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## CASENOTES

### The Supreme Court and *Tison v. Arizona*: A Capital Example of Judicial Unsoundness

— Perhaps because of the finality of death as a punishment for a criminal offense,<sup>1</sup> the United States Supreme Court has entertained numerous constitutional challenges to capital punishment on the theory that it violates the eighth amendment's prohibition against cruel and unusual punishment.<sup>2</sup> A pattern has emerged in the over one hundred years in which the Court has been hearing such cases. Whereas early cases concerned the mode of execution,<sup>3</sup> more recent Supreme Court decisions focus on the death penalty's implementation.<sup>4</sup> Under an approach that focuses on its implementation, death is a constitutionally permissible sanction,<sup>5</sup> but certain limitations must exist to ensure that its administration comports with the eighth amendment. Accordingly, the Supreme Court has required that the sentencer impose the death penalty in a nonarbitrary fashion,<sup>6</sup> that the death penalty be proportionate to the crime for which it is sanctioned,<sup>7</sup> and that the sentencer be given some guidelines in deciding whether to employ it.<sup>8</sup>

Most recently, the Supreme Court used the doctrine of felony murder, which provides that a person committing a felony where another is killed may be charged with that murder, to place an additional constraint on the administration of the death penalty. In 1982, the Supreme Court in *Enmund v. Florida*<sup>9</sup> held that the eighth amendment

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<sup>1</sup> *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("imposition of death by public authority is so profoundly different from all other penalties"); *Seritt v. Alabama*, 731 F.2d 728, 732 (11th Cir. 1984) ("death penalty differs from all other forms of criminal punishment").

<sup>2</sup> These challenges have ranged from the style of execution, *see generally* *Wilkerson v. Utah*, 99 U.S. 130 (1878), to the unconstitutionality of the death penalty itself. *See generally* *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>3</sup> In *Wilkerson v. Utah*, 99 U.S. 130 (1878), the Court concluded that a public shooting did not violate the eighth amendment. *Id.* at 135, 137. In 1890, the Court determined that the Constitution permitted death by electrocution. *In re Kemmler*, 136 U.S. 436, 449 (1890).

<sup>4</sup> *See* *Cabana v. Bullock*, 106 S. Ct. 689, 700 (1986) (state court responsible for making proper finding before defendant may be executed); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (Constitution requires that defendant kill, attempt to kill, or intend to kill before being given death sentence); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (sentencer may not refuse to consider any relevant mitigating factor); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (state must define capital crimes so as to obviate standardless sentencing); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (sentencer must not exclude from consideration any aspect of defendant's character or record as a mitigating factor); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (death must not be grossly disproportionate to the severity of the crime); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (mandatory death sentence unconstitutional); *Gregg*, 428 U.S. at 197-98 (jury discretion to be tempered by clear and objective standards) (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)); *Furman*, 408 U.S. at 310 (Stewart, J., concurring) (death cannot be imposed in a wanton or freakish fashion).

<sup>5</sup> *See, e.g.*, *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976); *Woodson*, 428 U.S. at 285; *Jurek v. Texas*, 428 U.S. 262, 268 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Gregg*, 428 U.S. at 187.

<sup>6</sup> *See* *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

<sup>7</sup> *See* *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 187; *Hemans v. United States*, 163 F.2d 228, 237 (6th Cir.), *cert. denied*, 332 U.S. 801 (1947).

<sup>8</sup> *See* *Woodson*, 428 U.S. at 303. Commingled with this idea that the jury must be given some guidance — a decision that arose because of states having mandatory death sentences — is the notion that the eighth and fourteenth amendments require the states to consider any mitigating factor in the sentencing procedure. *See* *Lockett*, 438 U.S. at 604.

<sup>9</sup> 458 U.S. 782 (1982).

precluded executing those who did not kill, attempt to kill, or intend to kill.<sup>10</sup> Thus, although the nontriggerperson<sup>11</sup> could still be convicted of murder under the felony murder rule, a sentencer could not impose the death penalty on the nontriggerperson absent a finding that he or she intended to kill.<sup>12</sup>

*Enmund* caused many of those placed on death row before 1982 to challenge their sentences. In several of those cases, the reviewing court found present the necessary requirement that the defendant actually killed or intended to kill and therefore affirmed the sentences.<sup>13</sup> Some courts, however, vacated the capital sentences because the facts of the case did not satisfy *Enmund*.<sup>14</sup> In the 1987 case of *Tison v. Arizona*,<sup>15</sup> the Supreme Court, hearing a challenge to the Arizona Supreme Court's application of *Enmund*,<sup>16</sup> announced a new standard. Rather than restrict capital punishment to those who killed, attempted to kill, or intended to kill, the *Tison* Court held that where a defendant substantially participated in a felony where another is murdered, and showed a reckless indifference to human life, a sentencer may constitutionally impose the death penalty.<sup>17</sup>

In *Tison*, Gary Tison, while serving time in prison, killed a guard during an attempted escape. He received a sentence of life imprisonment.<sup>18</sup> Gary's wife, their three sons Ricky, Raymond, and Donald, and other relatives formulated plans for helping Gary Tison escape again.<sup>19</sup> On July 30, 1978, the three Tison brothers entered the

<sup>10</sup> *Id.* at 797.

<sup>11</sup> The *Enmund* Court used the term "nontriggerperson" to refer to the felon who does not commit the actual killing.

<sup>12</sup> *Cabana v. Bullock*, 106 S. Ct. 689, 697 (1986).

<sup>13</sup> *See, e.g., Skillern v. Estelle*, 720 F.2d 839, 844 (5th Cir. 1983) (defendant agreed in advance to rob and kill victim), *reh'g denied*, 469 U.S. 1067 (1984); *State v. LaGrand*, 153 Ariz. 21, 37, 734 P.2d 563, 579 (1987) (defendant participated in killing and intended to kill, thereby satisfying *Enmund*); *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983) (likelihood of homicide brings case within *Enmund* exception), *cert. denied*, 465 U.S. 1051 (1984).

<sup>14</sup> *See, e.g., Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982) (judgment reversed because jury did not find defendant had mind to kill), *reh'g denied*, 697 F.2d 699 (5th Cir. 1983); *State v. Emery*, 141 Ariz. 549, 553, 688 P.2d 175, 179 (1984) (death sentence reduced to life imprisonment because no evidence supporting claim that defendant killed, attempted to kill, or intended to kill); *People v. Garcia*, 36 Cal. 3d 539, 557, 684 P.2d 826, 836, 205 Cal. Rptr. 265, 275 (1984) (case remanded because aiding robbery and knowing companion is armed is insufficient to demonstrate that defendant intended to aid a killing).

<sup>15</sup> 107 S. Ct. 1676 (1987).

<sup>16</sup> The question presented to the Supreme Court on writ of certiorari was the following: Is the December 4, 1984, decision of the Arizona Supreme Court to execute these petitioners in conflict with the holdings of this Court where, in the words of that court, petitioners "did not specifically intend that the [victims] die, . . . did not plot in advance that these homicides would take place, or . . . did not actually pull the triggers on the guns which inflicted the fatal wounds, . . ." but where that court fashioned an expanded definition of "intent to kill" to include any situation where a non-triggerman "intended, contemplated or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony?"

Brief for Petitioners at i; *State v. Ricky Wayne Tison*, 142 Ariz. 446, 690 P.2d 747 (1984); *State v. Raymond Curtis Tison*, 142 Ariz. 454, 690 P.2d 755 (1984) (No. 84-6075) [hereinafter Brief for Petitioners].

<sup>17</sup> *Tison*, 107 S. Ct. at 1688.

<sup>18</sup> *Id.* at 1678.

<sup>19</sup> *Id.* Justice Brennan, in his dissent, disagreed with the majority's characterization of the facts, and cited the record to demonstrate that Gary Tison planned the breakout for a year, mentioned

Arizona State Prison carrying an ice chest filled with guns.<sup>20</sup> The brothers armed their father and a cellmate, Randy Greenawalt, and the group fled the prison without firing a single shot.<sup>21</sup> Problems with their getaway vehicle forced the group to stop a passing motorist and steal a car in order to continue their flight.<sup>22</sup> Posing as a motorist in need of assistance, Raymond stood in front of the disabled vehicle, while the other four armed themselves and waited by the side of the highway.<sup>23</sup> John Lyons, his wife Donnela, their two-year old son Christopher, and a fifteen-year old niece, Theresa Tyson, stopped to assist them.<sup>24</sup>

The Tisons and Greenawalt commandeered the Lyons' car and kidnapped the family.<sup>25</sup> After the Tisons and Greenawalt drove the family away from the highway, Gary Tison fired his shotgun into the radiator of the original getaway car, presumably to ensure its inoperability.<sup>26</sup> At the request of John Lyons, Gary Tison ordered his sons Ricky and Raymond to get some water for the family.<sup>27</sup> According to Ricky, he and Raymond gave the water jug to their father, who, along with Greenawalt, went behind the disabled car and began shooting.<sup>28</sup> Raymond's story differed somewhat. He recalled being at the Lyons' car when the two heard the shotgun blasts.<sup>29</sup> Both Ricky and Raymond agreed that they watched their father and Greenawalt repeatedly shoot the four victims.<sup>30</sup> All the victims ultimately died from the shooting.<sup>31</sup> Neither Ricky nor Raymond made any effort to help the family, though both expressed feeling surprised.<sup>32</sup>

After the killings, the Tisons and Greenawalt continued their journey until the police captured them several days later after a shootout at a roadblock.<sup>33</sup> After the police

the idea to Raymond only one week before the escape and discussed the possibility of his sons' participation only the day before. *Id.* at 1693 n.7 (Brennan, J., dissenting).

<sup>20</sup> *Id.* at 1678.

<sup>21</sup> *Id.* The brothers testified that they conditioned their participation in the breakout on their father's promise that no one was to be hurt. Raymond stated, "Well, I just think you should know when we first came into this we had an agreement with my dad that nobody would get hurt because we [the brothers] wanted no one hurt." *State v. Raymond Curtis Tison*, 142 Ariz. 454, 462, 690 P.2d 755, 763 (1984) (citing Aggravation Hearing and Sentencing Transcript, March 14, 1979, at 159).

<sup>22</sup> *Tison*, 107 S. Ct. at 1678.

<sup>23</sup> *Id.* at 1678-79.

<sup>24</sup> *Id.* at 1679.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Brennan added that the Tisons expressed feelings of helplessness and regret, as well as surprise. *Id.* at 1692 (Brennan, J., dissenting). Raymond stated about the shootings:

And when this [killing of the kidnap victims] came about we were not expecting it. And it took us by surprise . . . because we were not expecting this to happen. And I feel bad about it happening. I wish we could [have done] something to stop it, but by the time it happened it was too late to stop it. And it's just something we are going to live with the rest of our lives. It will always be there.

