Saint Louis University Law Journal

Volume 51
Number 3 *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World (Spring 2007)*

Article 14

4-25-2007

Revisiting Tison v. Arizona: The Constitutionality of Imposing the Death Penalty on Defendants Who Did Not Kill or Intend to Kill

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REVISITING *TISON v. ARIZONA*: THE CONSTITUTIONALITY OF IMPOSING THE DEATH PENALTY ON DEFENDANTS WHO DID NOT KILL OR INTEND TO KILL

INTRODUCTION

A man stalks a playground where young children are enjoying their afternoon recess. He convinces a six-year-old girl to help him find his lost puppy. Once outside the school fence, the man grabs the girl and takes her to a remote wooded area, where he rapes and sodomizes her. He cannot take the chance of the girl telling her parents, so when he is finished, he picks up a rock and crushes her skull. You see, if she would have told anyone about their encounter, he would have had to go back to prison, where he just finished serving time for raping a minor.

The man is apprehended. He is tried by a jury of his peers.[1] He is sentenced to death.[2]

In the next county, an unemployed woman is told about a "fool-proof" plan to get some quick cash. Her boyfriend tells her about a drug-dealing neighbor who keeps a lot of cash in his house, and who is not likely to report a robbery. They formulate a plan in which they will sneak into the house, the boyfriend will threaten the owner with a sawed-off shotgun, and the two will take any money they can find. Because her rent already is a month past due, and believing that no one would get hurt, she agrees to help with the robbery. When they get to the house, the woman, as planned, is unarmed. However, before she realizes what is happening, the boyfriend breaks through a window, enters the home, and immediately shoots the owner in the head.[3]

1. The Sixth Amendment to the U.S. Constitution grants criminal defendants the right to be tried by an impartial jury from the state and district where the defendant allegedly committed the crime. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law . . . .").

2. This hypothetical death sentence is based on the Oklahoma murder and death penalty statutes: "A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." OKLA. STAT. ANN. tit. 21, § 701.7.A (West Supp. 2006). In Oklahoma, a person who is convicted of first degree murder can be punished by death. § 701.9.A.

3. The facts of this hypothetical are loosely based on those in *State v. Linscott*, 520 A.2d 1067 (1987). In that case, the defendant was convicted of murder under Maine's accomplice

The woman is apprehended. She is tried by a jury of her peers.[4] She, too, is sentenced to death.[5]

The first hypothetical crime is one that legitimately may be classified as among "the most serious of crimes."[6] After terrorizing the young girl, the defendant formed the intent to kill her and did, in fact, kill her simply because he did not want to take the chance of returning to prison.

In the second example, the defendant did not intend for anyone to get hurt—much less, to be killed. Although her intentions were not innocent, they did not include fatal violence. However, intent alone does not determine punishment in many jurisdictions.[7]

In its two most recent decisions limiting the application of the death penalty, the Supreme Court reiterated that the death penalty must be reserved for offenders who are guilty of "a narrow category of the most serious crimes."[8] The Court emphasized that the death penalty only should apply to those who are "most deserving of execution" because of their "extreme culpability."[9]

Applying the death penalty in felony murder cases brings these concepts into serious question.[10] Two landmark Supreme Court decisions have

liability statute. *Id*. at 1068. To be convicted under an accomplice liability theory, which is the basis for a felony murder conviction of a nontriggerman, the defendant's conduct does not have to be causally necessary for the crime to have occurred. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 470 (3d ed. 2001). In other words, an accomplice can be liable for a murder even if the principal would have killed the victim without the defendant's participation. *Id.*

4. Again, according to the guarantees of the Sixth Amendment. *See supra* note 1.

5. This hypothetical death sentence also is based on the Oklahoma murder and death penalty statutes. §§ 701.7.A, 701.9.A. "A person . . . commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission of [an enumerated felony]." § 701.7.B.

6. While there is no precise definition of what constitutes the "most serious of crimes," one author suggests that they are those crimes that "most outrage the conscience of the community." SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY 34 (2003).

7. *See, e.g.*, CAL. PENAL CODE § 190.2(b) (West Supp. 2006):

> Unless an intent to kill is specifically required [in an enumerated special circumstance], an actual killer . . . need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

S.D. CODIFIED LAWS § 22-16-8 (Supp. 2006) ("Homicide perpetrated by an act imminently dangerous to others and evincing a depraved mind, without regard for human life, is not the less murder because there was no actual intent to injure others.").

8. Roper v. Simmons, 543 U.S. 551, 553 (2005); Atkins v. Virginia, 536 U.S. 304, 319 (2002).

9. *Roper*, 543 U.S. at 553; *Atkins*, 536 U.S. at 319.

10. Scott Turow maintains that the death penalty is not, in practice, reserved for the most egregious crimes and the most culpable offenders. TUROW, *supra* note 6, at 71. In Lake County,

attempted to define the parameters of when it is constitutional to impose the death penalty on defendants who participate in felonies in which someone is killed, but who did not themselves kill or intend to kill.[11] In *Enmund v. Florida*, the Court held that, to apply the death penalty, a defendant must have intended for a killing to take place.[12] Five years later, in *Tison v. Arizona*, the Court clarified that the culpability requirement for imposing the death penalty can be satisfied by the defendant's "major participation in the felony," and his or her "reckless indifference to human life."[13]

Two years after deciding *Tison*, the Court decided two other landmark cases, upholding the death penalty in both of them. In 1989, in *Penry v. Lynaugh*, the Court held that executing mentally retarded offenders did not violate the Eighth Amendment.[14] The same day that it ruled on *Penry*, the Court held in *Stanford v. Kentucky* that executing an offender who was sixteen or seventeen years old at the time of the crime did not constitute cruel and unusual punishment.[15] Together with *Tison*, these cases represent an era during which the Court narrowly defined "cruel and unusual punishment" so that it remained constitutional to execute certain categories of offenders.

The Court may be entering a new era, as in 2002 and 2005, respectively, it held that mentally retarded offenders and juvenile offenders lack the culpability required to justify imposing the death penalty.[16] In light of these decisions to restrict the use of the death penalty, which overruled *Penry* and *Stanford*, the Court may be primed to revisit the *Tison* issue of whether a

Illinois, a man was sentenced to death when a botched robbery attempt resulted in the victim's death. *Id.* While this defendant was sentenced to death, several other murderers did not receive the death penalty, including a mother who fed acid to her baby, a man who killed his friend by placing him on railroad tracks in front of an oncoming train, and a man who killed four people. *Id.*

11. *See* Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 801 (1982).

12. *Enmund*, 458 U.S. at 801.

13. *Tison*, 481 U.S. at 158.

14. 492 U.S. 302 (1989).

15. 492 U.S. 361 (1989).

16. Roper v. Simmons, 543 U.S. 551, 553 (2005); Atkins v. Virginia, 536 U.S. 304, 319 (2002). The *Atkins* Court held that mentally retarded offenders are not among the most morally culpable "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . . ." *Atkins*, 536 U.S. at 306. The *Roper* Court held that juveniles cannot be considered among the most culpable of offenders because of their lack of maturity, their susceptibility to outside pressure and influence, and their lack of character development as compared to adult offenders. *Roper*, 543 U.S. at 569–70. Turow suggests that the deterrent rationale does not justify executing juvenile offenders because they are among a class of citizens that are not capable of understanding the future. TUROW, *supra* note 6, at 60. In Turow's experience in representing such offenders, they "act out a range of narcissistic and infantile impulses—rage, perverted self-loathing, or a grandiose conviction they'll never be caught—in which consequences have no role." *Id.*

defendant who did not kill or intend to kill also lacks the culpability required to justify imposing the ultimate punishment.[17] If the Court does revisit the issue for the first time in almost twenty years, it likely will consider the same factors that it has in most other death penalty decisions: 1) current legislative judgments, 2) culpability and justification rationales, 3) jury sentencing trends, and 4) international law and opinions.

There has been no survey of state legislation since *Tison* to determine whether there has been a shift in the national consensus regarding the execution of nontriggermen. This research will fill that gap. This Comment will review current legislative judgments, culpability and justification rationales, and international law to analyze the constitutionality of imposing the death penalty on defendants who did not kill or intend to kill.[18] Part I will review the *Enmund* and *Tison* decisions and the Court's current position on the issue. The author will provide a critique of the *Tison* Court's claims and reasoning in Part II. Part III will provide an analysis of current state statutes and compare the findings to those that the Court relied on in *Tison*. Part IV will explore the culpability and justification rationales for applying the death penalty, and whether the goals of deterrence and retribution are satisfied when the death penalty is imposed on a defendant who did not kill or intend to kill. Part V will discuss current international law regarding the death penalty and whether executing defendants who did not kill or intend to kill violates international standards and treaties. The Comment will conclude with the author's reasoning as to why imposing the death penalty in felony murder cases that lack intent is contrary to the country's "evolving standards of decency"[19] and, therefore, is unconstitutional.

I. *ENMUND* AND *TISON*: INTENT VS. RECKLESSNESS

A. Enmund v. Florida

In 1982, the Supreme Court held in *Enmund v. Florida* that, in applying the death penalty, the punishment "must be tailored to [the defendant's] personal responsibility and moral guilt."[20] The Court said that the Eighth

17. Also contributing to the decision's vulnerability is the fact that *Tison* was a 5-4 decision. *Tison*, 481 U.S. 137.

18. This Comment will not explore or discuss jury sentencing decisions, but future research in this area would be valuable in determining how often juries actually impose the death penalty on defendants who did not kill or intend to kill.

19. Writing for the majority in *Roper v. Simmons*, Justice Kennedy explained that interpreting the Eighth Amendment prohibition against cruel and unusual punishment requires the Court to refer to "the evolving standards of decency that mark the progress of a maturing society." 543 U.S. at 560–61.

20. Enmund v. Florida, 458 U.S. 782, 801 (1982).

Amendment[21] prohibits executing a defendant who participated in an underlying felony in a felony murder case, but did not kill, attempt to kill, or intend for a killing to take place.[22]

The *Enmund* case involved a botched robbery attempt in which two defendants shot and killed an elderly couple.[23] The plan was for Sampson and Jeanette Armstrong to knock on the back door of the victims' farmhouse, ask for water for an overheated car, and then demand money while holding one of the victims at gunpoint.[24] The plan turned fatal when the victim's wife came out of the house, shot Jeanette Armstrong, and then one of the Armstrongs shot and killed both victims.[25] A jury sentenced Sampson Armstrong and the driver of the getaway car, Earl Enmund, to death.[26]

The jury convicted Enmund based on Florida's felony murder statute, which the judge summarized in the jury instructions: "The killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill."[27] Because one of Florida's statutory aggravating circumstances was that the murder was committed while the defendant was "engaged in or an accomplice in the commission of an armed robbery," Enmund essentially was eligible for the death penalty based solely on the fact that he participated in a robbery in which another person killed someone.[28]

21. The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Courts traditionally have found a punishment "cruel and unusual" if it does not have deterrent or retributive value, or if it is "grossly disproportionate to the severity of the crime." *Leading Cases*, 101 HARV. L. REV. 119, 144 (1987).

22. *Enmund*, 458 U.S. at 801.

23. *Id.* at 784.

24. *Id.*

25. *Id.*

26. *Id.* at 785.

27. *Enmund*, 458 U.S. at 784–85.

