 67-72 and accompanying text. It should not be employed as a justification for capital punishment, even if it requires activism by the Supreme Court. States still retain the right to define first-degree murder as a murder occurring during the commission of a felony. *Enmund* simply mandates that once a defendant is found guilty of the crime as defined by state statute, specific intent must be proven before the death penalty may be imposed. This approach attempts to insure that the death penalty will be imposed only upon the most culpable and morally aberrant individuals.

felony-murder doctrine as a basis for imposing the death penalty. *Enmund* does not affect the ability of states to require intent when convicting a defendant of first-degree murder. Rather, the *Enmund* holding addresses only the use of the felony-murder concept as a basis for imposing capital punishment after the elements of the underlying crime have been proven. As a result of *Enmund,* if a state seeks the death penalty for a nontriggerman in a felony murder, the state must prove that he intended to cause a death. States no longer can rely on the presumed intent inherent in the felony-murder doctrine.

Although it is clear that the *Enmund* majority was not satisfied with a low level of intent,[169] the Court's failure to explicitly require a higher level of intent will allow lower courts to undermine the thrust of the *Enmund* decision.[170] To insure that courts follow the *Enmund* approach, the Supreme Court should have stated explicitly that specific intent must be proven before a nontriggerman in a felony murder can receive the death penalty. Additionally, because specific intent is itself a nebulous concept, the Court also should have articulated a definition of specific intent. For example, the Court could have defined the requisite specific intent as *deliberate* or *willful,* terms commonly used in first-degree murder statutes,[171] or as *knowing* and *purposeful,* terms used to define specific intent under the Model Code.[172]

If the Supreme Court had implemented this approach, lower courts would have less difficulty understanding the requirements of *Enmund.* They would be unable to circumvent the result sought by the *Enmund* Court by requiring proof of lesser degrees of intent. Furthermore, by defining intent in a manner similar to that found in first-degree murder statutes or the Model Code, the Supreme Court would have provided guidance for the lower courts in understanding the required level of intent; ample precedent applying these definitions of intent already exists.

Future Implications

The *Enmund* Court failed to articulate the level of intent that must be proven before a nontriggerman in a felony murder can be sentenced to death. As a result, the constitutional protection provided by the *Enmund* decision may be limited. Implicitly, *Enmund* requires proof of specific intent; yet, because the Court failed to articulate this, lower courts have no specific guidelines to apply in future felony-murder cases. Thus, it is possible for lower courts to comply facially with the *Enmund* requisite of intent, yet circumvent the goal of *Enmund* by requiring proof of a lesser degree of

169. *See supra* notes 157-58 and accompanying text.

170. The *Enmund* dissent recognized that intent would be difficult to prove and that, in all likelihood, the Supreme Court ultimately would be forced to develop an eighth amendment definition of intent. 102 S. Ct. at 3391 (O'Connor J., dissenting).

171. *See* M. BASSIOUNI, *supra* note 57, at 243-44.

172. *See supra* notes 161-63 and accompanying text.

intent. This possibility is illustrated in two cases decided subsequent to *Enmund*.

In *Hall v. State,*[173] Hall and his co-felon sat in a grocery store parking lot, waiting to steal a car for use in a robbery. When the victim, Mrs. Hurst, came out of the grocery store, Hall grabbed her and forced her into her car. Hall testified that he directed Mrs. Hurst to a nearby wooded area where his co-felon sexually assaulted and shot her. Hall was convicted of first-degree murder and sentenced to death.[174] On appeal, the Florida Supreme Court held that even though Hall did not actually pull the trigger, the fact that he was present at the site of the victim's death was sufficient to hold him responsible for the murder and to uphold his death sentence.[175]

Although this appeal was decided prior to *Enmund,* the possible application of *Enmund* was discussed in the Florida Supreme Court's denial of Hall's petition for a writ of habeas corpus.[176] The Court distinguished *Enmund* on the bases that Hall had provided the weapon and was present at the victim's death.[177] Furthermore, Enmund was aiding and abetting only the robbery, while Hall was aiding and abetting not only the underlying felony, but also the murder itself.[178] Relying on these factors, the *Hall* court declared that it was convinced that Hall intended the death to occur, and therefore it denied the writ.[179]

The state supreme court did not indicate what level of intent Hall possessed. It seems certain, however, that in applying *Enmund,* the *Hall* court focused on general, rather than specific, intent. Arguably, Hall possessed general intent because the plan to kidnap Mrs. Hurst and steal her car was a deviation from normal, reasonable conduct and was likely to result in harm to the victim.[180] Although Hall may have intended to abandon the victim in the woods and use her car to proceed with the robbery as planned, it is not clear that he intended the death of the victim. Under a specific intent

---

173. 403 So. 2d 1321 (Fla. Dist. Ct. App. 1981) (per curiam), *cert. denied,* 420 So. 2d 872 (Fla. 1982) (per curiam).

174. 403 So. 2d at 1322-25.

175. *Id.* at 1321.

176. Hall v. State, 420 So. 2d 872 (Fla. 1982) (per curiam).

177. *Id.* at 874.