*State v. Raymond Curtis Tison*, 142 Ariz. 454, 462, 690 P.2d 755, 763 (1984) (citing Aggravation Hearing and Sentencing Transcript, March 14, 1979, at 159).

<sup>33</sup> *Tison*, 107 S. Ct. at 1679. At the shootout, the third son, Donald Tison, was killed and Gary Tison escaped into the desert where he eventually died. *Id.*

apprehended them, the state jointly tried the Tison brothers and Randy Greenawalt for the crimes associated with the prison escape and the shootout.<sup>34</sup> In addition to charging each of the Tisons with armed robbery, kidnapping and car theft, Arizona also charged them with felony murder, a capital offense.<sup>35</sup> Arizona state juries convicted both Ricky and Raymond Tison of felony murder.<sup>36</sup>

Arizona affords those found guilty of first degree murder a separate sentencing hearing, before a single judge, to determine if the offense warrants the death penalty.<sup>37</sup> The statute lists six aggravating and four mitigating circumstances as guidelines to the judge in his or her sentencing decision.<sup>38</sup> The trial court found three aggravating factors

<sup>34</sup> *Id.* The Arizona trial court sentenced Randy Greenawalt to 30 years to life for the assaults associated with the escape and for possession of a deadly weapon, and four to five years for escape, the sentences to run concurrently. *State v. Greenawalt*, 128 Ariz. 388, 391/626 P.2d 118, 121, *cert. denied*, 454 U.S. 848 (1981). The trial court also sentenced Greenawalt to 30 years for the roadblock assaults and four to five years for unlawful flight and possession of a stolen motor vehicle. *Id.* These sentences were to run concurrently to each other but consecutively to the sentences arising out of the escape. *Id.* Finally, all these sentences imposed on Greenawalt were to run consecutively to the life term he was already serving prior to the escape. *Id.*

The state charged Dorothy Tison, Gary's wife, in connection with the escape. She pleaded *nolo contendere* to conspiracy and served a nine month prison term. Brief for Petitioners at 3 n.3 (citing *State v. Tison*, Cr. No. 108352 (Maricopa County)).

<sup>35</sup> *Tison*, 107 S. Ct. at 1679. The Arizona felony murder statute provided the basis for the capital murder charges. *Id.* Section 13-452 of the Arizona Revised Statutes provides, in pertinent part: "A murder which is . . . committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate . . . robbery, . . . kidnapping, or mayhem . . . is murder of the first degree." ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-1978) (amended 1973) (repealed 1978) (*quoted in* Brief for Petitioners at 1a-2a). Additionally, section 13-139 provides: "[a]ll persons concerned in the commission of a crime whether it is a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." ARIZ. REV. STAT. ANN. § 13-139 (1956) (repealed 1978) (*quoted in* Brief for Petitioners at 1a).

<sup>36</sup> *Tison*, 107 S. Ct. at 1679-80. The state also convicted Ricky and Raymond Tison of aiding and abetting an escape, assault with a deadly weapon, possession of a stolen motor vehicle, and unlawful flight from a pursuing law enforcement vehicle. *State v. Greenawalt*, 128 Ariz. 388, 391, 626 P.2d 118, 121, *cert. denied*, 454 U.S. 848 (1981). They each received concurrent sentences of 30 years to life for the assaults, and four to five years for the other crimes, which were to be served concurrently, but consecutively to the sentences for assault. *Id.*

The statutory references in this note and *infra* notes 37-38 are to those laws in effect at the time the state convicted and sentenced the Tisons.

<sup>37</sup> Section 13-454(A) of the Arizona Revised Statutes provides that "[w]hen the defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing . . . for the purpose of determining the sentence to be imposed." ARIZ. REV. STAT. ANN. § 13-454(A) (Supp. 1957-1978) (repealed 1978) (*cited in* Brief for Petitioners at 2a).

Section 13-453 fixes the penalty for first degree murder at death or life imprisonment without possibility of parole until 25 years have elapsed. ARIZ. REV. STAT. ANN. § 13-453 (Supp. 1957-1978) (amended 1973) (repealed 1978) (*cited in* Brief for Petitioners at 2a).

<sup>38</sup> Under sections 13-454(E)(1)-(6) of the Arizona Revised Statutes, which was repealed in 1978, the Arizona court is to consider the following six aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

present during the murder: the Tisons knowingly had created a grave-risk of death to persons other than the victims; the murders were committed with pecuniary gain; and the murders were committed in an especially heinous, cruel, or depraved manner.<sup>39</sup> The judge found no statutory mitigating factors, but the court did determine the presence of three nonstatutory factors: the Tisons' youth (Ricky was 20 and Raymond was 19); the Tisons' minimal prior criminal records; and the murder convictions' basis in the felony murder rule.<sup>40</sup> The trial judge also determined, however, that both of the Tison brothers substantially participated in the crimes that invoked the felony murder doctrine.<sup>41</sup> As a result of these findings, the judge sentenced both Ricky and Raymond to death.<sup>42</sup>

On direct appeal, the Arizona Supreme Court affirmed the sentences.<sup>43</sup> In its evaluation of the trial court's determination of aggravating factors, the Court found sufficient evidence to support a finding of pecuniary gain and heinousness, but concluded that insufficient evidence existed to find that the defendants created a grave risk of danger to others.<sup>44</sup> In addition, the Arizona Supreme Court specifically found that the brothers did not pull the triggers, did not intend that the family die, and did not even know that

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

ARIZ. REV. STAT. ANN. § 13-454(E)(1)-(6) (Supp. 1957-1978) (*cited in* Brief for Petitioners at 3a-4a). The four mitigating factors, according to section 13-454(F)(1)-(4), included the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress; although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

ARIZ. REV. STAT. ANN. § 13-454(F)(1)-(4) (Supp. 1957-1978) (repealed 1978) (*cited in* Brief for Petitioners at 4a).

Section 13-454(D) provides that death shall be imposed if one or more statutory aggravating circumstances is found and no mitigating factors are found "sufficiently substantial to call for leniency." ARIZ. REV. STAT. ANN. § 13-454(D) (Supp. 1957-1978) (repealed 1978) (*cited in* Brief for Petitioners at 3a).

<sup>39</sup> See *State v. Ricky Wayne Tison*, 129 Ariz. 526, 542, 633 P.2d 355, 351; *State v. Raymond Curtis Tison*, 129 Ariz. 546, 555, 633 P.2d 335, 364 (1981).

<sup>40</sup> See *R.W. Tison*, 129 Ariz. at 544, 633 P.2d at 353; *R.C. Tison*, 129 Ariz. at 555, 633 P.2d at 364.

<sup>41</sup> See 129 Ariz. at 545, 633 P.2d at 354 (quoting trial court).

<sup>42</sup> See *Tison v. Arizona*, 107 S. Ct. 1676, 1680 (1987).

<sup>43</sup> *R.W. Tison*, 129 Ariz. at 545, 633 P.2d at 354; *R.C. Tison*, 129 Ariz. at 557, 633 P.2d at 366.

<sup>44</sup> *R.W. Tison*, 129 Ariz. at 542-43, 633 P.2d at 351-52; *R.C. Tison*, 129 Ariz. at 555, 633 P.2d at 364.

the homicides would take place.<sup>45</sup> In spite of these findings, the Arizona Supreme Court determined that but for the Tisons' participation, the murders would not have transpired, and, as a result, affirmed their capital sentences.<sup>46</sup> The United States Supreme Court then denied the brothers' writ for certiorari.<sup>47</sup>

Both Ricky and Raymond Tison collaterally attacked their death sentences.<sup>48</sup> They claimed that their sentences did not satisfy the *Enmund v. Florida*<sup>49</sup> test, which required a defendant to kill, attempt to kill, or intend to kill before the state could sentence him or her to death.<sup>50</sup> The Arizona Supreme Court found *Enmund* fulfilled, reasoning that Ricky and Raymond possessed the requisite intent because each could have anticipated the use of lethal force.<sup>51</sup> The Tison brothers subsequently petitioned the United States Supreme Court for a writ of certiorari, which the Supreme Court ultimately granted.<sup>52</sup>

In a five to four decision,<sup>53</sup> the Supreme Court vacated and remanded the case back to Arizona and held that the Arizona Supreme Court applied an erroneous standard in making the findings *Enmund v. Florida* required.<sup>54</sup> In its holding, the Court determined that substantial participation in a felony combined with reckless indifference to human life sufficed to satisfy the *Enmund* culpability standard.<sup>55</sup> Thus, according to the Court, sentencing a person to death under these circumstances does not violate the eighth amendment's prohibition against cruel and unusual punishment.<sup>56</sup> Justice Brennan, in

<sup>45</sup> *R.W. Tison*, 129 Ariz. at 545, 633 P.2d at 354. The Arizona Supreme Court made the following finding:

The record establishes that both Ricky and Raymond Tison were present when the homicides took place and that they occurred as part of and in the course of the escape and continuous attempt to prevent recapture. The deaths would not have occurred but for their assistance. That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance.

*Id.*

<sup>46</sup> *Id.* at 557, 633 P.2d at 366.

<sup>47</sup> 459 U.S. 882 (1982).

<sup>48</sup> The Tisons challenged their sentences by filing a petition for post-conviction relief and a motion for rehearing. *State v. Ricky Wayne Tison*, 142 Ariz. 446, 447, 690 P.2d 747, 748 (1984); *State v. Raymond Curtis Tison*, 142 Ariz. 454, 455-56, 690 P.2d 755, 756-57 (1984).

<sup>49</sup> 458 U.S. 782 (1982).

<sup>50</sup> *Ricky Wayne Tison*, 142 Ariz. at 447, 690 P.2d at 748; *Raymond Curtis Tison*, 142 Ariz. at 456, 690 P.2d at 757.

<sup>51</sup> *Ricky Wayne Tison*, 142 Ariz. at 448, 690 P.2d at 749; *Raymond Curtis Tison*, 142 Ariz. at 457, 690 P.2d at 758. It appears that the Arizona Supreme Court ignored its finding made three years earlier that the Tisons did not intend that the killings take place. See *supra* note 45. Instead, the Arizona Supreme Court determined from the circumstances of the escape and subsequent events that Ricky and Raymond Tison could anticipate the use of lethal force and, hence, intended to kill. *Ricky Wayne Tison*, 142 Ariz. at 448, 690 P.2d at 749; *Raymond Curtis Tison*, 142 Ariz. at 456, 690 P.2d at 757. The United States Supreme Court indicated that this interpretation of intent was erroneous. *Tison*, 107 S. Ct. at 1684.