28. *Id.* at 785. The jury also found the following statutory aggravators to exist, in support of their verdict: 1) the defendant committed the capital felony for pecuniary gain, 2) the capital felony was "especially heinous, atrocious, or cruel," and 3) the defendant previously was convicted of a violent felony. *Id.* The purpose of including aggravating circumstances in death penalty statutes is to force legislatures to create "exacting guidelines about the factual circumstances under which capital punishment may even be considered." TUROW, *supra* note 6, at 55. However, legislatures tend to adjust the number of aggravating circumstances to correspond to electorate pressure. *Id.* at 68. For example, when a Chicago community policing volunteer was killed in 1998, the Illinois legislature responded by making the murder of a community policing volunteer eligible for capital punishment. *Id.* Felony murder aggravators provide prosecutors with a way to pursue the death penalty more easily than under other aggravating circumstances. *Id.* As a result, 60% of the condemned prisoners on Illinois' death row were convicted and sentenced based on felony murder eligibility. *Id.* Turow argues that

The Supreme Court addressed the issue of whether the death penalty is constitutional under the Eighth and Fourteenth Amendments for a defendant who "neither took life, attempted to take life, nor intended to take life."[29] As it did in an earlier constitutional analysis of the death penalty, the Court considered the history of the punishment, current statutes, international opinion, and jury sentencing decisions.[30]

1. Statutes

At the time the Court decided *Enmund*, thirty-six state and federal jurisdictions authorized the death penalty.[31] The Court used statistics summarizing the current status of death penalty statutes to support its finding that legislative judgment "weigh[ed] on the side of rejecting capital punishment for the crime at issue."[32]

Eleven states required the government to prove a defendant's culpable mental state before the jury could impose the death penalty.[33] In eight of those states, the mental state had to include an actual intent to kill.[34]

On the other hand, only eight jurisdictions allowed the death penalty simply for participating in a robbery in which another robber kills someone (i.e., felony murder *simpliciter*).[35] In four jurisdictions, felony murder was not a capital crime.[36]

Nine states allowed for the death penalty to be imposed in a felony murder situation in which the defendant was not the actual killer only if the statutory aggravating circumstances were above and beyond the felony murder itself, and they outweighed the mitigating circumstances.[37] In three of these states, felony murder was not included in the lists of statutory aggravating

adding crimes to the list of felony murders that are eligible for the death penalty results in unfettered prosecutorial discretion as to when to pursue the death penalty, which in turn leads to unfair disbursement of the punishment. *Id.* at 69. While responding to the electorate and considering its concerns are fundamental duties of the legislature, the legislature must not respond to a simply emotional public by adding ways for a criminal to be executed.

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

30. *Id.* at 788–89. The Court followed the same format in its analysis in *Coker v. Georgia*, where the Court held that it was unconstitutional to execute a defendant for the rape of an adult woman. 433 U.S. 584 (1977).

31. *Enmund*, 458 U.S. at 789.

32. *Id.* at 789–93.

33. *Id.* at 789–90.

34. *Id.* at 790. The other three states required a showing "short of intent, such as recklessness or extreme indifference to human life." *Id.*

35. *Id.* at 789. Felony murder *simpliciter* requires no showing of culpable intent to commit a homicide. *See* Tison v. Arizona, 481 U.S. 137, 148 (1987). Florida was one of the states that allowed the death penalty for felony murder *simpliciter*. *Id.* at n.5.

36. *Enmund*, 458 U.S. at 791.

37. *Id.* at 791–92. Depending on the aggravating circumstances, a defendant in these nine states could be put to death without proving an intent to kill. *Id.* at 791.

circumstances.[38] Six of these states, however, provided for a statutory mitigating circumstance in which the defendant's participation in the capital felony was relatively minor compared to other actors in the crime.[39] The Court reasoned that the states included these mitigating circumstances to reduce the chances of a defendant receiving the death penalty for a vicarious felony murder.[40]

The Court summarized the statutory findings by pointing out that only about one-third of American jurisdictions would allow a defendant to be executed for the crime of participating in a robbery in which a murder occurred.[41] In addition, none of the eight states that had enacted new death penalty legislation in the preceding four years allowed for the death penalty to be applied in such a situation.[42]

2. International Opinion

The majority in *Enmund* mentioned international opinion only in a footnote, to support its finding that the public considers the death penalty disproportionate in a case such as Enmund's.[43] The Court pointed out that India and England had abolished the felony murder doctrine and that Canada and several other countries had severely restricted it.[44] Continental Europe, at the time, had never even recognized the doctrine.[45]

3. Deterrence and Retribution

The majority concluded its opinion with an analysis of the justifications for the death penalty and their application to the *Enmund* case.[46] The "principal social purposes" that the death penalty addresses are retribution and deterrence.[47] The Court found that these justifications do not apply to a case in which the defendant did not kill or intend to kill.[48]

38. *Id.* at 792.

39. *Id.* at 791–92.

40. *Id.* at 792. In *Roper v. Simmons*, Justice O'Connor claimed that the presence of mitigators considering the age of the offender shows that the states contemplated the issue of whether seventeen-year-olds should be subjected to the death penalty and decided that a categorical ban was not appropriate. 543 U.S. 551, 606 (2005) (O'Connor, J., dissenting). These mitigators, O'Connor said, show that some legislatures have concluded that some seventeen-year-olds are mature enough to deserve the punishment; therefore, the Court should not interfere with the legislatures' judgments. *Id*. at 606–07.

41. *Enmund*, 458 U.S. at 792.

42. *Id.*

43. *Id.* at 796 n.22.

44. *Id.*

45. *Id.*

46. *Enmund*, 458 U.S. at 797–801.

47. *Id.* at 798 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)). The Court noted that, unless the death penalty serves the goal of retribution or deterrence, it "is nothing more than the

To support its conclusion that the death penalty would not serve a deterrent function in Enmund's case, the Court relied on research showing that only a very small fraction of robberies resulted in a homicide.[49] Because the likelihood that someone would be killed in any given robbery was so small, the Court reasoned that an accomplice should not share the blame for a killing simply because he or she took part in the robbery.[50]

For retribution to be a legitimate justification for the death penalty, the Court stressed that it must be proportionate to the defendant's culpability.[51] In Enmund's case, his culpability was limited to his participation in the robbery, since he had no intention of anyone being killed.[52] The Court summarized: "Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[53]

B. Tison v. Arizona

Five years later, in 1987, the *Tison* Court stripped the *Enmund* holding of some of its effect by holding that the death penalty is constitutional in a felony murder case when 1) the defendant was a major participant in the underlying felony and 2) the defendant exhibited a reckless indifference to human life.[54] The Court did not overrule *Enmund*, but rather clarified that the above two elements actually combined to satisfy the culpability mandated in *Enmund*.[55]

In *Tison*, the defendants, Ricky and Raymond Tison, took a chest full of guns into a prison to help their father, Gary Tison, and his cellmate, Randy Greenawalt, escape.[56] During the escape, no one fired any shots and no one was injured.[57] However, a couple of days after the escape, the group decided to steal a car.[58] One of the defendants flagged down a car that was occupied by a man, his wife, their two-year-old son, and their fifteen-year-old niece, to help

purposeless and needless imposition of pain and suffering," which would make it an unconstitutional punishment. *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

48. *Id.* at 799–801.

49. *Id.* at 799 n.23. A recent study at the time that the Court decided *Enmund* showed that only 0.43% of robberies in the U.S. ended in homicide. *Id.* at 800 n.24.

50. *Id.* at 801. The Court said: "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." *Id.* at 799.

51. *Enmund*, 458 U.S. at 800.

52. *Id.* at 801.

53. *Id.*

54. Tison v. Arizona, 481 U.S. 137, 158 (1987).

55. *Id.*

56. *Id.* at 139. Gary Tison was serving a life sentence for killing a guard during a previous escape attempt. *Id.*

57. *Id.*

58. *Id.* at 139–40.

with a "flat tire."[59] The criminals drove the family into a deserted area, where they planned to switch cars with the family.[60] After telling the family to stand in front of one of the cars, Gary Tison and Randy Greenawalt shot and killed all four of them.[61] The Tison brothers claimed they were surprised by the shooting, but admitted that they did not try to help the family.[62]

The Tison brothers and Greenawalt were tried separately for the capital murders of the four victims.[63] The Tisons were convicted based on Arizona's felony murder statute, which made it a capital offense for someone to be involved in a kidnapping or robbery in which a person is killed.[64] The judge sentenced both of the Tisons to death.[65]

On appeal, the Arizona Supreme Court interpreted "intent" to include recklessness and subsequently found that because of his reckless participation in the crime, Raymond Tison did intend to kill; therefore, his death sentence did not violate *Enmund*.[66] The Arizona court reasoned that, because Raymond played an active part in all of the events leading up to the murders (including providing weapons when he knew of his father's murder conviction), and because he did nothing to stop the murders or to disassociate himself from his father and Greenawalt after the murders, he intended to kill.[67] In Ricky Tison's appeal, the court said that Ricky's involvement basically was the same as Raymond's and that his death sentence would not violate *Enmund*.[68]

The Supreme Court granted certiorari as to the issue of whether the Eighth Amendment bars the application of the death penalty to a defendant who played a substantial role in the underlying felony and who acted with reckless indifference to the value of human life.[69] The Court again relied heavily on state legislatures' judgment in assessing the proportionality of the punishment.[70] The majority ended with a brief discussion about culpability, but it based its decision mostly on the status of state legislation.[71]

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

60. *Id.*

61. *Id.* at 140–41.

62. *Id.* at 141.

63. *Id.* Gary Tison died of exposure after escaping to the desert. *Id.* Another Tison brother who was involved, Donald Tison, died in a police shootout following the murders. *Id.*

64. *Tison*, 481 U.S. at 141.

65. *Id.* at 143.

66. *Id.* at 143–45, 151.

67. *Id.* at 144–45.

68. *Id.* at 145, 151.

69. Tison v. Arizona, 481 U.S. at 152. The Court explained that the *Enmund* Court did not address this specific situation. *Id.*

70. *Id.*

71. *Id.* at 158.