178. *Id.; see also* State v. Tiller, 94 Ill. 2d 303, 447 N.E.2d 174 (1982). Both the majority and the dissent in *Tiller* disagreed as to the meaning of *Enmund.* The majority held that the defendant could not be sentenced to death on the authority of *Enmund* because there was no evidence that the defendant had planned or participated in the murders. *Id.* at 324, 447 N.E.2d at 185. Yet, Justice Moran strongly disagreed with the *Tiller* majority's interpretation of *Enmund.* He believed that there was evidence that the defendant in *Tiller* had planned the robbery, and, unlike *Enmund,* the defendant was present during the robbery for some time. Justice Moran believed that the *Tiller* opinion would make it very difficult to sentence anyone to death. *Id.* at 324-26, 447 N.E.2d at 185-86 (Moran, J., dissenting).

179. 420 So. 2d at 874.

180. General intent has been defined as the foreseeability of likely harm resulting from the actor's deviation from reasonable, standard conduct. *See supra* notes 62-64 and accompanying text.

standard, the death penalty could not have been imposed on Hall because there was no proof that he specifically intended the killing to occur.[181]

Subsequently, in *Womack v. State,*[182] an Alabama appellate court upheld a state statute that allows the death penalty to be imposed against a nontriggerman accomplice upon proof of culpable mental state.[183] Although the court found that the Alabama law is consistent with the *Enmund* requirements, in fact, the law does not appear to require proof of specific intent. The words *proof of a culpable mental state* merely imply that proof of either type of intent, general or specific, is required. Thus, the Alabama statute is seemingly at odds with *Enmund's* implicit mandate of proof of specific intent.[184]

The *Womack* court further found that the *Enmund* rationale did not extend to the Alabama case because under Alabama law, an accomplice to a felony may be guilty of first-degree murder and sentenced to death if the accomplice aided and abetted an intentional killing by the triggerman.[185] The court defined aiding and abetting as "assistance rendered through acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary."[186] This definitional approach is known as the accomplice-liability doctrine, and the *Womack* court's opinion appears to suggest that *Enmund's* proof of intent requirement applies only to the felony-murder doctrine, and not to the accomplice-liability doctrine.[187] Assuming that Sampson Armstrong intentionally killed the Kerseys, and assuming further that Enmund's conduct complied with Alabama's definition of aiding and abetting, under the *Womack* approach Enmund could have received the death penalty without proof that he specifically intended the killings.[188] This result boldly contravenes *Enmund's* holding that before a nontriggerman can receive the death penalty, there must be proof that he killed, attempted to kill, or intended that a killing occur.

Because the Supreme Court failed to articulate the level of intent required in certain common circumstances, such as those presented in *Hall* and *Womack,* lower courts have discretion to determine what level of intent is necessary before imposing the death penalty on a nontriggerman. As previously demonstrated, a lower court can camouflage its determination of intent by simply stating that intent was present; the court does not have to

181. Specific intent requires proof that the actor intended his conduct to produce a certain result. *See supra* notes 61-63 and accompanying text.

182. 435 So. 2d 754 (Ala. Crim. App.), *aff'd sub nom. Ex parte* Womack, 435 So. 2d 766 (Ala. 1983).

183. 435 So. 2d at 762.

184. For a discussion of the distinctions between the levels of intent, see *supra* notes 61-66 and accompanying text.

185. 435 So. 2d at 762-63.

186. *Id.* at 763.

187. *Id.* at 762-63.

188. *Id.*

explain what level of intent existed or how the intent was proved. In order to resolve this problem, the Supreme Court once again will have to confront the meaning of intent for eighth amendment purposes.

Conclusion

The Supreme Court's holding that Earl Enmund did not deserve to die because he did not kill, attempt to kill, or intend to kill, seems fair and just when applied to the Court's interpretation of the facts presented in *Enmund.* In order to reach that conclusion, however, the Court stretched the limits of the excessiveness test and formulated a new, unclear requirement of proof of intent.

The Court manipulated the objective factors of the excessiveness test to prove that death is an excessive punishment for one who does not intend to kill. The standards for both cruel and unusual punishment, and the excessiveness test, are the results of the Supreme Court's historic struggle to define cruel and unusual punishment. The *Enmund* opinion brings into question the continued validity, as well as the objectivity, of these standards. If the *Enmund* holding had been based on the excessiveness test alone, the decision might have been different because the examination of societal opinion and penological justification was not conclusive. The decision, however, rested equally on the application of the new capital punishment requirement of proof of individual intent to kill.

Nevertheless, it remains possible to base liability on either transferred intent of a co-felon, or transferred intent from the underlying felony, as long as that liability does not result in the punishment of death. Furthermore, because the Court failed to indicate the requisite level of intent, this new eighth amendment requirement might not curtail imposition of the death penalty immediately. The Supreme Court should have stated that specific intent must be proven before a nontriggerman in a felony murder can receive capital punishment. Because the Court failed to articulate this, lower courts can undermine the thrust of *Enmund* by requiring proof of less than specific intent. As a result, a future Court will be compelled to confront the issues which *Enmund* should have resolved.

Laura L. Kerton