<sup>52</sup> 107 S. Ct. 1182 (1986).

<sup>53</sup> See *Tison*, 107 S. Ct. at 1678. Justice O'Connor delivered the opinion for the majority in which Chief Justice Rehnquist, and Justices White, Powell, and Scalia joined. Justice Brennan filed a dissenting opinion in which Justice Marshall joined and in which Justices Blackmun and Stevens joined in part.

<sup>54</sup> *Id.* at 1688.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

a sharply critical dissenting opinion, argued that the majority's test not only contravened precedent, state legislative and sentencing trends, and constitutional principles of proportionality, but also clouded the already unclear issue of when the death penalty applies to a particular set of facts.<sup>57</sup>

The *Tison* Court, when compared with *Enmund*, has created a new standard for determining when death is a permissible sanction for a person convicted under a felony murder statute. States may now impose capital punishment on individuals who do not intend to kill, so long as that individual substantially participated in the underlying felony and manifested a reckless indifference to human life. Under *Tison*, the intentional actor and the recklessly indifferent actor may receive the same punishment. The *Tison* Court's reasoning in support of the new standard, however, is faulty. The Court relied on state and judicial responses to felony murder where intent is absent; yet, upon closer examination, the trend in state legislatures and courts is to decline imposing the death penalty on an individual who did not kill or intend to take life. Finally, when the *Tison* reckless indifference test is analyzed in light of prior Supreme Court warnings against the arbitrariness of capital sentencing, the test must fail the eighth amendment's cruel and unusual prohibition.

The first section of this casenote will explore the historical developments of the eighth amendment<sup>58</sup> and the death penalty,<sup>59</sup> as well as common law and statutory approaches to the felony murder doctrine.<sup>60</sup> Section two will summarize the majority<sup>61</sup> and dissenting<sup>62</sup> opinions in *Tison v. Arizona* and the reasoning advanced in support of both positions. Section three of this casenote will criticize *Tison* in light of precedent, state and judicial sentencing trends, and constitutional principles of proportionality.<sup>63</sup> Finally, the fourth section will analyze the implications of the *Tison* decision on capital sentencing in the future.<sup>64</sup> This casenote will propose that, to acknowledge precedent and the states' responses to felony murder, and to inject some consistency in capital sentencing cases, the Court should abandon the *Tison*'s reckless indifference standard and return to the *Enmund* test.<sup>65</sup>

## I. BACKGROUND

### A. The Eighth Amendment

Courts have struggled with what constitutes "cruel and unusual punishment" under the eighth amendment.<sup>66</sup> The provision's elasticity perhaps is described best in Chief

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<sup>57</sup> See generally *id.* at 1688-1702 (Brennan, J., dissenting).

<sup>58</sup> See *infra* notes 66-73 and accompanying text.

<sup>59</sup> See *infra* notes 74-106 and accompanying text.

<sup>60</sup> See *infra* notes 107-62 and accompanying text.

<sup>61</sup> See *infra* notes 163-93 and accompanying text.

<sup>62</sup> See *infra* notes 196-234 and accompanying text.

<sup>63</sup> See *infra* notes 241-318 and accompanying text.

<sup>64</sup> See *infra* notes 319-25 and accompanying text.

<sup>65</sup> See *infra* notes 326-28 and accompanying text.

<sup>66</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (eighth amendment "has been interpreted in a flexible and dynamic manner"); *Furman v. Georgia*, 408 U.S. 238, 258 (1972) ("the Cruel and Unusual Punishment clause, . . . is not susceptible of precise definition") (Brennan, J., concurring); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) ("[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted").



Justice Warren's comments in the 1958 case of *Trop v. Dulles*: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>67</sup>

Although courts may agree that the precise meaning of "cruel and unusual punishment" is unclear, they dispute the purposes of the clause. As a result, several theories have been proffered. Some courts have claimed that the drafters included the amendment to prevent the government from imposing punishment disproportionate to the crime committed.<sup>68</sup> Others point out that the language suggests that the drafters sought to protect the criminal by outlawing sanctions that involve wanton and unnecessary infliction of pain.<sup>69</sup>

In light of the imprecision that has accompanied efforts to define the eighth amendment and its underlying purposes, the courts have fashioned guidelines in interpreting the meaning of the clause and distinguishing cruel and unusual punishment from permissible punishment. Some of these rules are mechanical. For example, courts have interpreted the provision to invalidate punishments deemed inhumane, barbarous, or torturous,<sup>70</sup> or punishment unknown at common law.<sup>71</sup> The Supreme Court though, in the last half century, has moved away from this technical inquiry and toward a more

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

<sup>67</sup> 356 U.S. 86, 101 (1958).

<sup>68</sup> See *Solem v. Helm*, 463 U.S. 277, 286-87 (1983) (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)). See also *O'Neil v. Vermont*, 144 U.S. 323 (1892), where Justice Field, dissenting, wrote: "The inhibition [of the eighth amendment] is directed, . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339-40. (Field, J., dissenting).

The Supreme Court, in a decision made eighty-five years after *O'Neil*, employed the logic of Justice Field to reverse the capital sentence of a defendant convicted of rape. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>69</sup> See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("primary concern of drafters was to proscribe torture") (citing Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969)); *Gregg*, 428 U.S. at 173 (punishment must not involve wanton infliction of pain).

<sup>70</sup> See *Clappier v. Flynn*, 605 F.2d 519, 533 (10th Cir. 1979) (cruel and unusual means something inhuman and barbarous); *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967) ("cruel and unusual conduct was aimed at preventing a recurrence of torture and barbarous punishments"); *Bläck v. United States*, 269 F.2d 38, 43 (9th Cir. 1959) (eighth amendment prevents inhuman and barbarous punishment); *Mayberry v. Robinson*, 427 F. Supp. 297, 310 (M.D. Pa. 1977) (cruel and unusual is inhuman and barbarous treatment). For examples of punishments that courts have considered to be barbarous or torturous, see *O'Neil v. Vermont*, 144 U.S. 323, 363 (1892) (Field, J., dissenting) (use of the rack, thumbscrews invalid); *State v. Evans*, 73 Idaho 50, 57-58, 245 P.2d 788, 792 (1952) ("pillory, burning at stake, breaking on the wheel, drawing and quartering and the like"); *King v. State*, 75 Okla. Crim. 210, 215, 130 P.2d 105, 108 (Okla. Crim. App. 1942) (whipping post, dismemberment, mutilation) (quoting *Ellis v. State*, 54 Okla. Crim. 295, 298, 19 P.2d 972, 974 (Okla. Crim. App. 1933)).

<sup>71</sup> See *In re Pinaire*, 46 F. Supp. 113, 113 (N.D. Tex. 1942) (cruel and unusual prohibition implies some punishment unknown at common law). For judicial interpretation of state constitutions forbidding cruel and unusual punishment see *People ex rel Bradley v. Illinois State Reformatory*, 148 Ill. 413, 421, 36 N.E. 76, 79 (1894) (precludes cruel and degrading sanctions or punishments not known at common law); *Weber v. Commonwealth*, 303 Ky. 56, 63, 196 S.W.2d 465, 469 (1946) (cruel and unusual applies to punishments unknown at common law).

conceptual analysis. Under this approach, public attitudes<sup>72</sup> and whether a sanction accords with or is degrading to human dignity<sup>73</sup> measure the constitutionality of a particular punishment.

### B. *The Death Penalty*

Although the death penalty predates the eighth amendment, it remains one of the most controversial issues of eighth amendment jurisprudence. Capital punishment appeared as an acceptable means of punishment in colonial America as early as 1636.<sup>74</sup> By the time the states ratified the Constitution in 1789, states commonly used death as a penalty for criminal offenses.<sup>75</sup>

In 1869 in *Wilkerson v. Utah*, one of the earliest eighth amendment cases the Supreme Court considered, the Court tacitly approved the death penalty's constitutionality.<sup>76</sup> The *Wilkerson* Court concluded that the Constitution permitted a public shooting as a means of execution.<sup>77</sup> After commenting that the prisoner's counsel did not object to death in itself as cruel and unusual, but rather the means of inflicting death,<sup>78</sup> the *Wilkerson* Court further stated that the category of punishments prohibited by the eighth amendment did not include death by public shooting.<sup>79</sup>

At other times, the Court has gone beyond tacit approval and has expressly sanctioned the death penalty's constitutionality. In 1890 in *In re Kemmler*, the Court addressed the issue of whether electrocution constituted cruel and unusual punishment under the fourteenth amendment.<sup>80</sup> The Court held electrocution to be a permissible means of imposing death, carefully distinguishing between the penalty itself and its implementation.<sup>81</sup> Chief Justice Fuller wrote in *Kemmler* that the eighth amendment impliedly encompassed "something more than the mere extinguishment of life."<sup>82</sup> Fifty years later,

<sup>72</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 332 (1972) (Marshall, J., concurring) (punishment "may be invalid if popular sentiment abhors it").

<sup>73</sup> See, e.g., *Gregg*, 428 U.S. at 173 (penalty must accord with dignity of man) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)); *Furman*, 408 U.S. at 281 (Brennan, J., concurring) (severity of punishment must not be degrading to human dignity); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (eighth amendment "must draw its meaning from the evolving standards of decency").

<sup>74</sup> See *Furman*, 408 U.S. at 335 (Marshall, J., concurring) (citing Hookins, *The Capitall Lawes of New-England*, HARV. L. SCI. BULL. 10-11 (Feb. 1956)).

<sup>75</sup> *Gregg*, 428 U.S. at 177.

<sup>76</sup> 99 U.S. 130, 134-35 (1878).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 136-37.

<sup>79</sup> *Id.* at 134-35. The *Wilkerson* Court stated:

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.

*Id.*

<sup>80</sup> 136 U.S. 436, 446 (1890). The petitioners presented the issue under the fourteenth amendment because at that time, the eighth amendment applied only to the federal government. Not until the 1960 case of *Robinson v. California*, 370 U.S. 660 (1962), did the Supreme Court hold the eighth amendment applicable to the states.

<sup>81</sup> *Kemmler*, 136 U.S. at 447.