1. Statutes

The Court began its analysis by pointing out that "four states authorize[d] the death penalty in felony murder cases" in which the defendant acted with a "culpable mental state such as recklessness or extreme indifference to human life."[72] The Court did not specifically mention, as the *Enmund* Court did, how many states required a showing of intent to kill before the death penalty could be applied in a felony murder case.[73]

The Court claimed that a majority of jurisdictions "specifically authorize" the death penalty in a felony murder case when the defendant substantially participated in a felony in which he knew there was a high likelihood of death.[74] In its calculation of a "majority," the Court included the following: the four states referenced above that allowed for the death penalty in felony murder cases as long as the defendant acted with a culpable mental state, two states that required that the defendant's participation be "substantial" before authorizing the death penalty, at least six states that provided a statutory mitigator of minor participation in the felony, six states that allowed the death penalty for felony murder *simpliciter*, and three states that required proof of an additional aggravator before imposing the death penalty.[75]

According to the *Tison* Court, only a "small minority" of jurisdictions that allowed the death penalty for felony murder required an intent to kill before imposing the punishment.[76] Specifically, the Court said that eleven death penalty states prohibited imposing the death penalty in situations in which "the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."[77]

As for statutory changes that took place between *Enmund* and *Tison*, the Court conceded, in a footnote, that Mississippi and Nevada had changed their statutes since *Enmund* to require a finding that "the defendant killed, attempted to kill, or intended to kill, or that lethal force be employed."[78] The Court also mentioned that New Jersey recently had enacted legislation allowing for the death penalty in intentional murder cases, but not in felony murder cases.[79] In 1985, Oregon began authorizing the death penalty for felony murders, but only if the defendant intended to kill.[80] After *Enmund*, Vermont changed its death

72. *Id.* at 152–53.
73. *Id.* at 152–55.
74. *Tison*, 481 U.S. at 153–54.
75. *Id*. at 152–54.
76. *Id.* at 158.
77. *Id.* at 154.
78. *Id.* at 152 n.4.
79. *Tison*, 481 U.S. at 152 n.4.
80. *Id.*

penalty statute to allow for the punishment only in circumstances in which a correctional officer was killed.[81]

2. Culpability

After finding that "a majority of American jurisdictions clearly authorize capital punishment" for cases such as the Tisons', the Court went on to assess the proportionality of the punishment.[82] The Court pointed out that a defendant's mental state is critical in determining culpability in a capital crime.[83] Also critical is the idea that the more purposeful the conduct, and the more serious the crime, the harsher the punishment should be.[84]

The Court disagreed with the notion that an intent to kill can distinguish the most culpable and dangerous killers.[85] It reasoned that some killers who intended to kill are not even criminally liable, such as those who do so in self-defense.[86] On the other hand, the Court said, murder lacking intent, such as that involving torture or committed during a robbery, can be the most dangerous and inhumane.[87] The reckless indifference to the value of human life that is inherent in such crimes can, according to the Court, shock the "moral sense" just as much as an intent to kill.[88]

The *Tison* Court summarized the *Enmund* Court holding as follows: "when 'intent to kill' results in its logical though not inevitable consequence—the taking of human life—the Eighth Amendment permits the State to exact the death penalty . . . ."[89] The *Tison* Court took the *Enmund* holding a step further, holding that "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state . . . that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result."[90] This language establishes that reckless participation in certain dangerous felonies may involve a culpable mental state on par with other capital crimes and is worthy of the death penalty.[91]

81. *Id.*
82. *Id.* at 155.
83. *Id.* at 156.
84. *Tison*, 481 U.S. at 156.
85. *Id.* at 157.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Tison*, 481 U.S. at 157.
90. *Id.* at 157–58.
91. The determination of whether a particular crime carries a "grave risk of death" is fact-sensitive. For example, although not all robberies may be included in this category, one that involved a convicted killer who recently broke out of prison and was armed with an arsenal of weapons most likely would be.

II. CRITIQUE OF THE *TISON* OPINION

A. Brennan's Dissent

Writing for a four-Justice dissent, Justice Brennan pointed out several flaws in the majority's opinion.[92] The dissent criticized the majority for neglecting to include a proper proportionality analysis, which the Constitution requires.[93] Justice Brennan asserted that, absent a defendant's intent to kill, a death sentence cannot be proportional.[94]

The dissent provided a summary of the *Enmund* Court's proportionality review, including its analysis of the retributive and deterrent functions of the *Enmund* decision.[95] Justice Brennan also pointed out several flaws in how the Court calculated the states' legislative judgments regarding imposing the death penalty in cases such as the Tisons'.[96] In addition, according to the dissent, a complete and proper constitutional analysis of the death penalty requires the Court to review jury sentencing trends and the actual imposition of the death penalty in similar cases, which the majority did not do.[97]

The majority's incomplete constitutional analysis was reason enough for the four Justices to dissent.[98] However, Justice Brennan inferred that the most disturbing aspect of the opinion was that the Court's new rule could result in arbitrary results in virtually identical cases.[99]

B. Flawed Calculations

Much of the *Tison* majority's opinion consisted of a survey of then-current state death penalty statutes.[100] As mentioned above, the majority did not provide a deterrent rationale to support its decision, nor did it review jury sentencing decisions. Because the legislative judgments are among the only objective criteria that the Court uses to justify new rules regarding the death penalty, it is critical that the numbers are accurate and are not misleading.[101]

92. *Tison*, 481 U.S. at 159 (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens joined in the dissent.

93. *Id.* at 168.

94. *Id.* at 170.

95. *Id.* at 172–74.

96. *Id.* at 174–75.

97. *Tison*, 481 U.S. 176–79.

98. *Id.* at 182.

99. *Id.*

100. *See id.* at 152–55 (majority opinion).

101. The *Atkins* decision, as well as other major death penalty decisions, stressed the importance of using objective factors in a death penalty proportionality review. Atkins v. Virginia, 536 U.S. 304, 312 (2002). "Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent.'" *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1000 (1991)).

As the Court reiterated in *Atkins v. Virginia*, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[102] Such evidence is clear and reliable only if calculated and interpreted correctly.

The majority did not include in its calculations jurisdictions that did not have a death penalty, nor those that authorized it only in circumstances other than those described in the *Tison* opinion.[103] If the Court had included these jurisdictions in its analysis, it would have been forced to admit that a majority of jurisdictions at that time prohibited imposing the death penalty on nontriggermen[104] who did not intend to kill.[105]

At the time of the opinion, thirteen states and the District of Columbia had abolished the death penalty, and four other states restricted the death penalty to those who actually and intentionally kill.[106] The majority, on the other hand, claimed that "only [eleven] states authorizing capital punishment forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."[107] However, this statement is misleading because the majority apparently included in its sample only states that authorized the death penalty for felony murder—not all states that authorized the death penalty. The more accurate statement would be that "only [eleven] states authorizing capital punishment [*for felony murder*] forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness." In actuality, fifteen states authorizing capital punishment refused to impose the death penalty under such circumstances, and twenty-nine jurisdictions altogether forbade it.[108]

1. No "Specific Authorization"

As mentioned above, the Court claimed that a majority of jurisdictions "specifically authorize" the death penalty in felony murder cases where the defendant may not have had an intent to kill, but was a major participant "in a

102. *Id.* at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

103. *Tison*, 481 U.S. at 175 (Brennan, J., dissenting).

104. This Comment will use the term "nontriggermen" to refer to defendants in a felony murder case who did not actually kill (or attempt to kill).

105. *Tison*, 481 U.S. at 175 (Brennan, J., dissenting).

106. *Id.* at 175 n.13.

107. *Id.* at 154 (majority opinion).

108. The twenty-nine jurisdictions consisted of the fifteen death penalty states that did not allow for the death penalty under these circumstances, plus the thirteen states, along with the District of Columbia, that did not allow the death penalty under any circumstances. *Id.* at 175 & n.13 (Brennan, J., dissenting).

felony in which he knew death was highly likely to occur."[109] This author disagrees with the Court's use of the phrase "specifically authorize[s]," because no statute's plain language authorizes the imposition of the death penalty in the circumstances described by the Court. Even if the Court interprets the statutes as allowing the death penalty for the situation, to say that the jurisdictions "specifically authorize" it implies legislative intent that is not as obvious as the phrase suggests.

If the legislators had intended to "specifically authorize" the death penalty in certain circumstances, they most likely would have spelled out those circumstances in the statute. If the legislature did not spell out the circumstances, then it actually is the Court that is authorizing the punishment. This legitimately can be within a court's discretion, but the Court should not attempt to use legislative intent to support its decision when such legislative intent may not exist.

2. Overlapping Categories

The subcategories into which the majority placed the states are not mutually exclusive, as the opinion implies. For example, a state that requires proof of an additional aggravator also may provide a statutory mitigator that considers a defendant's minor participation in the felony or may require proof of a culpable mental state, or both.[110] Therefore, the majority's grouping would not work today because adding the subgroups together would result in double- or triple-counting some states.

Placing the states into so many categories tends to confuse the reader and complicate the issue. The ultimate issue that the Court appeared ready to address was whether it is constitutional to impose the death penalty on a defendant who did not kill or intend to kill.[111] However, if the Court had remained focused on this issue, then it may not have been able to support its decision with its analysis of legislative judgments. Therefore, the *Tison* majority ended up creating a narrowly defined category that it could stretch the legislative findings to support, and which would allow the Court to impose the death penalty on the Tison brothers.

109. *Id.* at 154 (majority opinion).

110. It is not clear whether the categories were mutually exclusive at the time of the *Tison* decision, but they currently are not. If they were not mutually exclusive at the time of the decision, then the majority's reasoning is even more flawed because the citations do not accurately represent all of the states that fell into each category.

111. In her introduction to the majority opinion, Justice O'Connor explained: "The question presented is whether the petitioners' participation in the events leading up to and following the murder . . . makes the sentences of death . . . constitutionally permissible although neither petitioner specifically intended to kill the victims and neither inflicted the fatal gunshot wounds." *Tison*, 481 U.S. at 138.

C. Weak Culpability Argument

The *Tison* majority conceded that a defendant's state of mind is a key factor in determining his or her culpability in a capital case.[112] It admitted that the American legal tradition is based on the concept that "the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[113] However, the majority used weak examples and seemed to stretch precedent in an effort to reconcile these concepts with imposing the death penalty on the Tisons.

The *Tison* majority referred to the *Enmund* decision, claiming that the Court in that case allowed the death penalty "at least" in cases where the felony murderer intentionally killed.[114] This summary of the holding was inaccurate. The *Enmund* Court specifically noted that Enmund did not kill nor intend to kill; therefore, his culpability was less than that of his accomplices who did kill.[115] The Court said that the Eighth Amendment did not allow for the actual killers and Enmund to be treated alike and to be assigned the same culpability.[116]

The *Enmund* Court noted, "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[117] There is no more severe punishment than execution, so in basing its opinion on this principle, the *Enmund* Court established that the death penalty cannot be imposed on someone who did not intend to kill.

The *Tison* majority then went on to argue that intent to kill is an ineffective way of "definitively distinguishing the most culpable and dangerous of murderers."[118] However, the *Enmund* Court did not claim that intent should "definitively distinguish" the most culpable offenders. Rather, the *Enmund* Court implied that intent to kill was one of the characteristics separating the most culpable offenders from those less culpable—not the only characteristic distinguishing them. In other words, the Court was saying that if you have A (the most culpable offenders), then you must have B (intent); however, the Court was not necessarily saying the inverse is true (that if you have B, you must have A). The *Enmund* Court's logic, therefore, is not at odds with the *Tison* majority's assessment that those who intentionally kill after being provoked are not as deserving of the death penalty.[119]

112. *Id.* at 156.
113. *Id.*
114. *Id.*
115. Enmund v. Florida, 458 U.S. 782, 798 (1982).
116. *Id.*
117. *Id.* (quoting H.L.A. HART, *Punishment and the Elimination of Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 158, 162 (1968)).
118. Tison v. Arizona, 481 U.S. 137, 157 (1987).
119. *See id.*

The Court's examples of dangerous murderers who kill "unintentionally" also are misleading.[120] Murder resulting from torture cannot be considered unintentional when the murderer continually inflicted pain and suffering on someone, most likely expecting the person to die.[121] At least one state specifically defines torture as including a specific intent to kill.[122] As to the Court's other example, if a robber shoots someone during the course of a robbery, it most likely is intentional, even if not premeditated.[123] Even in the *Tison* case, no one disputed whether the actual shooters intended to kill the victims during the kidnapping and robbery or whether these men were among the most dangerous of criminals. Gary Tison and Randy Greenawalt apparently shot the family intentionally, and they may be considered among the most culpable, dangerous, and inhumane murderers.

D. No Deterrence Rationale

The *Tison* majority did not discuss the deterrence rationale for applying the death penalty to situations in which the defendant did not kill or intend to kill. A Supreme Court opinion regarding the constitutionality of the death penalty is incomplete without a discussion of both of the primary justifications for punishment. Other major death penalty Supreme Court opinions in recent

120. *See id.* at 170 n.9 (Brennan, J., dissenting) (explaining that the Court's examples of torture and murder during a robbery are wanton, yet intentional killings).

121. *See id.* at 157 (majority opinion) (listing torture as an example of an unintentional murder that is among the most dangerous and inhumane of crimes). In the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, § 1, Dec. 10, 1984, 23 I.L.M. 1027. The U.S. federal government defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340 (2000).

122. IDAHO CODE ANN. § 18-4001 (2004) ("torture causing death shall be deemed the equivalent of intent to kill").

123. *See Tison*, 481 U.S. at 170 n.9 (Brennan, J., dissenting) (explaining that premeditation and deliberation—not intent—are missing from the Court's examples).

history discuss how the holding supports the goal of deterrence,[124] so the absence of such a discussion is conspicuous in *Tison*.

Because the Court claimed that its decision was not contrary to its holding in *Enmund*, the fact that it did not discuss the deterrent value of its decision could imply that the Court was in agreement with its analysis of the subject in *Enmund*.[125] The *Enmund* discussion on the subject, however, would not support the Court's holding in *Tison*.[126] One also might infer that the Court could not reconcile its holding with the goal of deterrence, so it left the discussion out of its opinion. Because the Court essentially is deciding whether a group of offenders lives or dies, it must be able to justify its decision by saying that the punishment would serve this social purpose.

III. LEGISLATIVE JUDGMENTS

The ultimate issue that this Comment seeks to answer is whether the Supreme Court still would find that it is constitutional to impose the death penalty on a defendant who did not kill or intend to kill. This research included reviewing each of the state death penalty statutes, considering whether the statute would allow the death penalty to be imposed on such a defendant. The author then reviewed each statute and compared its current status with how it was interpreted by the *Tison* majority.

A. States Forbidding the Death Penalty when the Defendant Did Not Kill or Intend to Kill

Currently, thirty-eight states authorize the use of the death penalty.[127] Of those thirty-eight states, sixteen prohibit imposing the death penalty on a defendant who did not kill or intend to kill.[128] Before the death penalty can be

124. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) (finding that executing juvenile offenders cannot be justified by the goals of retribution and deterrence); Atkins v. Virginia, 536 U.S. 304, 319–20 (2002) (finding that executing mentally retarded offenders does not further the goals of retribution and deterrence); Enmund v. Florida, 458 U.S. 782, 797–801(1982) (finding that executing a defendant to avenge murders that he did not commit nor intend to commit does not contribute to the retribution or deterrence goals).

125. Justice Brennan referred to the *Enmund* Court's deterrence and retribution discussion to support the position that the *Tison* holding was inconsistent with *Enmund*. *Tison*, 481 U.S. at 172–73 (Brennan, J., dissenting).

126. *See supra* text accompanying notes 46–50.

127. The following states' statutes allow for the imposition of the death penalty: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Roper v. Simmons, 543 U.S. 551, 579, app. A (2005).

128. Based on the author's research, the following states do not allow the death penalty to be imposed on defendants who did not kill or intend to kill: Alabama, Connecticut, Kansas,

imposed, fifteen states specifically require that a defendant purposely, knowingly, or intentionally killed the victim.[129] In Maryland, only a murder defendant who is a principal in the first degree (presumably the killer) is eligible for the death penalty.[130]

B. States Allowing the Death Penalty for Nontriggermen Who Did Not Intend to Kill

Twenty-two states authorize the death penalty for nontriggermen who had no intent to kill, but a majority of them have statutory safeguards to minimize the risk of sentencing such defendants to death.[131] This group consists of states whose statutes: 1) require the state prove beyond a reasonable doubt at least one aggravating circumstance in addition to the fact that the murder occurred during the course of a felony, 2) require the state to prove that a nontriggerman defendant acted with a culpable mental state, and 3) allow imposition of the death penalty on nontriggermen simply because they participated in the underlying felony, referred to by the *Tison* Court as felony murder *simpliciter*, and 4) provide an affirmative defense that is applicable to some nontriggermen who did not intend to kill.[132]

Louisiana, Maryland, Missouri, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, Utah, Virginia, and Washington. *See infra* note 129.

129. ALA. CODE §§ 13A-5-40(b), 13A-6-2(a)(1) (LexisNexis 2005); CONN. GEN. STAT. ANN. § 53a-54a (West 2001); KAN. STAT. ANN. § 21-3439 (1995); LA. REV. STAT. ANN. § 14:30 (Supp. 2006); MO. REV. STAT. § 565.020 (2000); N.H. REV. STAT. ANN. § 630:1-a (1996); N.J. STAT. ANN. §§ 2C:11-3(a), (c) (West 2005); N.M. STAT. § 31-20A-5 (2000) (statutory aggravating circumstances all require an intent to kill, unless the victim was a police officer on duty); N.Y. PENAL LAW § 125.27 (McKinney 2004); OHIO REV. CODE ANN. § 2903.01 (West Supp. 2006); 18 PA. CONS. STAT. ANN. § 2502 (West 1998); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2005); UTAH CODE ANN. § 76-5-202 (Supp. 2006); VA. CODE ANN. § 18.2-31 (2004); WASH. REV. CODE ANN. §§ 9A.32.030(1)(a), 10.95.020 (West 2000 & Supp. 2006).

130. MD. CODE ANN., CRIM. LAW § 2-202(a)(2)(i) (LexisNexis 2002). A principal in the second degree may be eligible for the death penalty if the victim was a law enforcement officer. *Id.* § 2-202(a)(2)(ii). If the victim was a law enforcement officer, a principal in the second degree still must have intended for the killing to take place, must have been a major participant in the murder, and must have been present when the murder occurred to be eligible for the death penalty. *Id.*

131. According to the author's research, the following states fall into this category: Arizona, Arkansas, California, Colorado, Deleware, Florida, Georgia, Idaho, Illinois, Indiana, Mississippi, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, and Wyoming. Although Kentucky does not have a felony murder statute, a nontriggerman who did not kill or intend to kill can be convicted of murder, a capital offense, if "under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KY. REV. STAT. ANN. § 507.020(1)(b) (LexisNexis 1999).

132. *See* Tison v. Arizona, 481 U.S. 137, 153 (1987).

1. States Requiring Additional Aggravating Circumstances

Thirteen of these twenty-two states require proof of at least one aggravating circumstance in addition to the fact that the murder occurred during the course of a felony.[133] This requirement puts the statutes in compliance with *Enmund*, so that the death penalty cannot be imposed on nontriggermen simply because of their participation in the underlying crimes.

2. States Requiring Proof of a Culpable Mental State

Five states require the government to prove that a nontriggerman defendant acted with a culpable mental state.[134] Of these states, Nevada and South Carolina require a showing that a murder defendant acted with malice aforethought, which can be express or implied.[135] In fact, Nevada requires proof of malice aforethought and an additional aggravating circumstance.[136] For a nontriggerman in California or Kentucky to be eligible for the death penalty in a felony murder case, he or she must have acted with reckless or extreme indifference to human life.[137] In Delaware, a defendant who

133. ARIZ. REV. STAT. ANN. § 13-703(E)–(F) (Supp. 2005); COLO. REV. STAT. §§ 18-1.3-1201(2)(b)(II)(A), 18-1.3-1201(5) (2006); IDAHO CODE ANN. § 19-2515(9) (Supp. 2006); 720 ILL. COMP. STAT. ANN. § 5/9-1(b) (LexisNexis Supp. 2006); IND. CODE ANN. § 35-50-2-9(b) (LexisNexis 2004); MONT. CODE ANN. § 46-18-303 (2005); NEB. REV. STAT. § 29-2523(1) (Supp. 2004); NEV. REV. STAT. § 200.033 (2005); OKLA. STAT. ANN. tit. 21, § 701.12 (West 2002); OR. REV. STAT. § 163.095 (2005); S.D. CODIFIED LAWS § 23A-27A-1 (2004); TENN. CODE ANN. § 39-13-204 (2003); WYO. STAT. ANN. § 6-2-102(h) (2005).

134. CAL. PENAL CODE § 190.2(d) (West Supp. 2006); DEL. CODE ANN. tit. 11, § 636(a)(2) (Supp. 2004); KY. REV. STAT. ANN. § 507.020(1)(b) (LexisNexis 1999); NEV. REV. STAT. § 200.010 (2005); S.C. CODE ANN. § 16-3-10 (2003).

135. NEV. REV. STAT. § 200.010 (2005) ("Murder is the unlawful killing of a human being, with malice aforethought, either express or implied . . . ."); S.C. CODE ANN. § 16-3-10 (2003) ("'*Murder*' is the killing of any person with malice aforethought, either express or implied.").

136. NEV. REV. STAT. §§ 200.010, 200.030(1)(b), 200.030(4)(a) (2005).

137. CAL. PENAL CODE § 190.2(d) (West Supp. 2006) ("[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [an enumerated felony] which results in the death of some person or persons . . . shall be punished by death or imprisonment in the state prison for life without the possibility of parole . . . ."); KY. REV. STAT. ANN. § 507.020(1)(b) (LexisNexis 1999) ("A person is guilty of murder when . . . under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."). In Arkansas, a defendant can be guilty of capital murder if he *or* the killer acts with extreme indifference to human life: "A person commits capital murder if . . . acting alone or with one . . . or more other persons, the person commits or attempts to commit [an enumerated felony and] . . . the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life . . . ." ARK. CODE ANN. § 5-10-101(a)(1) (2006).

recklessly caused the death of someone during the course of an enumerated felony is eligible for the death penalty.[138]

3. Felony Murder *Simpliciter*

Only three states' statutory language still provides for imposition of the death penalty on defendants for felony murder *simpliciter*.[139] However, *Enmund* established that the death penalty for such crimes is unconstitutional, so the punishment could not be authorized in these states simply for participating in the underlying felony—despite what these statutes may imply.[140] Of these states, the Florida statute allows the death penalty only if the killer was one of the people perpetrating the felony.[141] Two of the three states take a defendant's minor participation in the capital felony into account in mitigation of the murder.[142]

4. Affirmative Defenses

Three of these twenty-two states provide an affirmative defense for defendants who did not kill.[143] The affirmative defenses include a showing

138. DEL. CODE ANN. tit. 11, §§ 636(a)(2), 4209(e)(1)(j) (Supp. 2004).

139. FLA. STAT. ANN. § 782.04(1)(a)(2) (West Supp. 2006), 921.141(5)(d) (West 2006); GA. CODE ANN. §§ 16-5-1(c) (2003), 17-10-30(b)(2) (2004); N.C. GEN. STAT. ANN. §§ 14-17, 15A-2000(e)(5) (2005). The Montana statute allows the death penalty for felony murder *simpliciter* only in the specific case of aggravated kidnapping. MONT. CODE ANN. §§ 45-5-102(1)(b), 46-18-303(2) (2005).

140. It is likely that the state legislatures have not seen the need to update their statutes to reflect the *Enmund* rule and rely on the courts to make sure that sentencing is constitutional and in compliance with Supreme Court decisions.