<sup>82</sup> *Id.* Chief Justice Fuller wrote: "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*

in the 1940 case of *Louisiana ex rel. Francis v. Resweber*,<sup>85</sup> the Court again focused on the mode of execution; the Court never questioned the validity of the death penalty itself.<sup>84</sup>

A 1972 case provided the Supreme Court with an excellent opportunity to assess the death penalty's constitutionality as a punishment, apart from the means used to inflict death; yet the Court balked at the chance to speak as a coherent whole. In the landmark case of *Furman v. Georgia*,<sup>85</sup> the Court considered the validity of three state capital punishment statutes. The Court also addressed the claim that the death penalty, in and of itself, constituted cruel and unusual punishment and thereby violated the eighth amendment.<sup>86</sup> The *Furman* Court never resolved the issue of the death penalty's constitutionality. Two justices found the death penalty unconstitutional on its face;<sup>87</sup> four justices reached the opposite result;<sup>88</sup> and three justices, though declaring the statutes before the Court unconstitutional, left open the question of whether death was ever an appropriate punishment.<sup>89</sup>

Four years after *Furman*, the Court again confronted the issue of the death penalty's constitutionality. This time, in *Gregg v. Georgia*,<sup>90</sup> the Court issued a much less ambiguous opinion than in *Furman*. In a plurality opinion written by Justices Stewart, Powell, and Stevens, the Court declared that the death penalty was not *per se* unconstitutional.<sup>91</sup> Although the Court has in subsequent cases held that the death penalty's imposition violates the eighth amendment in certain circumstances,<sup>92</sup> the proposition that capital punishment is not, in and of itself, unconstitutional remains valid constitutional law.

The *Gregg* Court provided several justifications for its conclusion that the death penalty did not offend the notion of cruel and unusual punishment. First, the Court recognized that capital punishment had long been applied in both the United Kingdom and the United States.<sup>93</sup> Second, the Court noted that the post-*Furman* legislative response to capital punishment indicated that society at large regarded death as an appropriate response to certain crimes.<sup>94</sup> Third, the infrequency of juries' imposing the death

<sup>85</sup> 329 U.S. 459 (1947). In *Resweber*, the Court addressed whether a second execution, needed because a mechanical failure on the first attempt did not kill the defendant, constituted cruel and unusual punishment. In a five to four decision, the Court held that it did not. *Id.* at 465-66.

<sup>84</sup> *Id.* at 464. Justice Reed, writing for a plurality, asserted: "[t]he cruelty against which the Constitution protects . . . is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.*

<sup>85</sup> 408 U.S. 238 (1972) (per curiam).

<sup>86</sup> *Id.* at 240 (Douglas, J., concurring).

<sup>87</sup> *Id.* at 305 (Brennan, J., concurring); *id.* at 369-70 (Marshall, J., concurring).

<sup>88</sup> *Id.* at 375 (Burger, C.J., dissenting); *id.* at 408 n.6 (Blackmun, J., dissenting); *id.* at 419 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

<sup>89</sup> *Id.* at 257 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring).

<sup>90</sup> 428 U.S. 153 (1976).

<sup>91</sup> *Id.* at 187. Justices Stevens, Stewart, and Powell stated: "[w]e hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.*

<sup>92</sup> See *supra* notes 5-10 and accompanying text for a discussion of limitations placed on the imposition of the death penalty.

<sup>93</sup> *Gregg*, 428 U.S. at 176. The *Gregg* Court stated that "[t]he common-law rule imposed a mandatory death sentence on all convicted murderers." *Id.* at 176-77 (citing *McCautha v. California*, 402 U.S. 183, 197-98 (1971)).

<sup>94</sup> *Id.* at 179, 183. In *Gregg*, the Court cited to at least 35 states that had, since the *Furman*

penalty on convicted defendants, the Court commented, further strengthened the proposition that death deserved application in a small number of extreme cases.<sup>95</sup> Finally, the *Gregg* Court concluded that the death penalty served a penological purpose.<sup>96</sup>

The *Gregg* Court explained that capital punishment furthered two<sup>97</sup> important social goals: retribution and deterrence of future capital crimes.<sup>98</sup> With respect to retribution, the *Gregg* Court noted that the death penalty, in part, expressed society's outrage at certain conduct.<sup>99</sup> Although the Court recognized that retribution was not the primary goal of the criminal justice system, it did acknowledge that capital punishment was necessary to prevent individuals from resorting to self-help means of achieving justice.<sup>100</sup> Deterrence as a goal of capital punishment has generated far more controversy than retribution because of the ambiguous statistics supporting the punishment's actual deterrent value.<sup>101</sup> Despite the lack of empirical evidence on the number of felons deterred from committing murder, the Supreme Court still acknowledges deterrence as one of the death penalty's two primary purposes.<sup>102</sup>

decision, enacted statutes providing for the death penalty in certain circumstances. *Id.* at 179-80. Moreover, Congress even had declared death to be an appropriate response to aircraft piracy resulting in death. *Id.* at 180 (citing Antihijacking Act of 1974, 49 U.S.C. §§ 1472(i), (n) (1970 & Supp. IV)). *But see id.* at 232 (Marshall, J., dissenting) for an argument claiming that the passage of such statutes in the 35 states is not conclusive as to the general public's opinion.

<sup>95</sup> *Id.* at 182 (citing *Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting)). In *Furman*, Chief Justice Burger stated:

The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty . . . . Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty.

408 U.S. at 388 (Burger, C.J., dissenting).

<sup>96</sup> See generally *Gregg*, 428 U.S. at 182-87.

<sup>97</sup> *Id.* at 183. Some advocates have advanced a third purpose for the death penalty. The death penalty, under this approach, is thought to incapacitate dangerous criminals and prevent crimes that they might otherwise commit in the future. *Id.* at 183 n.28 (citing *People v. Anderson*, 6 Cal. 3d 628, 651, 493 P.2d 880, 896, 100 Cal. Rptr. 152, 167-68, cert. denied, 406 U.S. 958 (1972); *Commonwealth v. O'Neal*, 369 Mass. 242, 258-59, 339 N.E.2d 676, 685-86 (1975)).

<sup>98</sup> *Gregg*, 428 U.S. at 183.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* The *Gregg* Court stated that capital punishment was "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.*

<sup>101</sup> *Gregg*, 428 U.S. at 184 & n.31 (citing Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (June 1975)). The *Gregg* plurality concluded that "[t]he results [evaluating the worth of the death penalty as a deterrent to crime] simply have been inconclusive." *Gregg*, 428 U.S. at 185. The *Gregg* plurality continued, "although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* (footnote omitted); see also *Furman v. Georgia*, 408 U.S. at 347 (Marshall, J., concurring) ("This [not knowing how many have refrained from murder because of the fear of death] is the nub of the problem and it is exacerbated by the paucity of useful data.").

<sup>102</sup> See *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (citing *Gregg*, 428 U.S. at 183). In fact, as the *Gregg* Court pointed out:

We may . . . assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contem-

In light of the eighth amendment's purposes and the death penalty's goals, the Court has placed several limitations on the death penalty in an effort to define the parameters of what constitutes cruel and unusual punishment. First, that which is torturous or amounts to a lingering death is clearly unconstitutional.<sup>103</sup> Second, a sentencer violates the eighth amendment in imposing death where death is disproportionate to the crime committed.<sup>104</sup> A third restriction on capital punishment states that the sentencer must have some discretion in imposing death, or, in other words, mandatory capital sentences are cruel and unusual.<sup>105</sup> Fourth, and finally, where a sentencer administers the death penalty in a freakish or arbitrary manner, the Constitution demands the capital sentence's vacation.<sup>106</sup> A felony murder case, where the defendant sentenced to death did not actually kill, but rather participated in a felony that caused another's death, further tests the eighth amendment's boundaries.

### C. *The Felony Murder Doctrine*

The felony murder rule has its origins in the English common law.<sup>107</sup> Simply stated, the common law doctrine held that one who causes the death of another during the commission of a felony may be charged with murder.<sup>108</sup> As the number of crimes constituting felonies increased, the courts alleviated the rule's harshness by requiring that the felony be violent<sup>109</sup> and that the death be a natural and probable consequence

plated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some other categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

428 U.S. at 185-86 (footnote omitted).

<sup>103</sup> See *supra* note 70.

<sup>104</sup> See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 n.4 (1977) (death is disproportionate for the crime of rape and therefore violates the eighth amendment's cruel and unusual provision); see also *supra* note 7.

<sup>105</sup> See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (Louisiana's mandatory death sentence statute unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (North Carolina's mandatory capital sentence violates eighth and fourteenth amendments).

<sup>106</sup> See, e.g., *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (eighth amendment satisfied by eliminating total arbitrariness and capriciousness in imposition of death); *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) (eighth amendment is supposed "to require legislatures to write penal laws that are even-handed, nonselective and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups"). Justice Brennan, concurring in the opinion, said: "[i]ndeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." *Furman*, 408 U.S. at 274 (Brennan, J., concurring). Justice Stewart, also concurring, stated that "[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310 (Stewart, J., concurring); see also *Moore v. Balkcom*, 716 F.2d 1511, 1520 (11th Cir. 1983) ("[The] cases have emphasized that discretion need not be eliminated from capital punishment mechanisms; rather, the Supreme Court has focused in channeling discretion to minimize the risk of arbitrary decision making.").

<sup>107</sup> See *Morris, The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956) (citing *Lord Dacres' Case*, 72 Eng. Rep. 458 (K.B. 1525)).

<sup>108</sup> LAFAYE & SCOTT, *CRIMINAL LAW* § 71, at 545 (1972).

<sup>109</sup> *Id.* at 545-56.

of the offense.<sup>110</sup> The United States felony murder rule developed from this English common law.<sup>111</sup>

In the United States, common law provided that murder included a death resulting from the commission of a felony.<sup>112</sup> American courts, like their counterparts in England, restricted the scope of the felony murder doctrine by limiting its application. For example, some jurisdictions required that the felony be inherently dangerous.<sup>113</sup> Additionally, some states have held that the felony had to be recognizable at common law.<sup>114</sup> Still another method some courts employed was that the felony in question must be *malum in se* rather than *malum prohibitum*.<sup>115</sup>

The felony murder rule requires that the homicide occur during the commission of a felony.<sup>116</sup> Thus, the rule is inoperable in cases where there is a break in the chain of events leading from the initial felony to the murder.<sup>117</sup> The commission of the felony requirement is satisfied where the homicide and felony are part of the same transaction.<sup>118</sup>

<sup>110</sup> *Id.* (citing *Regina v. Horsey*, 176 Eng. Rep. 129 (Assiz. 1862)).

<sup>111</sup> *See, e.g.*, *State v. Foster*, 293 N.C. 674, 687, 239 S.E.2d 449, 458 (1977) ("felony murder" is an abbreviation for a homicide committed in the commission of or attempt to commit a felony . . . 'which is inherently dangerous to human life or foreseeably dangerous to human life') (quoting *State v. Williams*, 284 N.C. 67, 72, 199 S.E.2d 409, 412 (1973)).