141. FLA. STAT. ANN. § 782.04(3) (West Supp. 2006) (specifying an offense as second degree murder if a person is killed by someone other than the person perpetrating or attempting to perpetrate the felony).

142. FLA. STAT. ANN. § 921.141(6)(d) (West 2006); N.C. GEN. STAT. ANN. § 15A-2000(f)(4) (2005).

143. ARK. CODE ANN. § 5-10-101(b) (2006) (providing an affirmative defense to prosecution under the felony murder doctrine if the defendant did not kill the victim "or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission"); COLO. REV. STAT. § 18-3-102(2) (2006) (providing an affirmative defense to a felony murder charge if the defendant: 1) was not the only participant in the underlying felony, 2) did not kill or "in any way solicit, request, command, importune, cause, or aid in the [killing]," 3) was not armed, 4) had no reasonable ground to believe that the other participant was armed, 5) did not engage in conduct likely to result in death or serious bodily injury, nor had any reason to believe other participant would engage in such conduct, and 6) tried to dissociate himself from the underlying felony after having reasonable grounds to believe that other participants were armed or intended to inflict death or serious bodily injury on the victim); OR. REV. STAT. § 163.115(3)(a)–(e) (2005) (affirmative defense to a charge of felony murder if the defendant: 1) was not the only participant in the underlying felony, 2) did not kill or "in any way solicit, request, command, importune, cause or aid in the [killing]," 3) was not armed, 4) had no reasonable ground to believe that other

that the defendant did not kill or intend in any way for another participant to kill.[144] Similarly, before a jury can impose the death penalty on a defendant in Mississippi, it must make a written finding that the defendant killed, attempted to kill, intended for the killing to happen, or contemplated that lethal force would be used.[145]

However, in Arkansas, defendants such as the Tisons cannot use the affirmative defenses if they aid in the commission of the murder, as the Tisons did by supplying the weapons. The Tisons would not have been able to use an affirmative defense in Colorado or Oregon because, at the very least, they knew that the killers (their accomplices) were armed.

C. Comparison of Current Statutes to Those Characterized by the Tison *Majority*

The *Tison* majority classified states according to various subgroups, including the following: 1) states that allow the death penalty with proof of a culpable mental state short of intent, 2) states in which the defendant's participation must be substantial, 3) states that have statutory mitigators that take the defendant's minor participation into account, 4) states that require proof of at least one additional aggravating circumstance, and 5) states that authorize the death penalty for felony murder *simpliciter*.[146] The Court then grouped states into two distinct, mutually exclusive categories: 1) states that allow the death penalty in felony murder cases where the defendant did not intend to kill, but did substantially participate in a felony in which he knew it was highly likely that death would occur, and 2) states that do not allow the death penalty even when the defendant substantially participated in the felony murder and he or she acted with extreme recklessness.[147]

Since the Court decided *Tison*, the number of states in each category has changed. This section will review some of the more significant legislative changes.

1. Affirmative Defenses

The *Tison* majority did not specifically mention how many states provided affirmative defenses in their statutes for nontriggermen involved in felony murders.[148] Seven states currently include affirmative defenses to murder in their statutes so that nontriggermen who did not intend to kill are not punished

participants were armed, and 5) had no reasonable ground to believe that other participants would "engage in conduct likely to result in death").

144. *See supra* note 143.

145. MISS. CODE ANN. § 99-19-101(7) (2000).

146. Tison v. Arizona, 481 U.S. 137, 152–53 (1987).

147. *Id.* at 154.

148. *See id.* at 152–54.

on the same level as triggermen and nontriggermen who intended for a killing to take place.[149] Four states that provide an affirmative defense for such nontriggermen also require a showing of intent to kill before imposing the death penalty.[150]

By providing these affirmative defenses, states that otherwise would allow the death penalty in felony murder cases are ensuring that a defendant's participation in the felony murder is substantial before imposing the punishment. The *Tison* majority characterized two jurisdictions as requiring a defendant's substantial participation in the felony murder before allowing imposition of the death penalty: Connecticut and a federal jurisdiction[151] involving aircraft piracy.[152] Connecticut no longer authorizes the death penalty for felony murder, but the affirmative defense serves as a safeguard against the murder conviction.[153] Therefore, three states not cited by the *Tison* majority require substantial participation in the underlying felony before the death penalty can be applied.[154]

2. Mitigators for Minor Participation in the Murder or Felony

The *Tison* Court cited six states as taking minor participation in the felony into account in mitigation of the felony murder.[155] Currently, twenty-one states have statutory mitigators that require a jury to consider the defendant's level of participation or culpability in the crime before imposing the death penalty or other punishment.[156] This jump represents a 250% increase in the number of states that impose this consideration on the jury.

149. ARK. CODE ANN. § 5-10-101(b) (2006); COLO. REV. STAT. § 18-3-102(2) (2006); CONN. GEN. STAT. ANN. § 53a-54c (West 2001); N.J. STAT. ANN. § 2C:11-3(a)–(d) (West 2005); N.Y. PENAL LAW § 125.25(3)(d) (McKinney Supp. 2006); OR. REV. STAT. § 163.115(3)(a)–(e) (2005); WASH. REV. CODE ANN. § 9A.32.030(1)(c)(i)–(iv) (West 2000).

150. CONN. GEN. STAT. ANN. § 53a-54a (West 2001); N.J. STAT. ANN. § 2C:11-3(a), (c) (West 2005); N.Y. PENAL LAW § 125.27 (McKinney 2004); WASH. REV. CODE ANN. §§ 9A.32.030(1)(a) (West 2000), 10.95.020 (West Supp. 2006).

151. The author's analysis does not include a recent review of federal jurisdictions and federal legislative judgments.

152. *See Tison*, 481 U.S. at 153 (citing CONN. GEN. STAT. §53a-46a(g)(4) (1985) and 49 U.S.C. app. §1473(c)(6)(D)).

153. *See* State v. Amado, 719 A.2d 45, 45 (Conn. 1998) (explaining that "only intentional murders could serve as predicate for capital felony conviction"); State v. Johnson, 699 A.2d 57 (Conn. 1997) (explaining that felony murder cannot be the murder required for conviction of a capital felony).

154. The three states are Arkansas, Colorado, and Oregon. *See supra* note 143.

155. *Tison*, 481 U.S. at 153. The majority mentioned that "at least" six states considered such mitigating circumstances, but only cited six.

156. ALA. CODE § 13A-5-51 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-703(G) (2001); ARK. CODE ANN. § 5-4-605(5) (2006); CAL. PENAL CODE § 190.3(j) (West 2006); COLO. REV. STAT. § 18-1.3-1201(4)(d)–(e) (2006); CONN. GEN. STAT. ANN. § 53a-46a(h) (West 2001); FLA. STAT. ANN. § 921.141(6) (West 2006); IND. CODE ANN. § 35-50-2-9(c) (LexisNexis 2004); KAN.

Three states actually have multiple mitigators that take culpability into account.[157] Colorado and Arizona, the state in which the *Tison* case originated, now require consideration of whether the defendant's conduct in the offense was relatively minor compared to the other actors' conduct, and whether the defendant reasonably could have foreseen that his or her conduct during the felony would cause someone's death.[158] In addition to providing mitigation for a defendant's minor participation, New Hampshire allows the jury to consider that equally culpable defendants did not receive the death penalty.[159]

Instead of listing statutory mitigators, Ohio's statute provides a list of considerations for the jury to weigh against the statutory aggravating circumstances.[160] The state requires a jury to consider "the nature and circumstances of the offense, the history, character, and [the] background of the offender . . . ."[161] In addition, the jury must consider "the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim."[162]

Texas does not provide a list of mitigating circumstances that the defendant can present to the jury. However, the state's sentencing statute requires the court to submit to the jury the issue of whether or not the defendant actually caused the death of the victim, or did not actually cause the death but did intend for the death to occur.[163]

STAT. ANN. § 21-4637 (1995); KY. REV. STAT. ANN. § 532.025(2)(b) (LexisNexis Supp. 2005); MD. CODE ANN., CRIM. LAW § 2-303(h) (LexisNexis Supp. 2005); MISS. CODE ANN. § 99-19-101(6) (2000); MONT. CODE ANN. § 46-18-304 (2005); NEB. REV. STAT. § 29-2523(2) (Supp. 2004); N.H. REV. STAT. ANN. § 630:5(VI) (1996); N.C. GEN. STAT. §§ 14-17, 15A-2000(f) (2005); OHIO REV. CODE ANN. § 2929.04(B) (West Supp. 2006); S.C. CODE ANN. § 16-3-20(C)(b) (2003); TENN. CODE ANN. § 39-13-204(j) (2003); WASH. REV. CODE ANN. § 10.95.070 (West 2002); WYO. STAT. ANN. § 6-2-102(j) (2005).

157. ARIZ. REV. STAT. ANN. § 13-703(G)(3)–(4) (Supp. 2005); COLO. REV. STAT. § 18-1.3-1201(4)(d)–(e) (2006); N.H. REV. STAT. ANN. § 630:5(VI)(c), (g) (1996).

158. *See supra* note 157 (providing Arizona's and Colorado's mitigation statutes).

159. N.H. REV. STAT. ANN. § 630:5(VI)(g) (1996).

160. OHIO REV. CODE ANN. § 2929.04(B)(1)–(7) (West Supp. 2006).

161. *Id.* § 2929.04(B).

162. *Id.* § 2929.04(B)(6).

163. TEX. PENAL CODE ANN. § 37.071(2)(b)(2) (Vernon Supp. 2005).

3. Additional Aggravating Circumstances

Fourteen states currently require the state to prove beyond a reasonable doubt at least one aggravating circumstance (beyond commission or attempted commission of the underlying felony) before authorizing the death penalty in a felony murder case.[164] When compared to the three states that the *Tison* majority cited as requiring additional aggravation, this figure represents an increase of almost 400%.[165]

Of the fourteen states that require additional aggravation, three still do not authorize the death penalty in most cases for defendants who did not kill or intend to kill. As previously discussed, the Colorado and Oregon statutes provide an affirmative defense for nontriggermen who did not intend to kill.[166] All of New Mexico's aggravators require intent to kill, except when the victim is a law enforcement officer.[167]

4. Felony Murder *Simpliciter*

Imposition of the death penalty for felony murder *simpliciter* is obsolete. As mentioned above, only three state statutes have not been updated to prohibit a defendant's execution solely for participation in an enumerated felony in which someone was killed.[168] That figure represents half of the number of states that the *Tison* majority cited as allowing for capital punishment in cases of felony murder *simpliciter*.[169]

164. The fourteen states include the thirteen states listed *supra* note 133 and New Mexico. N.M. STAT. §§ 31-20A-3, 31-20A-5 (2005). New Mexico was not included in the previously mentioned list because it is not among the twenty-two states that authorize the use of the death penalty on defendants who did not kill or intend to kill (unless the victim is a law enforcement officer). *Id.* § 31-20A-5.

165. *See* Tison v. Arizona, 481 U.S. 137, 153 (1987).

166. *See supra* note 143.

167. N.M. STAT. § 31-20A-5 (2000).

168. *See supra* notes 139–42 and accompanying text. *Enmund* established that imposition of the death penalty for felony murder *simpliciter* is unconstitutional. Enmund v. Florida, 458 U.S. 782, 797 (1982). *Tison* did not overrule this holding in that the Court still required a showing of a culpable mental state. 481 U.S. at 157–59. Florida, Georgia, and North Carolina, therefore, may simply have neglected to revise their statutes to reflect these decisions, assuming that the Court automatically would apply the *Enmund* or *Tison* standard to each case. *See supra* notes 139–40 and accompanying text.