<sup>112</sup> *See Jenkins v. State*, 230 A.2d 262, 267 (Del. 1967), *reh'g denied*, 396 U.S. 995 (1968); *Commonwealth v. Guida*, 341 Pa. 305, 308, 19 A.2d 98, 100 (1941).

<sup>113</sup> *See, e.g.*, *People v. Washington*, 62 Cal. 2d 777, 780, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) (felony murder ascribes malice to "felon who kills in perpetration of an inherently dangerous felony"); *People v. Pavlic*, 227 Mich. 562, 565, 199 N.W. 373, 374 (1924) (sale of liquor, although a felony, "is an act not itself directly and naturally dangerous to life").

<sup>114</sup> *See, e.g., Pavlic*, 227 Mich. at 565, 568, 199 N.W. at 374-75 (1924) (selling liquor is a statutory felony but not a common law felony and therefore conviction for manslaughter could not stand); *Commonwealth v. Exler*, 243 Pa. 155, 156-65, 89 A. 968, 969-71 (1914) (shock resulting in death from statutory rape not murder because statutory rape not a common law felony).

<sup>115</sup> *See LAFAVE & SCOTT, supra* note 108, § 71, at 547 (citing *Reddick v. Commonwealth*, 17 Ky. L. Rptr. 1020, 33 S.W. 416 (1895); *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924)).

*Malum in se* is "[a] wrong in itself; an act . . . involving illegality from the very nature of the transaction . . ." BLACK'S LAW DICTIONARY 865 (5th ed. 1979).

*Malum prohibitum* is "[a] wrong prohibited; . . . an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law." *Id.*

<sup>116</sup> *See, e.g.*, *State v. Lashley*, 233 Kan. 620, 631, 664 P.2d 1358, 1369 (1983) ("[t]o invoke the felony murder rule, there must be proof that a homicide was committed in the perpetration of or in attempt to perpetrate a felony and that the collateral felony was one inherently dangerous to human life") (citing *State v. Smith*, 225 Kan. 796, 799-800, 594 P.2d 218, 221 (1979)); *Payne v. State*, 81 Nev. 503, 505, 406 P.2d 922, 924 (1965) ("felony murder rule . . . is that any homicide committed while perpetrating or attempting a felony is first degree murder").

<sup>117</sup> *See, e.g.*, *People v. Walsh*, 262 N.Y. 140, 148, 186 N.E. 422, 424 (1933) ("where there is no reasonable doubt of a complete intervening desistance from the crime, as by the abandonment of the loot and running away, the subsequent homicide is not murder without proof of deliberation and intent") (citation omitted).

<sup>118</sup> *See People v. Goddard*, 135 Mich. App. 128, 136, 352 N.W.2d 367, 371 (1984) ("homicide must be incident to the felony and associated with it as one of its hazards"); *Bassett v. Commonwealth*, 222 Va. 844, 855-56, 284 S.E.2d 844, 851-52 (1981) (defendant properly convicted of felony murder where murder committed at a location different from where robbery occurred and fifteen to twenty minutes later) (citing *Briley v. Commonwealth*, 221 Va. 532, 543-44, 273 S.E.2d 48, 55-56 (1980), *cert. denied*, 456 U.S. 938 (1982)); *cf. Commonwealth v. Almeida*, 362 Pa. 596, 602-03, 68 A.2d 595, 599 (1949) (killing can take place during escape but need not occur at same time as felony), *cert. denied*, 339 U.S. 924 (1950).

In addition to demonstrating a temporal relationship between the underlying felony and the murder, a state, to invoke the felony murder doctrine, must establish the defendant's frame of mind. Unlike the common law, which required intent as a necessary component of a crime,<sup>119</sup> felony murder's elements do not include an intent to take a person's life.<sup>120</sup> To convict a person of felony murder, a state is obliged to prove only that the defendant intended to commit the felony that accompanied the homicide. In essence, the felony murder rule transfers the defendant's intent from the underlying felony to the murder.<sup>121</sup>

Application of the felony murder rule affects all who participated in the underlying felony. The rule operates to make each felon, including the nontriggerperson, criminally liable for the victim's death.<sup>122</sup> In states authorizing the death penalty for felony murder, such authorization implicates the eighth amendment's prohibition against cruel and unusual punishment if the defendant did not in fact kill the victim. Prior to *Enmund*, the Supreme Court had not directly addressed the constitutionality of imposing death on those persons convicted of felony murder who did not kill, attempt to kill, or intend to kill.

In the 1978 case of *Lockett v. Ohio*, the Supreme Court considered the constitutionality of the Ohio death penalty statute, which limited the sentencer's discretion in weighing the circumstances of the crime and the offender's record and character as mitigating factors.<sup>123</sup> The Supreme Court declared the statute unconstitutional and reversed the

<sup>119</sup> See *State v. Tabasso Homes, Inc.*, 42 Del. 110, 121, 28 A.2d 248, 254 (1942); *State v. O'Neil*, 147 Iowa 513, 519, 126 N.W. 454, 456 (1910); *Commonwealth v. Mixer*, 207 Mass. 141, 142, 93 N.E. 249, 249 (1910); *State v. Ryan*, 70 N.H. 196, 196-97, 46 A. 49, 49 (1900) (quoting *State v. Cornish*, 66 N.H. 329, 330, 21 A. 180, 181 (1890)).

<sup>120</sup> See, e.g., *State v. Ferrari*, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975) (murder resulting from burglary is murder in first degree whether willful and premeditated or only accidental); *People v. Chapman*, 261 Cal. App. 2d 149, 165, 67 Cal. Rptr. 601, 611 (1968) ("A killing in the perpetration of a robbery is murder of the first degree, whether willful and premeditated or only accidental and whether or not it is planned as part of the robbery.") (citations omitted); *People v. Ulsh*, 211 Cal. App. 2d 258, 272, 27 Cal. Rptr. 408, 417 (1962) (killing in perpetration of robbery is first degree murder, whether it was intentional or accidental).

<sup>121</sup> See, e.g., *People v. William M.T.*, 82 Misc. 2d 308, 309, 369 N.Y.S.2d 333, 335 (Nassau Cty Ct. 1975) (felony murder is unintentional killing where the element of evil intent is transferred from underlying felony to the killing).

<sup>122</sup> See *People v. Medina*, 41 Cal. App. 3d 438, 452, 116 Cal. Rptr. 133, 143 (1974) (accomplice guilty of homicide, just like actual killer); *Pope v. State*, 84 Fla. 428, 441, 94 So. 865, 870 (1922) (one who was present and aided and abetted the felonious act is to be punished like the one who committed the felony); *People v. Jeffrey*, 94 Ill. App. 3d 455, 460, 418 N.E.2d 880, 885-86 (1981) (defendant can be convicted of felony murder even though he did not intend to kill or kill victim); *Mumford v. State*, 19 Md. App. 640, 643, 313 A.2d 563, 566 (1974) (each and any accomplice engaged in felony is responsible for murder). For a list of state felony murder statutes, see Note, *The Felony Murder Rule and the Death Penalty: Enmund v. Florida — Overreaching by the Supreme Court?* 19 NEW ENG. L. REV. 255, 259 n.23 (1983). For a discussion of agency and proximate cause theories of criminal culpability, see *id.* at 260-61.

For a discussion of accessory law and its application to the felony murder rule, see generally Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 44-47 (1979).

<sup>123</sup> 438 U.S. 586, 589 (1978). In *Lockett*, Sandra Lockett and three others planned to rob a pawn shop. *Id.* at 590. While Lockett sat in the getaway car with the engine running, her two cofelons robbed and killed the storeowner. *Id.* As a result of Lockett's participation in the robbery and murder, Ohio charged Lockett with and convicted her of aggravated murder under Ohio law and

petitioner's death sentence.<sup>124</sup> One issue the Court did not address as a coherent body was whether death was a disproportionate penalty for a felony murder committed by a nontriggerperson who did not attempt or intend to kill.<sup>125</sup> Several Justices, however, commented on this question. Justice Blackmun, concurring in the opinion, stated in a footnote that the eighth amendment should not require that the defendant actually intend to kill because other means existed to measure culpability under the cruel and unusual clause.<sup>126</sup> Justice White, dissenting in part, adopted the opposite position, asserting that the state could not constitutionally impose the death penalty without a finding that the defendant had a conscious purpose to kill.<sup>127</sup> Thus, although *Lockett* raised the issue of the death penalty's constitutionality in the felony murder context, the Court failed to articulate a sound means of analysis in dealing with the issue. Thus, the felony murder doctrine has significant consequences for the potential felon. So long as a homicide occurs during the commission of a felony, an individual may be held responsible for murder whether or not he or she was the triggerperson. Imposing death on one who did not kill, attempt to kill, or intend to kill, but who was convicted of murder under a state's felony murder statute, raises important constitutional issues. In *Lockett*, individual Justices commented on these issues. Not until the 1982 case of *Enmund v. Florida*<sup>128</sup> did the Supreme Court address the constitutionality of sentencing to death the nontriggerperson felon who lacked an intent to kill.

#### D. *Enmund v. Florida and its Progeny*

On April 1, 1975, Sampson and Jeannette Armstrong entered the central Florida home of Thomas and Eunice Kersey, robbing and killing them.<sup>129</sup> Earl Enmund, seated in a getaway car by the side of the road, waited to help his cofelons escape.<sup>130</sup> Florida

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sentenced her to death. *Id.* at 593-94. Part of her defense rested on her belief that her co-defendants were simply going to the store to pawn a ring. *Id.* at 592.

The State's case against *Lockett* depended upon the testimony of Al Parker, a cofelon and the one who admittedly shot and killed the pawnshop owner. *Id.* at 589. According to Parker's description of *Lockett's* role, *Lockett* herself first suggested the others could get some money by robbing a grocery store and a nearby furniture store. *Id.* at 590. When this plan fell apart, *Lockett's* brother suggested robbing a pawnshop. *Id.* Since *Lockett* knew the owner, she would not be the one to enter the store. *Id.* *Lockett* did, however, guide the others to the store and waited in the car while they committed the robbery. *Id.*

<sup>124</sup> *Id.* at 606. Chief Justice Burger, in delivering the opinion of the Court, declared the Ohio statute unconstitutional because it did not "permit the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases." *Id.*

<sup>125</sup> *Id.* at 609 n.16.

<sup>126</sup> *Id.* at 614-15 n.2 (Blackmun, J., concurring). Justice Blackmun wrote that the eighth amendment should not require a finding of intent to kill, for such a rule "is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of *mens rea*." *Id.* (Blackmun, J., concurring).

<sup>127</sup> *Id.* at 628 (White, J., concurring in the judgment).

<sup>128</sup> 458 U.S. 782 (1982).

<sup>129</sup> *Id.* at 783-84.

<sup>130</sup> *Id.* at 784-86. The Florida Supreme Court concluded that the only reasonable inference that could be drawn from the evidence was that Enmund helped the robbers escape. *Enmund v. State*, 399 So.2d 1362, 1370 (Fla. 1981). The Florida Supreme Court wrote: "[T]he only evidence of the degree of his [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kersey's money." *Id.*



charged all three<sup>131</sup> with first degree murder and robbery. Juries found both Enmund and Sampson Armstrong guilty of the two counts each of first degree murder and recommended death for both defendants.<sup>132</sup> The Florida Supreme Court affirmed Enmund's conviction and sentence.<sup>133</sup> The United States Supreme Court granted Enmund's petition for certiorari<sup>134</sup> to determine the issue of whether death is a constitutionally permissible sentence for one who did not kill, attempt to kill, or intend to kill.<sup>135</sup>

In *Enmund v. Florida*, the Supreme Court held that the eighth amendment precluded the imposition of the death penalty on a person who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."<sup>136</sup> The Court reached this conclusion by adopting an approach that used as many objective factors as the record before the Court would allow.<sup>137</sup> Among other factors, the *Enmund* Court considered legislative judgments and jury sentencing decisions before offering its own judgment.<sup>138</sup>

The *Enmund* Court's survey of felony murder and sentencing statutes revealed that only eight jurisdictions allowed the death penalty solely because the defendant participated in a robbery during which another robber killed.<sup>139</sup> Nine additional states, the Court found, permitted an execution absent a defendant's intent to kill if sufficient aggravating circumstances existed.<sup>140</sup> In sum, the Court noted that only one third of American jurisdictions imposed capital sentences on felons who participated in a robbery where a homicide occurred.<sup>141</sup> Although the Court did not find unanimity among the states,<sup>142</sup> it concluded that such legislative responses to the situation where a defendant did not kill, attempt to kill, or intend to kill suggested a rejection of the death penalty

<sup>131</sup> The state tried Jeanette Armstrong separately and convicted her of two counts of second degree murder and one count of robbery; she received three consecutive life terms. *Enmund v. State*, 399 So.2d at 1371.

<sup>132</sup> *Enmund*, 458 U.S. at 785. The Florida murder statute at the time of the conviction read in pertinent part: "The unlawful killing of a human being, when . . . committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any robbery . . . shall be murder in the first degree and shall constitute a capital felony . . ." FLA. STAT. § 782.04 (1973) (reprinted in *Enmund*, 399 So.2d at 1370).

The Supreme Court stated that the trial court, in its required written findings, found no mitigating factors and four aggravating factors. *Enmund*, 458 U.S. at 785. These aggravating factors included "defendant was engaged in or was an accomplice in the commission of an armed robbery, FLA. STAT. § 921.141(5)(d) (1981); the felony was committed for pecuniary gain, § 921.141(5)(f); it was especially heinous, atrocious, or cruel, § 921.141(5)(h); and Enmund was previously convicted of a felony involving the use or threat of violence, § 921.141(5)(b)." *Id.* (citing 399 So.2d 362, 371-72 (Fla. 1981)). The Florida Supreme Court treated the factors of robbery and pecuniary gain as one and accepted the prior conviction of a violent felony as an aggravating factor. It rejected the finding that the felony was cruel, heinous or atrocious. *Enmund*, 399 So.2d at 1373.

<sup>133</sup> *Enmund*, 399 So.2d at 1373.

<sup>134</sup> 454 U.S. 939 (1981).

<sup>135</sup> *Enmund*, 458 U.S. at 787.

<sup>136</sup> *Id.* at 797.

<sup>137</sup> *Id.* at 788.

<sup>138</sup> *Id.* at 788-89.

<sup>139</sup> *Id.* at 789.

<sup>140</sup> *Id.* at 791.

<sup>141</sup> *Id.* at 792.

<sup>142</sup> *Id.* at 792-93 (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977)).

in such cases.<sup>143</sup> In its examination of jury sentencing in felony murder cases,<sup>144</sup> the *Enmund* Court found convincing evidence that juries repudiated death as a punishment for such criminals as Earl Enmund.<sup>145</sup>

The Court next compared death as a penalty for robbery in the abstract to the robbery that Enmund committed. In the abstract, the Court commented, robbery was dissimilar to murder, and hence, death was an excessive punishment for the robber.<sup>146</sup> In Enmund's case in particular, the Court stressed that because Enmund did not kill or intend to kill, he deserved different treatment than the intentional killer.<sup>147</sup> Additionally, the Court concluded that the eighth amendment prohibited Florida from attributing to Enmund the Armstrongs' culpability.<sup>148</sup> Therefore, the Court held that capital punishment for Enmund constituted cruel and unusual punishment.<sup>149</sup>

Finally, the Court examined whether the death penalty, when applied to one in Enmund's position, advanced capital punishment's retributive or deterrent goals.<sup>150</sup> The Court was unconvinced that putting Enmund to death for two killings that he did not commit or intend to commit contributed to the retributory goals because retribution depended on culpability and intention, and Enmund did not intend either of the killings.<sup>151</sup> Moreover, the Court expressed its doubt that capital punishment would deter those who never intended to take another's life.<sup>152</sup>

Four years later, in *Cabana v. Bullock*, the Supreme Court again faced a case in which a nontriggerperson felon was sentenced to death.<sup>153</sup> In *Cabana*, Mississippi convicted Crawford Bullock of capital murder under its felony murder statute.<sup>154</sup> Although *Cabana*

<sup>143</sup> *Id.* at 793.

<sup>144</sup> The *Enmund* Court relied on the plurality opinion in *Gregg v. Georgia*, which stated: "[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." *Id.* at 794 (citing *Coker v. Georgia*, 433 U.S. at 596, quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)).

<sup>145</sup> *Id.* at 794. The *Enmund* Court asserted that "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as [Earl Enmund's]." *Id.* In all reported appellate decisions since 1954 where a defendant was executed for homicide, only 6 of 362 were nontriggerpersons and their executions all occurred in 1955. *Id.* at 794-95.

The nature of the nation's death row population also indicates that juries have rejected the death penalty for the defendant who did not kill, was not present at the killing, and did not participate or plan to murder the victim. *Id.* at 795 (citing Appendix E to Brief for Petitioner; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. (Oct. 20, 1981)). Of the 739 inmates under sentences of death for whom sufficient information is available, 41 did not participate in the killings; of the 40 of these for whom information is available, 16 were not present and of these, only 3 were sentenced to die despite no finding that they participated in a scheme intended to kill the victim. *Enmund*, 458 U.S. at 795.

<sup>146</sup> *Id.* at 797 (quoting *Gregg v. Georgia*, 428 U.S. at 184). The Court noted that by definition, robbery did not include the death of or serious injury to another. *Id.* (quoting *Coker v. Georgia*, 433 U.S. at 598). According to the majority, victims of murders and robberies were clearly distinguishable because for the former, their lives were over, a fact untrue for the latter. *Id.*

<sup>147</sup> *Id.* at 798.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See *id.* at 798-801.

<sup>151</sup> *Id.* at 801.

<sup>152</sup> *Id.* at 798-99.

<sup>153</sup> 106 S. Ct. 689 (1986).

<sup>154</sup> *Id.* at 693-94.

primarily involved the federal court's role in an *Enmund*-based appeal,<sup>155</sup> the Court in dicta ended any speculation as to *Enmund*'s scope. The *Cabana* Court, in unequivocal terms, asserted that *Enmund* imposed the categorical rule that a state could not remain faithful to the eighth amendment if it executed a person who had not killed, attempted to kill, or intended to kill.<sup>156</sup>

Since 1982, federal courts have consistently followed the *Enmund* doctrine. Thus, federal courts have required a finding that a defendant killed, attempted to kill, or intended to kill before they would affirm a death sentence.<sup>157</sup> Although the *Enmund* standard would permit a court to order an execution if a nontriggerperson intended that lethal force would be employed,<sup>158</sup> federal courts have not affirmed death sentences solely on this ground.<sup>159</sup>

*Enmund* has also governed state proceedings. Thus, state trial courts must also find the requisite intent to kill before imposing a capital sentence.<sup>160</sup> Although in many cases, state appellate courts have affirmed death sentences,<sup>161</sup> states have used the *Enmund* standard to vacate a death sentence where no finding was made that the defendant killed, attempted to kill, or intended to kill.<sup>162</sup>

<sup>155</sup> *Id.* at 693, 699-700. The Court concluded that the federal habeas court must examine the entire state court record in order to determine whether the *Enmund* finding had been made. *See id.* at 697. Where the state courts have failed to make any finding regarding the *Enmund* criteria, the Supreme Court held that the state may either vacate the death penalty and impose a sentence of life imprisonment or the state may make a determination, from its own judicial system, that the defendant killed, attempted to kill, or intended to kill. *Id.* at 699-700.

<sup>156</sup> *Id.* at 697.

<sup>157</sup> *See, e.g.,* McKenzie v. Risley, 801 F.2d 1519, 1530 (9th Cir. 1986) (*Enmund* indicated finding of "intent may be a condition precedent to the imposition of the death penalty"); Roach v. Martin, 757 F.2d 1463, 1483 (4th Cir. 1985) (death sentence valid under *Enmund* because record indicates that Roach killed or contemplated that a killing take place); Hitchcock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984) ("A defendant cannot be sentenced to death for participating in a felony with no intent to participate in a murder.") (citation omitted); Chaney v. Brown, 730 F.2d 1334, 1356 n.29 (10th Cir.) ("Before a death penalty can be imposed it must be proven beyond a reasonable doubt that [the defendant] killed or attempted to kill the victim or himself intended or contemplated that the victim's life would be taken.") (citing *Enmund*, 458 U.S. at 801), *cert. denied*, 469 U.S. 1090 (1984); Reddix v. Thigpen, 728 F.2d 705, 708 (5th Cir.) ("The eighth amendment, . . . allows the state to impose the death penalty only if it first proves that the defendant either participated directly in the killing or personally had an intent to commit murder"), *reh'g denied*, 732 F.2d 494 (5th Cir.), *cert. denied*, 469 U.S. 990 (1984).

<sup>158</sup> *Enmund*, 458 U.S. at 797.