169. *See Tison*, 481 U.S. at 153. The Court referred to "six states which *Enmund* classified *along with Florida* as permitting capital punishment for felony murder *simpliciter*." *Id.* (emphasis added). This statement implies that seven states actually authorized the punishment for felony murder *simpliciter*; however, the Court cited only six and included Florida in its list. *Id.* at n.8.

5. "New" Death Penalty States

Since the Court decided *Tison*, Kansas and New York have reinstated the death penalty.[170] Both of these states forbid the imposition of the death penalty on defendants who did not intend to kill.[171] Also, New York does not even classify felony murder as first degree, but rather as second degree, indicating the legislature's judgment that traditional felony murder does not involve the level of culpability required to justify punishment for first degree murder.[172] These two states represent legislatures that likely have considered the death penalty issue more closely and more thoroughly than other states since *Tison*, because these state legislatures had to formulate entire statutes before reinstating the death penalty. After assuredly long debates and careful consideration, both legislatures found the death penalty to be disproportionate punishment for defendants who did not kill or intend to kill.

D. Summary of Statutory Findings

Twenty-eight states forbid imposing the death penalty on nontriggermen who did not intend to kill.[173] Of the twenty-two states that allow the death penalty for nontriggermen under certain circumstances, nearly all have some kind of statutory safeguard to limit its use on such offenders. Most of these states provide a statutory mitigator for minor participation in the felony,[174] and some require proof of an additional aggravator, of a culpable mental state, or a combination of both. Therefore, only one state's legislature has failed to incorporate the *Enmund* and *Tison* decisions into its homicide and death penalty statutes.[175]

In two of its most recent analyses regarding the death penalty, *Atkins* and *Roper*, the Court based its holdings largely on the "consistency of the direction of change" among state legislatures.[176] The legislatures appear to be, on balance, moving toward prohibiting the death penalty's use on nontriggermen

170. For reasons not relevant to this discussion, the highest courts in Kansas and New York declared the states' death penalty statutes unconstitutional in 2004. Roper v. Simmons, 543 U.S. 551, 580 app. A (2005).

171. KAN. STAT. ANN. § 21-3439 (1995); N.Y. PENAL LAW § 125.27 (McKinney 2004).

172. N.Y. PENAL LAW § 125.25(3) (McKinney 2004).

173. This figure represents the twelve states that have abolished the death penalty, plus the sixteen discussed *supra* notes 128–29 and accompanying text.

174. *Supra* note 156. The *Enmund* Court said that the presence of these mitigators indicated that states wanted to reduce the chance of nontriggermen receiving the death penalty. Enmund v. Florida, 458 U.S. 782, 793 (1982).

175. *See supra* note 140 (providing a possible explanation of why felony murder *simpliciter* statutes still exist). Georgia is the only state whose statute does not appear to have incorporated *Enmund* and *Tison*. *See supra* Part III.B.3.

176. Roper v. Simmons, 543 U.S. 551, 566 (2005); Atkins v. Virginia, 536 U.S. 304, 316 (2002).

who did not intend to kill; however, the change has not been significant and does not appear to be happening very quickly.

IV. PROPORTIONALITY ANALYSIS

If the Court reconsiders the constitutionality of imposing the death penalty on defendants who did not kill or intend to kill, its complete opinion must include a proportionality analysis.[177] In fact, a strong proportionality argument may overcome weaker objective evidence, as it did in *Atkins*, according to Justice O'Connor.[178] To overrule *Tison*, the Court would have to show that a defendant who does not kill or intend to kill does not deserve the same punishment as someone who intended for the murder to occur, or who actually committed the murder. In making this showing, the Court would have to demonstrate that the penological goals of the death penalty—retribution and deterrence—would not be served by executing such defendants.

A. Culpability and Retribution

States began dividing murder into degrees to recognize that the "several forms of murder varied greatly in degree of atrociousness."[179] Differentiating murders then enabled the states to "match the penalty to the seriousness of the offense."[180] The death penalty is the most serious and severe punishment; therefore, it follows that it should be used only for the most serious crimes.

1. Other Serious Crimes

The Supreme Court has repeatedly recognized that the death penalty should be reserved for the most serious crimes and has noted that only a narrow group of crimes falls into that category.[181] Among the list of crimes that the Court has determined to be unquestionably severe but not worthy of the death penalty are 1) the rape of an adult woman,[182] 2) murder committed by

177. In his *Tison* dissent, Justice Brennan noted that the Constitution and Supreme Court precedent require that the Court include a proportionality analysis in Eighth Amendment cases involving the death penalty. Tison v. Arizona, 481 U.S. 137, 168 (1987) (Brennan, J., dissenting).

178. In her dissent in *Roper*, Justice O'Connor said that the objective evidence in *Atkins* was too weak to support the Court's ruling, but that "the compelling proportionality argument against capital punishment of the mentally retarded played a decisive role in the Court's Eighth Amendment ruling." *Roper*, 543 U.S. at 606 (O'Connor, J., dissenting).

179. *See, e.g.*, Bruce v. State, 566 A.2d 103, 107 (Md. 1989).

180. *Id.*

181. *Roper*, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 319). States that continually expand lists of aggravating circumstances actually defy this notion. For example, the Illinois death penalty statute included seven aggravating circumstances when it was passed in 1977; now, there are twenty-one different ways that a defendant can be eligible for the death penalty. TUROW, *supra* note 6, at 67–68.

182. *Roper*, 543 U.S. at 568 (citing Coker v. Georgia, 433 U.S. 584 (1977)).

the mentally retarded,[183] 3) murder committed by a juvenile under the age of eighteen,[184] and 4) felony murder in which the defendant did not kill or intend to kill.[185] A reason for the Court's hesitance in applying the death penalty in such cases is that the defendants lack the "extreme culpability [that] makes them 'the most deserving of execution.'"[186]

The *Roper* Court found that juveniles lack this culpability due to a variety of factors that essentially prevent the defendants from properly weighing the consequences of their actions and from independently forming the intent required to make them extremely culpable.[187] If the Court has found that a seventeen-year-old who actually formed an intent to kill is not extremely culpable, in part because he was not capable of making an informed decision, then it defies logic to find that a defendant who never forms such an intent or makes such a decision *does* possess extreme culpability.[188]

As the *Enmund* Court noted, robbery is a serious crime that deserves adequate punishment.[189] However, it is not "so grievous an affront to humanity that the only adequate response may be the penalty of death."[190] Referring to the crime of robbery, the Court said,

> [I]t does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim, life . . . is not over and normally is not beyond repair.[191]

This same line of reasoning applies to any underlying felony that a defendant may be guilty of forming an intent to commit. Arson, kidnapping, rape, robbery, and burglary all deserve serious punishment. The mental state required to commit these crimes, however, is far from the mental state involved in intentionally taking a human life. Defendants who do not kill or intend to kill lack the very thing that makes the crime of murder so reprehensible: the thought process in which they decide that it is acceptable to end a human life.

183. *Id.* (citing *Atkins*, 536 U.S. at 315).

184. *Id.*

185. *Id.* (citing Enmund v. Florida, 458 U.S. 782 (1982)).

186. *See id.* (citing *Atkins*, 536 U.S. at 319).

187. *See supra* note 16 (providing a list of factors that led to the Court's determination that juveniles are not among the most culpable offenders).

188. In *Roper*, the defendant, seventeen-year-old Christopher Simmons, killed a woman by throwing her off of a bridge. 543 U.S. at 556–57. In planning the murder with his friends, Simmons assured them that they could "get away with it" because of their ages. *Id.* at 556.

189. *Enmund*, 458 U.S. at 798.

190. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 184 (1976)).

191. *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977)).

2. Reckless Indifference

Acting recklessly and without concern for human life certainly is morally reprehensible behavior that deserves severe punishment—especially when a life is, in fact, lost as a result.[192] However, as Justice Brennan acknowledged in his *Tison* dissent, a reckless person's culpability is necessarily less than that of a person who actually killed or intended to kill.[193] The reckless actor is less culpable because he did not make a choice to kill another human being.[194] The law traditionally punishes individuals based on the decisions they make. A person who chooses to rob should be punished for making—and acting on—that choice. A person who chooses to rob and to kill someone in the process should be punished for making both of those choices and certainly should be punished on a different level than the person who chose only to rob.

a. Model Penal Code

Proponents of applying the death penalty to nontriggermen who did not intend to kill may point out that the Model Penal Code (MPC) includes in its definition of murder "[homicide] committed recklessly under circumstances manifesting extreme indifference to the value of human life."[195] Grouping this type of homicide into the same category as homicides committed purposely or knowingly, these proponents may argue, indicates that the drafters of the MPC equated reckless indifference with intent. This reasoning may support the classification scheme, but it still does not support imposing the death penalty on defendants who merely exhibit extreme indifference rather than an actual intent to kill. The Comments to MPC section 210.2, the section on murder, indicate that the drafters considered how states at the time classified murder and whether they included a form of reckless homicide.[196] However, the drafters did not consider whether the states they referenced had a death penalty or whether the states that did have the death penalty allowed for it to be imposed in cases of reckless homicide. Absent such consideration, it cannot be argued that the drafters of the MPC supported applying the death penalty to cases in which the defendant did not kill or intend to kill—they simply supported classifying extreme cases of reckless homicide as murder.

192. *See* Tison v. Arizona, 481 U.S. 135, 170–71 (1987) (Brennan, J., dissenting).

193. *Id.* at 171.

194. *Id.* at 170–71.

195. MODEL PENAL CODE § 210.2(1)(b) (Official Draft and Revised Comments 1980).

196. *Id.* § 210.2 cmt. 4 at 26 (noting, among other statutory observations, that at least fifteen states recently revised their murder statutes, but maintained a form of reckless homicide).

b. Common Law

Common law, however, defined murder as killing with "malice aforethought."[197] At common law, malice consisted of killing "another human being without justification (e.g., self-defense), excuse (e.g., insanity), or mitigating circumstance (e.g., sudden heat of passion)."[198] These types of homicides traditionally are included as first degree murder in states that grade offenses.[199] On the other hand, manifesting extreme indifference to human life is considered implied malice, which most often is classified as second degree.[200] Therefore, at common law, the death penalty would not apply to a homicide in which the defendant exhibited extreme indifference to human life, but did not kill or intend to kill.

c. Rome Statute

The international community does not consider recklessness to be as culpable of a mental state as intent. Although the United States is not a party to the Rome Statute of the International Criminal Court (ICC), its modern significance is arguably more noteworthy than that of the MPC.[201] The drafting process of the Rome Statute resembles that of the MPC, only on an international level. It was a collaboration of the ideas of numerous countries and was adopted only after several revisions and extensive negotiations, including comprehensive discussions regarding the crimes over which the ICC should have jurisdiction.[202] Not only does it represent an international, rather than a national, consensus, but it was created several decades after the MPC was created.[203]

197. *Id.* § 210.2 cmt. 1 at 13 (citing Royal Comm'n on Capital Punishment, Report, CMD. No. 8932, at 26 (1953)).

198. DRESSLER, *supra* note 3, at 506.

199. *Id*.

200. *Id.* at 512.