<sup>159</sup> The petitioners in *Tison v. Arizona*, 107 S. Ct. 1676 (1987), for example, were "aware of no federal case allowing a death sentence to stand solely on the basis that a defendant anticipated that lethal force might be used or that lives might be taken." Brief for Petitioners at 26 (emphasis in original) (footnote omitted).

<sup>160</sup> *See, e.g.,* People v. Gawarel, 173 Cal. App. 3d 285, 297, 218 Cal. Rptr. 690, 695-96 (1985) (death penalty may be imposed only if the aider and abettor shared the perpetrator's intent to kill) (citing *Carlos v. Superior Court*, 35 Cal. 3d 131, 151, 672 P.2d 862, 197 Cal. Rptr. 79 (1984)); *Jackson v. State*, 502 So.2d 409, 413 (Fla. 1986) (for jury to recommend death sentence, it must first find that defendant killed, attempted to kill, or intended to kill); *State v. Peterson*, 287 S.C. 244, 248, 335 S.E.2d 800, 802 (1985) ("death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that killing take place or that lethal force be used").

<sup>161</sup> For example, see *infra* note 224 and accompanying text for the *Enmund* based challenges of Arizona death sentences.

<sup>162</sup> *See, e.g.,* Jones v. Thigpen, 555 F. Supp. 870, 877 (S.D. Miss. 1983) (no evidence that

II. *TISON V. ARIZONA*A. *Majority Opinion*

In a five to four decision, the Supreme Court held in *Tison v. Arizona* that, if a nontriggerperson substantially participates in a felony and shows reckless indifference to human life, then a state may impose death on him or her without running afoul of the eighth amendment.<sup>165</sup> The Court, finding that the Arizona courts already had established that Ricky and Raymond Tison were major participants in the felony murder,<sup>164</sup> vacated the judgments and remanded the case to the Arizona Supreme Court to determine if the Tisons showed reckless indifference to human life.<sup>165</sup> The Arizona Supreme Court vacated the Tisons' death sentences and remanded the case to the Arizona trial court; the Yuma County Superior Court of Arizona made the finding required by *Tison* and resentenced Ricky and Raymond Tison to death on November 20, 1987.<sup>166</sup>

The *Tison* Court looked to several factors in enunciating a substantial participation and reckless indifference standard. First, the Court concluded that the Tison brothers' actions fell between the two extremes to which *Enmund* spoke: the minor participant in a felony who has no intent to kill and the major felony participant who, intending to kill, does.<sup>167</sup> After factually distinguishing *Enmund*, the Court surveyed state legislative and judicial responses to capital sentencing and determined that public sentiment, as measured in the legislature and judiciary, supported a requirement of intent to kill prior to imposing the death penalty.<sup>168</sup> Finally, the Court compared reckless indifference with intent and found that an intent standard did not necessarily identify those criminals more deserving of the death penalty.<sup>169</sup>

The *Tison* Court began its analysis by juxtaposing the facts of the Tisons' case with the intent standard set out in *Enmund*. *Enmund*, the Court reasoned, spoke to two extremes: the minor participant in an armed robbery, away from the scene of the crime, who neither intended to kill nor had any murderous culpability; and the felony murderer who killed, attempted to kill, or intended to kill.<sup>170</sup> In the case of the former actor, the

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defendant killed, attempted to kill, or intended to kill the victim); *State v. Emery*, 141 Ariz. 549, 553, 688 P.2d 175, 179 (1984) (because record did not support finding that defendant killed victim, attempted to kill victim, or intended that his accomplice kill the victim, his capital sentence was reduced to life imprisonment).

<sup>165</sup> *Tison v. Arizona*, 107 S. Ct. 1676, 1688 (1987).

<sup>164</sup> *Id.* The Arizona Supreme Court in *Arizona v. Ricky Wayne Tison*, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981), quoted the trial court's finding which was that:

[n]either defendant's participation was relatively minor . . . . [T]he participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial . . . . At the moment of the firing, their participation may not have equalled that of Randy Greenawalt or Gary Tison, but their standing and watching them [sic] while armed themselves cannot be characterized as relatively minor participation.

And in *Arizona v. Ricky Wayne Tison*, 142 Ariz. 446, 690 P.2d 747, 749, the Arizona Supreme Court concluded that Ricky Tison "played an active part in the events that led to the murders."

<sup>165</sup> *Tison*, 107 S. Ct. at 1688.

<sup>166</sup> Telephone interview with Kathy Kempley, Deputy Clerk, Arizona Supreme Court (Jan. 11, 1988).

<sup>167</sup> *Tison*, 107 S. Ct. at 1684.

<sup>168</sup> *Id.* at 1685-86.

<sup>169</sup> *Id.* at 1687-88.

<sup>170</sup> *Id.* at 1684.

Court stated, capital punishment was a disproportionate penalty; for the latter, the death penalty was constitutionally valid.<sup>171</sup> The facts of the *Tisons*' case fell in between these two extremes.<sup>172</sup> Thus, the *Tison* Court stated that *Enmund* did not address the precise issue presented in *Tison v. Arizona* — whether the eighth amendment precluded the imposition of the death penalty where the defendant substantially participated in the felony and possessed a recklessly indifferent state of mind.<sup>173</sup> The *Tison* Court concluded that this new constitutional question required a judicial response.<sup>174</sup>

The *Tison* Court relied in part on state legislation in making its determination.<sup>175</sup> The majority surveyed the states that permit capital punishment and found that twenty-one jurisdictions authorized the death penalty where the defendant was a major actor in a felony in which he knew death was highly likely to occur even though the defendant did not intend to kill.<sup>176</sup> These statistics led the Court to conclude that society does not wholly reject capital punishment as excessive for a felony murderer who did not intend to kill.<sup>177</sup>

The *Tison* Court also considered state court sentencing in making its ruling.<sup>178</sup> The Court cited five cases to support its determination that an "apparent consensus" existed

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1685.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; see also *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (current judgment of state legislatures weighs heavily on side of rejecting death penalty as punishment for rape of adult woman); *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (society's endorsement of death penalty best indicated by the post-*Furman* legislative response).

<sup>176</sup> *Tison*, 107 S. Ct. at 1685-86. The majority categorized the 21 jurisdictions in the following manner:

1) Four states permit capital punishment in felony murder cases upon a showing of state of mind less than intent to kill such as recklessness or extreme indifference to human life. *Id.* at 1685 & n.5 (citing ARK. STAT. ANN. § 41-1501(1)(a)(1977 & Supp. 1985); DEL. CODE ANN. tit. 11, § 636 (a)(2), (b) (1979); ILL. REV. STAT. ch. 38, ¶¶ 9-1(a)(3), 9-1(b)(6) (1986); KY. REV. STAT. ANN. § 507.020(1)(b) (1984)).

2) Two jurisdictions require that the defendant substantially participate in the felony. *Id.* at 1685 & n.6 (citing 49 U.S.C. § 1473 (c)(6)(D) (1976); CONN. GEN. STAT. § 53a-46a(g)(4) (1985)).

3) At least six states consider minor participation in the felony as a mitigating factor. *Id.* at 1685 & n.7 (citing ARIZ. REV. STAT. ANN. § 13-703(G)(3) (1978 and Supp. 1986); COLO. REV. STAT. § 16-11-103(5)(d) (1978 and Supp. 1985); IND. CODE § 35-50-2-9(c)(4) (Supp. 1986); MONT. CODE ANN. § 46-18-304(6) (1985); NEB. REV. STAT. § 29-2523(2)(e) (1985); N.C. GEN. STAT. § 15A-2000(f)(4) (1983)).

4) Six states permit capital punishment for felony murder *simpliciter*. *Id.* at 1685-86 & n.8 (citing CAL. PENAL CODE §§ 189, 190.2(a)(17) (West Supp. 1987); FLA. STAT. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1985); GA. CODE ANN. §§ 16-5-1(a), 17-10-30(b)(2) (1982, 1984); S.C. CODE ANN. §§ 16-3-10, 16-3-20(C)(a)(1) (1985 and Supp. 1986); TENN. CODE ANN. §§ 39-2-202(a), 39-2-204(i)(7) (1982); WYO. STAT. §§ 6-2-101, 6-2-102(h)(iv) (1983)).

5) Three states require some additional aggravating factor before imposing the death penalty. *Id.* at 1686 & n.9 (citing IDAHO CODE § 19-2515(g) (Supp. 1986); OKLA. STAT. tit. 21, § 701.12 (1981); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1986)).

<sup>177</sup> 107 S. Ct. at 1686. The *Tison* Court concluded that "[t]his substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances." *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 179-81 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Coker v. Georgia*, 433 U.S. 584, 594 (1977) (emphasis in original)).

<sup>178</sup> *Id.*; cf. *Coker*, 433 U.S. at 596 (sentencing decisions of juries are important in determining

supporting<sup>179</sup> the proposition that major participation in a felony likely to result in the loss of human life, without a finding that the defendant intended to kill, may suffice to warrant death.<sup>180</sup> The Court stated that these state decisions indicated that there was no overriding state policy against the imposition of the death penalty in cases like *Tison*.<sup>181</sup>

In the third component of their analysis, the *Tison* Court compared the two standards — reckless indifference and intent to kill — to determine which, if either, typified the more blameworthy killer. The *Tison* Court declared that a defendant's mental state played a critical role in the determination of his or her culpability in capital cases.<sup>182</sup> The Court explained that, historically, the more purposeful the criminal conduct, the more serious the offense, and thus, the more severely the conduct should be punished.<sup>183</sup> The Court cautioned against focusing solely on the issue of "intent," however, for such a narrow concentration did not necessarily yield the most dangerous and culpable killers.<sup>184</sup> In addition, the Court noted that many persons who intended to and did kill suffered no criminal liability, or if they did receive punishment, did not deserve the death penalty.<sup>185</sup> By contrast, the Court commented, nonintentional killers may be the most ruthless and dangerous of all.<sup>186</sup> Thus, the Court concluded that reckless indifference may be equally as shocking to society's morality as an intent to kill.<sup>187</sup> As a result, the Court noted, common law and criminal codes had classified the two behaviors together.<sup>188</sup> Consequently, the Court stated that a reckless disregard for human life represented a highly

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whether capital punishment is appropriate); *Gregg*, 428 U.S. at 181 ("jury also is significant and reliable objective index of contemporary values") (citing *Furman v. Georgia*, 408 U.S. at 439-40 (Powell, J., dissenting)).