201. The International Criminal Court website provides a list of the one hundred current State Parties to the Rome Statute. International Criminal Court: The States Parties to the Rome Statute, http://www.icc-cpi.int/asp/statesparties.html (last visited Mar. 28, 2007). One author predicts that the Rome Statute will have a far-reaching effect beyond its application on an international level:

> The influence of the Rome Statute will extend deep into domestic criminal law. . . . National courts have shown, in recent years, a growing enthusiasm for the use of international law materials in the application of their own laws. The Statute itself, and eventually the case law of the International Criminal Court, will no doubt contribute in this area.

WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 19 (2001).

202. *See generally* SCHABAS, *supra* note 201, at 1–20 (discussing the creation of the ICC).

203. The Rome Statute originally was adopted by 120 international states on July 17, 1998. *Id.* at vii. The MPC was adopted by the American Law Institute on May 24, 1962. MODEL PENAL CODE (Official Draft and Revised Comments 1980).

The drafters of the Rome Statute debated about whether or not to lower the mens rea threshold in Article 30 to that of recklessness or gross negligence. They ultimately decided that the "most serious crimes" over which the ICC had jurisdiction necessarily required intent.[204] By deleting a bracketed text on recklessness, the drafters, who represented a large part of the international community, asserted that recklessness and intent are not equally culpable mental states.[205]

3. The Average Offender

The Court has reiterated that the culpability of the average offender does not justify applying the death penalty.[206] The Court has reasoned that if the average offender is not culpable enough to deserve the most severe punishment available, then juvenile and mentally retarded offenders definitely do not warrant this type of retribution.[207] Defendants who do not kill or intend to kill similarly are not among the average offenders and certainly should not be held more accountable than the average murderer.

4. Balancing the Wrong to the Victim and Expressing the Community's Moral Outrage

The *Roper* Court said that retribution can involve either balancing the wrong done to the victim[208] or expressing the community's "moral outrage" toward the offense.[209] Neither of these purposes is properly served by imposing the death penalty on defendants who did not kill or intend to kill.

This class of defendants does not actually take the victim's life, so counteracting the victim's death with such a defendant's death does not establish balance. Proponents of this principle of retribution may argue that an actual killer, or a defendant who intended for the victim to be killed, can be executed to "balance" the harm done. However, they cannot in good conscience argue that executing a nontriggerman who did not intend to kill provides proper balance.

There are several dangers inherent in allowing community sentiment to dictate punishment. First of all, community sentiment can be fleeting, and we should be extremely hesitant to let such sentiment contribute to an irreversible,

204. SCHABAS, *supra* note 201, at 86; *see also* text accompanying *infra* notes 246–47.

205. *See* SCHABAS, *supra* note 201, at 86–87.

206. Roper v. Simmons, 543 U.S. 551, 571 (2005); Atkins v. Virginia, 536 U.S. 304, 319 (2002).

207. *Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319–20.

208. This principle of retribution coincides with the "eye for an eye" theory of punishment. For a discussion of the defining characteristics of retributivist theory of punishment, see Michael S. Moore, *The Moral Worth of Retribution*, *as reprinted in* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 39–40 (3d ed. 2003).

209. *Roper*, 543 U.S. at 571.

permanent punishment.[210] Also, we should not allow for a human life to be taken simply as a salve for a community's anger. Individuals should be punished based on the crimes they actually commit—not on the crimes as the public sees them or on the outrage that the public may justifiably express at the result of the crime.[211]

Lay citizens most likely are not aware of the criminal elements necessary to prove that a crime has been committed—especially the concept of mens rea and its role in determining what crime has been committed. Therefore, when such citizens who support the death penalty learn of a robbery in which someone was killed, the knee-jerk reaction may be to demand the death of anyone involved in the robbery because, in their minds, any killing is murder and any murder is death penalty-eligible. This obviously is not how the legal system operates, and if it did, there would be no punishment left to distinguish the most abhorrent and most reprehensible crimes.

Allowing community and victim judgments to dictate punishment also may contribute to the randomness associated with applying the death penalty. Some victims' families and communities may oppose the death penalty or may be more willing to accept the quick finality of a defendant's guilty plea. Other families and communities, however, may insist that prosecutors go to trial and pursue the death penalty at all costs. As a result, one defendant may receive life in prison while another is executed after committing a virtually identical crime.[212]

210. The American public's moral outrage often wanes with time. For example, when the public first learned of President Bill Clinton's affair with his intern, there was a cry for impeachment and obvious public disgust for his conduct. However, by the time Kenneth Starr's investigation was completed, the public seemed to be directing its disgust toward Starr and his voracious attack on the President. This example is not an attempt to compare President Clinton's extramarital affair with the atrocity of murder, but rather to demonstrate how the public can insist on the worst punishment possible immediately after learning of an offender's act, only to later realize that such punishment may need to be reserved for conduct that is even more egregious. "[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment." JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80–82 (1883), *as reprinted in* DRESSLER, *supra* note 208, at 41.

211. Immanuel Kant advocated the principle that a human being should never be used to satisfy someone else's purpose. Immanuel Kant, *The Philosophy of Law*, *as reprinted in* DRESSLER, *supra* note 208, at 40. "Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society . . . ." *Id.*

212. According to an Associated Press study of the Ohio death penalty, 50% of the capital indictments filed between 1981 and 2002 resulted in plea bargains. Death Penalty Information Center, *Arbitrariness: Prevalence of Plea Bargains in Death Penalty Cases*, http://www.deathpenaltyinfo.org/article.php?did=2093 (scroll to article) (last visited Mar. 28, 2007). Of the cases that ended in plea agreements, 131 of the defendants killed multiple victims; meanwhile, 196 of the 274 people sentenced to death during the same time period had killed a single victim. *Id.*

B. Deterrence

The deterrent value of the death penalty for any kind of murder is debatable, and most likely will continue to be debated as long as the death penalty is applied.[213] However, the *Tison* Court did not provide a single deterrent argument for applying the death penalty in felony murder cases.[214] The death penalty cannot be an effective deterrent when the felony itself did not carry with it a substantial risk of death and when there was no intent for the murder to take place.

1. Low Risk of Death Even in Inherently Dangerous Felonies

Robbery, rape, and burglary are considered some of the most inherently dangerous felonies, as evidenced by the fact that they are among the enumerated felonies in virtually every felony murder statute.[215] However, the *Enmund* Court noted that the risk of someone dying during the course of a robbery is not so substantial that someone who simply participates in the robbery should share in the blame when a victim is killed.[216] In fact, crime statistics at the time showed that, in 1980, death occurred only in about 0.43% of robberies—supporting the majority's argument that the death penalty cannot act as an effective deterrent in such cases.[217] If this statistic was enough to support the Court's finding in 1982, then the present statistics are even more convincing.

According to the Federal Bureau of Investigation's Uniform Crime Reports, only 0.25% of robberies in 2004 resulted in murder.[218] The percentage of robberies that result in murder has dropped to nearly half of the percentage that the *Enmund* Court found to be an insignificant amount. As for

213. A survey of leaders among the top criminological societies in the country revealed that 84% of those experts said that the death penalty is not a deterrent to murder. *Facts About the Death Penalty* (Death Penalty Info. Ctr., Washington, D.C.), at 3, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Mar. 28, 2007). Also, the South has the highest murder rate among all of the regions in the United States, but also accounts for 56% of the executions nationwide. *Id.* Meanwhile, the Northeast has the lowest murder rate and accounts for less than 1% of executions. *Id.* Another study shows that death penalty states usually have higher murder rates than neighboring non-death penalty states. Death Penalty Information Center: Deterrence, http://www.deathpenaltyinfo.org/ (follow "Issues" hyperlink; then follow "Deterrence" hyperlink; then follow "Studies Comparing States with and without the Death Penalty" hyperlink) (last visited Mar. 28, 2007).

214. *See supra* Part II.B.2.D.

215. *See, e.g.*, CAL. PENAL CODE § 189 (West 2006); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2005).

216. Enmund v. Florida, 458 U.S. 781, 799 (1982).

217. *Id.* at 800 n.24.

218. There were 401,326 reported robberies in 2004 and 988 murders that occurred during the course of a robbery. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2004—UNIFORM CRIME REPORTS 23, 31 (2004).

rape, 0.038% of the 94,635 rapes reported in 2004 resulted in murder.[219] Of the 2,143,456 burglaries reported in 2004, only 77 resulted in murder.[220] That means that burglary, considered by state legislatures to be among the most inherently dangerous felonies, carries with it only a 0.0036% chance of someone being killed.

When someone actually is killed during one of these felonies, if the death penalty is not frequently imposed on such defendants, its deterrent value is reduced even further. Although recent numbers are not available, one of the drafts of the MPC noted that the "odds against a robbery ending with a death sentence . . . were . . . 1,286 to 1," and the odds were 1,133 to 1 that a rapist would be sentenced to death.[221] These numbers imply two things. First, juries do not often sentence felony murder defendants to death when they did not kill or intend to kill. This jury hesitance itself is a consideration in determining whether the death penalty is constitutional in certain circumstances. Second, the death penalty is applied so infrequently in these situations that the punishment is not likely to deter either the commission of the underlying felony or any killing that occurs during the course of the felony.

This argument is not an attempt to minimize the value of the lives actually lost during these felonies, but rather is meant to demonstrate that there is no deterrent value in executing defendants who did not kill or intend to kill while participating in these felonies. The numbers represent the fact that an overwhelming majority of defendants who participate in these felonies do not kill, so the threat of the death penalty would not have any effect in keeping them from killing. As for deterring them from participating in the underlying felonies, the death penalty is an improper deterrent. First, threatening death for participating in a felony in which killing is not an essential element is inherently unbalanced and certainly excessive. Also, the chance of a murder occurring during the course of such a felony is so minute that an offender most likely would not consider the possibility of the death penalty when deciding whether or not to commit a robbery, for example.

2. Deterring Recklessness

A penological goal of any punishment is to deter commission of the crime associated with the punishment. The courts in *People v. Gentry*[222] and *Bruce*

219. There were 36 murders reportedly committed in conjunction with a rape in 2004. *Id*. at 23, 27.

220. *Id*. at 23, 45.

221. MODEL PENAL CODE § 201.2 cmt. 4(C) n.10 (Tentative Draft No. 9 1959).

222. People v. Gentry, 510 N.E.2d 963, 966 (Ill. App. Ct. 1987).

v. State[223] took notice that there would be no deterrent value in punishing defendants for crimes that they had no intention of committing.[224]

In *Gentry*, the Appellate Court of Illinois held that to be guilty of attempted murder, a defendant must have had an intent to kill.[225] The court said that "intent to do bodily harm, or knowledge that the consequences of defendant's act may result in death or great bodily harm, is not enough."[226] Using similar reasoning in *Bruce*, the Court of Appeals of Maryland held that there is no such crime as attempted felony murder.[227] Because the only intent required to prove felony murder is the intent to commit the underlying felony, and because criminal attempt is a specific intent crime, one cannot attempt to commit felony murder.[228]

In *Gentry*, the defendant acted recklessly and put the victim's life in danger;[229] however, because he did not specifically intend to kill her, punishing him for trying to kill her would have had no effect in keeping him (or others) from attempting murder in the future.

The *Bruce* court noted, "There is no such criminal offense as an attempt to achieve an unintended result."[230] In so finding, the court recognized that there would be no deterrent value in punishing someone for a crime he or she did not intend to commit. If results are unintended, as they necessarily are in the cases of nontriggermen who did not intend to kill, then there can be no deterrent value in executing such defendants. Executing these defendants will not keep others like them from deciding to take a life, because they never made that decision.

223. *Bruce*, 566 A.2d at 106.

224. One scholar suggests that the only types of conduct that criminal law can affect are intentional action and forbearance. Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 363 (2004). Because the goal of criminal law is to guide behavior, Professor Morse argues that "a rational system of criminal law should focus solely on actions and should not impose punishment based on results." *Id.* The drafters of the MPC similarly argued, "[M]urders are, upon the whole, either crimes of passion, in which a calculus of consequences has small psychological reality, or crimes of such depravity that the actor reveals himself as doubtfully within the reach of influences that might be especially inhibitory in the case of the ordinary man." MODEL PENAL CODE § 201.6 cmt. 1 (Tentative Draft No. 9 1959).

225. *Gentry*, 510 N.E.2d at 966.

226. *Id.*

227. *Bruce*, 566 A.2d at 106

228. *Id.* at 105.

229. *See Gentry*, 510 N.E.2d at 964.

230. *Bruce*, 566 A.2d at 105.

V. INTERNATIONAL OPINION[231]

Whereas the *Roper* Court was able to point to specific international laws prohibiting the execution of juveniles, international guidance on executing nontriggermen who did not intend to kill is less specific.[232] A common theme in the international community is that countries that still use the death penalty should impose it only for the most serious of crimes. Treaties and other international documents indicate that the international community defines the most serious crimes as including an intent to kill.

A. International Covenant on Civil and Political Rights

Along with other members of the United Nations, the United States ratified the International Covenant on Civil and Political Rights (ICCPR)[233] in an effort "to promote universal respect for, and observance of, human rights and freedoms."[234] Article 6(2) of the treaty states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes . . . ."[235] While the Court claims to follow the ideal of imposing the death penalty only for the most serious crimes, it is doubtful that the Court's definition of what constitutes the "most serious crimes" coincides with the meaning that the ICCPR intended for that category of crimes.

B. American Declaration

The United States is a member of the Organization of American States (OAS), which has adopted the American Declaration of the Rights and Duties

231. This Comment will not discuss the general role of international law in interpreting death penalty jurisprudence. For a discussion of this topic, see Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115 (2002); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004).

232. *See* Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

233. The ICCPR is a binding treaty that provides restrictions on how countries use the death penalty. Bishop, *supra* note 231, at 1131. In 1998, President Clinton stated: "It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party." *Id.* at 1117 (quoting Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998)).

234. International Covenant of Civil and Political Rights, Preamble, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. The United States ratified the ICCPR with a restriction stating that "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on *any* person (other than pregnant women) duly convicted *under existing or future laws* permitting the imposition of capital punishment, including such punishment . . . ." Bishop, *supra* note 231, at 1133–34 (emphasis added).

235. ICCPR, *supra* note 234, at art. 6, § 2.

of Man.[236] The OAS then adopted the American Convention on Human Rights,[237] which states that the death penalty only can be imposed for the most serious crimes.[238] The United States has not yet ratified this Convention.[239]

C. Interpreting "Most Serious Crimes"

1. United Nations

The United Nations Commission on Human Rights has repeatedly emphasized that the "most serious crimes" include only intentional crimes. Beginning in 1999, the Commission has annually adopted a resolution that states that "the notion of 'most serious crimes' does not go beyond intentional crimes with lethal or extremely grave consequences."[240] Each year, the resolution "[u]rges all States that still maintain the death penalty . . . to comply fully with their obligations under the [ICCPR] . . . , notably not to impose the death penalty for any but the most serious crimes . . . ."[241]

The United Nations Economic and Social Council adopted these standards in its death penalty safeguards. The first safeguard states that "capital punishment may be imposed only for the most serious crimes, it being

236. Bishop, *supra* note 231, at 1142. The American Declaration became legally binding in 1967. *Id*. at 1142–43. The OAS created it under the ideal that "[e]very human being has the right to life, liberty and the security of his person." *Id*. at 1142.

237. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

238. Corte Interamericana de Derechos Humanos: Información–historia, http://www.corteidh.or.cr/historia.cfm (last visited Mar. 28, 2007); *see* Bishop, *supra* note 231, at 1143.

239. Corte Interamericana de Derechos Humanos: Información–historia, *supra* note 238. The Convention created the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to promote and protect the principles of the Convention. *Id.* Because the United States has not adopted the American Convention on Human Rights, it is questionable whether the country is bound by the advisory opinions and court decisions rendered by these two bodies. However, it is included in this discussion for purposes of explaining international standards as they apply to the death penalty in cases of unintentional crimes.

240. Comm'n on Hum. Rts. Res. 2005/59 ¶ 7(f), U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005); Comm'n on Hum. Rts. Res. 2004/67 ¶ 4(f), U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); Comm'n on Hum. Rts. Res. 2003/67 ¶ 4(d), U.N. Doc. E/CN.4/RES/2003/67 (Apr. 24, 2003); Comm'n on Hum. Rts. Res. 2002/77 ¶ 4(c), U.N. Doc. E/CN.4/RES/2002/77 (Apr. 25, 2002); Comm'n on Hum. Rts. Res. 2001/68 ¶ 4(b), U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001); Comm'n on Hum. Rts. Res. 2000/65 ¶ 3(b), U.N. Doc. E/CN.4/RES/2000/65 (Apr. 26, 2000); Comm'n on Hum. Rts. Res. 1999/61 ¶ 3(b), U.N. Doc. E/CN.4/RES/1999/61 (Apr. 28, 1999).

241. Comm'n on Hum. Rts. Res. 2002/77 ¶ 4(a), U.N. Doc. E/CN.4/RES/2002/77 (Apr. 25, 2002); Comm'n on Hum. Rts. Res. 2001/68 ¶ 4(a), U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001); Comm'n on Hum. Rts. Res. 2000/65 ¶ 3(a), U.N. Doc. E/CN.4/RES/2000/65 (Apr. 26, 2000); Comm'n on Hum. Rts. Res. 1999/61 ¶ 3(a), U.N. Doc. E/CN.4/RES/1999/61 (Apr. 28, 1999).

understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."[242]

2. Rome Statute

The preamble to the Rome Statute of the ICC states that "the most serious crimes of concern to the international community as a whole must not go unpunished . . . ."[243] This language establishes that the scope of the ICC's jurisdiction is limited to only the most serious crimes. Article 30 of the statute states that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."[244] Article 30, taken together with the Preamble, indicates that the drafters of the Rome Statute considered intent a necessary element of crimes in the "most serious" category.

3. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights has held that the death penalty must not be imposed for crimes that are not of "exceptional gravity."[245] The Commission noted that the varying degrees of gravity and individual culpability must be considered before imposing the death penalty.[246] The Commission also has recognized that a botched robbery attempt in which the

242. U.N. Econ. & Soc. Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶ 1, U.N. Doc. E/RES/1984/50 (May 25, 1984).

243. Rome Statute of the International Criminal Court, Preamble, July 1, 2002, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter Rome Statute].

244. *Id*. at art. 30. Article 30 goes on to define "intent," explaining,

> For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Id. at art. 30(2). The statute defines "knowledge" as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." *Id*. at art. 30(3).

245. *See, e.g.*, Garza v. United States, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 29 (2001), *available at* http://www.cidh.org/annualrep/2000eng/chapteriii/merits/USA12.243.htm (last visited Mar. 28, 2007).

246. *See* Edwards v. Bahamas, Case 12.067, Inter-Am. C.H.R., Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 65 (2001), *available at* http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm (last visited Mar. 28, 2007); Hall v. Bahamas, Case 12.068, Inter-Am. C.H.R., Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 65 (2001), *available at* http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm (last visited Mar. 28, 2007); Schroeter & Bowleg v. Bahamas, Case 12.086, Inter-Am. C.H.R., Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 65 (2001), *available at* http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm (last visited Mar. 28, 2007).

defendant did not kill or intend to kill the victims was not a crime of exceptional gravity and did not warrant the death penalty.[247]

D. International Law and the Tison Crime

The *Tison* decision and the standard it set forth violate these international standards because the Tison brothers did not intend for the murders to take place; therefore, they were sentenced to death for a crime that does not meet the "most serious" criteria. The intentional crimes referred to in the safeguards cannot be the underlying felony in a felony murder case, because even the Court has conceded that crimes outside of murder are not serious enough to qualify for the death penalty.[248]

CONCLUSION

When the Supreme Court revisits the issue of whether it is constitutional to execute an offender who did not kill or intend to kill, it should consider, as it has in the past, legislative judgments, proportionality, retribution, and deterrence rationales, and international law and opinion. A thorough review of current legislation reveals that a majority of states do not provide further restrictions than those imposed by *Enmund* and *Tison*. However, most of the states that do not prohibit punishment for defendants who did not kill or intend to kill have statutory safeguards in place so that less culpable offenders have less of a chance of being executed.

The two justifications for the death penalty—retribution and deterrence—do not apply to felony murder cases in which the defendant did not kill or intend to kill. If the Court considers international law and the United States' treaty obligations, it will find that an honest definition of the "most serious crimes" cannot include those in which a defendant did not kill or intend to kill.

Although, based on a thorough proportionality analysis, the Court should hold that it is unconstitutional to execute a defendant who did not kill or intend to kill, it is not likely to do so if it revisits the issue in the near future. For the Court to overrule *Tison*, either more state legislatures will need to revise their statutes so that nontriggermen who did not intend to kill are not eligible for the death penalty, or international law will have to take a more definite stance on the issue. With a compelling proportionality argument, evidence of changing

247. Andrews v. United States, Case 11.139, Inter-Am. C.H.R., Report No. 57/96, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 177 (1996). In the *Andrews* case, the defendant and an accomplice, Pierre Selby, went to rob a radio store, where people still happened to be present. *Id*. at ¶ 39. Andrews and Selby restrained the victims in the basement of the store, and Selby made them drink drain cleaner. *Id*. After stating that he could not make the victims drink the poison, Andrews left the store. Unbeknownst to Andrews, Selby then shot the victims. *Id*. at ¶ 39–40. One survivor verified Andrews's version of the events. *Id*.

248. *See* Enmund v. Florida, 458 U.S. 782, 797 (1982).

legislative judgment or well-defined international law could influence the Court.[249] However, a proportionality argument alone is not likely to convince a majority of the Justices of the unconstitutionality of the death penalty in these cases.

The effects of a murder are equal, no matter who kills or is killed: a victim loses a life, a survivor loses a loved one, and society as a whole loses some of its dignity. Although the effects are equal, however, the crimes and the culpability of those involved are not. Our criminal justice system is based on this "inequality" of crimes, and our punishments must reflect it. The most critical choice a criminal can make is whether to take a human life. One of the most critical choices our criminal justice system can make is whether to recognize the criminal's choice.

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249. Research of jury activity in death penalty cases involving nontriggermen would shed additional light on the constitutionality of applying the death penalty in such cases. The Court should consider how often juries impose the death penalty in these cases. If juries rarely impose the punishment, then this would weigh heavily in favor of finding it unconstitutional.

* J.D. Candidate, Saint Louis University School of Law, 2007. I would like to thank Professor David Sloss for his invaluable guidance and, more importantly, for his faith in my ability to handle this daunting project. I especially would like to thank my husband and best friend, Tom, for his patience, love, and unwavering support throughout my law school career.