<sup>179</sup> *Tison*, 107 S. Ct. at 1686-87 (citing *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983) (forced nighttime robbery with guns, killing contemplated), *cert. denied*, 465 U.S. 1051 (1984); *Deputy v. State*, 500 A.2d 581, 586, 599 (Del. 1985) (defendant present at robbery and murders, but conflicting evidence as to defendant's participation in killing), *cert. denied*, 107 S. Ct. 1589 (1987); *Ruffin v. State*, 420 So.2d 591, 594 (Fla. 1982) (defendant present at murder, assisted co-defendant in kidnapping victim, raped victim, did not interfere with killing, and continued on venture) (citing trial court); *People v. Davis*, 95 Ill. 2d 1, 52, 447 N.E.2d 353, 378 (defendant present at scene, had participated in other previous crimes with triggerman during which triggerman killed under similar circumstances), *cert. denied*, 464 U.S. 1001-02 (1983); *Selvage v. State*, 680 S.W.2d 17, 19, 22 (Tex. Crim. App. 1984) (defendant robbed jewelry store while a store security guard was killed, but no direct evidence that defendant shot victim)).

<sup>180</sup> *Tison*, 107 S. Ct. at 1686.

<sup>181</sup> *See id.*

<sup>182</sup> *Id.* at 1687.

<sup>183</sup> *Id.* The Court cited several examples to support this contention. The Court noted that "Pennsylvania became the first American jurisdiction to distinguish between degrees of murder, reserving capital punishment to 'wilful, deliberate and premeditated' killings and felony murders." *Id.* The Court also referred to *Lockett v. Ohio*, 438 U.S. 586 (1978), in which the plurality articulated the principle that the defendant's mental state was essential to weighing defendant's criminal liability in capital sentencing cases. *Tison*, 107 S. Ct. at 1687. Finally, the *Tison* Court noted that *Enmund* also recognized the importance of the mental state, ruling the death penalty impermissible where the defendant is a minor actor with no culpable state but valid where the felony murderer intended to kill. *Id.*

<sup>184</sup> *Tison*, 107 S. Ct. at 1687.

<sup>185</sup> *Id.* at 1687-88.

<sup>186</sup> *Id.* at 1688.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (citing G. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.5 pp. 447-48 (1978); MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962) (murder includes criminal homicide when "committed recklessly under circumstances manifesting extreme indifference to the value of human life.")).

culpable mental state that could be considered when making a death penalty determination.<sup>189</sup>

The *Tison* Court did not attempt to delineate the different types of actions or states of mind sufficient to justify imposing the death penalty.<sup>190</sup> Rather, the Court held that major participation in a felony and reckless indifference to human life satisfied the culpability standard of *Enmund*.<sup>191</sup> The Court did not apply this standard to the *Tison* facts, although it did suggest that the brothers manifested the requisite mental state.<sup>192</sup> Because the Arizona courts had not established whether or not the Tison brothers' acted with reckless indifference to human life, the Supreme Court vacated the Tisons' death sentence and remanded their case to the Arizona Supreme Court for a determination of that issue.<sup>193</sup> The Arizona trial court has since resentenced the Tisons to death on each of the murders.<sup>194</sup> The brothers' sentences are currently on appeal to the Arizona Supreme Court.<sup>195</sup>

### B. *The Tison Dissent*

In his dissenting opinion, Justice Brennan attacked the majority's substantial participation and reckless indifference standard, claiming it lacked substantive support and had problematic consequences. First, Justice Brennan disagreed with the majority's intimation that the record supported the conclusion that the Tisons showed reckless indifference to human life.<sup>196</sup> Second, Justice Brennan suggested that precedent, legislative and sentencing trends, and principles of proportionality demonstrated the death penalty's inappropriateness to such defendants as the Tison brothers.<sup>197</sup> Finally, the Court's holding, claimed Justice Brennan, exacerbated the problems already plaguing capital sentencing, including the arbitrariness of distinguishing those for whom death is a permissible penalty from those for whom it is not.<sup>198</sup>

Justice Brennan first reasoned that, contrary to the majority's suggestions, the record failed to support the claim that the Tisons acted with reckless disregard for human

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<sup>189</sup> *Tison*, 107 S. Ct. at 1688. The majority declared 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, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

*Id.*

<sup>190</sup> *Id.* ("We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here.")

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* While not ruling specifically on the issue of reckless indifference, the majority, in dictum, indicated that such a standard could be met if applied to the facts of *Tison*. On one occasion, the Court stated that "the record would support a finding of the culpable mental state of reckless indifference to human life." *Id.* at 1684. And on another, "[t]hese facts . . . would clearly support a finding that [Ricky and Raymond Tison] both subjectively appreciated that their acts were likely to result in the taking of innocent life." *Id.* at 1685.

<sup>193</sup> *Id.* at 1688.

<sup>194</sup> Telephone interview with Kathy Kempley, Deputy Clerk, Arizona Supreme Court (Jan. 11, 1988).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1691 (Brennan, J., dissenting).

<sup>197</sup> See generally *id.* at 1693-1701 (Brennan, J., dissenting).

<sup>198</sup> *Id.* at 1702 (Brennan, J., dissenting).

life.<sup>199</sup> He based this contention on the fact that the brothers had a different mental state at the time of the prison breakout than at the time of the murders.<sup>200</sup> Although the fact that the Tisons participated in the breakout and escape may have indicated that they contemplated and anticipated the use of lethal force during that time, according to Justice Brennan, such participation did not support the Court's suggestions about the Tisons' mental states at the time of the killings.<sup>201</sup>

Justice Brennan next argued that, even if the record did support a finding that the Tisons acted with reckless indifference during the robbery and kidnapping, the majority improperly restricted its focus to the facts the Arizona Supreme Court offered.<sup>202</sup> According to Justice Brennan, the record contained other relevant evidence the majority ignored.<sup>203</sup> This other evidence included the fact that the Tison brothers were getting water for the family when the shootings occurred and that, though neither could have prevented the murders, both brothers felt helpless, surprised, and remorseful over the deaths.<sup>204</sup> Justice Brennan argued that, by selectively concentrating on certain evidence, the majority failed to afford the defendants a reliable and individualized ruling under *Enmund*.<sup>205</sup> The only way to secure such a ruling, according to Justice Brennan, was to hold a full evidentiary hearing before a trial court.<sup>206</sup> Therefore, Justice Brennan argued that because the lower courts did not resolve the issue of recklessness, a trial court should decide the issue following a complete evidentiary hearing.<sup>207</sup> Contrary to the majority's disposition of *Tison*, Justice Brennan's dissent suggested that on remand, the hearing should consider a full review of the record and not just those components the majority emphasized.<sup>208</sup>

Justice Brennan next addressed the two rationales offered by the majority for disposing with the *Enmund* intent requirement. According to Justice Brennan, the majority had reasoned that those who intentionally killed were not always the most culpable and dangerous of murderers.<sup>209</sup> The Court also claimed, stated Justice Brennan, that state legislatures and courts had indicated a willingness to impose the death penalty where a defendant's mental state did not rise to the level of intent to kill.<sup>210</sup> Justice Brennan disputed both points.

<sup>199</sup> *Id.* at 1691 (Brennan, J., dissenting).

<sup>200</sup> *Id.* at 1691 n.4 (Brennan, J., dissenting).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1692 (Brennan, J., dissenting).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* Other factors, Justice Brennan noted, that the majority neglected included: neither Ricky nor Raymond had a prior felony record; both sons lived with their mother; neither planned the escape and both conditioned their involvement in the escape on their father's promise that no one was to be injured. See *Tison*, 107 S. Ct. at 1693 n.7 (Brennan, J., dissenting). Justice Brennan pointed out that "[g]iven these circumstances, the sons' own testimony that they were surprised by the killings, and did not expect them to occur, appears more plausible than the Court's speculation that they 'subjectively appreciated that their activities were likely to result in the taking of innocent life.'" *Id.* (Brennan, J., dissenting) (quoting majority opinion).

<sup>205</sup> See *id.* at 1693 (Brennan, J., dissenting).

<sup>206</sup> *Id.* (citing *Cabana v. Bullock*, 106 S. Ct. at 701 (Blackmun, J., dissenting), 708-09 (Stevens, J., dissenting)).

<sup>207</sup> *Id.*

<sup>208</sup> See *id.*

<sup>209</sup> *Id.* at 1694 (Brennan, J., dissenting).

<sup>210</sup> *Id.* at 1694, 1696-97 (Brennan, J., dissenting). See *supra* notes 179-88 and accompanying text for a discussion of the majority's opinion on intent and state sentencing trends.



Justice Brennan agreed with the majority that, in some circumstances, the most culpable murderers killed without ever intending to do so.<sup>211</sup> Yet where a murderer neither killed nor intended to kill, Justice Brennan stated, he or she is not as culpable.<sup>212</sup> Moreover, a finding of intent differed qualitatively from a finding of reckless indifference.<sup>213</sup> Because of that distinction, Justice Brennan reasoned, the moral and criminal culpabilities of one who killed or intended to kill did not correspond to those of one who did not kill or intend to kill.<sup>214</sup> This distinction in culpabilities, Justice Brennan concluded, manifested itself in *Enmund's* holding, which he interpreted as constitutionally mandating that a sentencer must find that a nontriggerperson had an intent to kill, prior to imposing the death penalty on him or her.<sup>215</sup> Brennan also expressed reservations about the apparent inconsistency between *Tison* and the decisions subsequent to *Enmund* that held that a state must establish that a defendant intended to kill before sentencing such a defendant to death.<sup>216</sup>

Justice Brennan disputed the majority's claim that a majority of American jurisdictions would authorize the death penalty in such situations as the *Tisons*.<sup>217</sup> Justice Brennan performed his own survey of state statutes, concentrating on those that prohibited the death penalty,<sup>218</sup> those that required a finding that the defendant killed or intended to kill,<sup>219</sup> and those that prohibited capital punishment under the *Tison* stan-

<sup>211</sup> *Tison*, 107 S. Ct. at 1694 (Brennan, J., dissenting).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1695 (Brennan, J., dissenting). Justice Brennan explains the distinction in the following manner: "The difference lies in the nature of the choice each has made. The reckless actor has not chosen to bring about the killing in the way the intentional actor has." *Id.* (emphasis in original).

<sup>214</sup> *Id.* Brennan supported this claim by first laying down the premise that differentiating between mental states is based on the person's ability to choose between good and evil. *Id.* (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952)). From this, Brennan explained, followed the argument that punishment must conform to the choice the individual makes. *Id.* So, Brennan concluded, reckless indifference should yield a different penalty than an intentional killing "if we are to retain 'the relation between criminal liability and moral culpability' on which criminal justice depends." *Id.* (quoting *People v. Washington*, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965)).

Brennan then moved to a brief survey of prior cases to illustrate that distinguishing intent from reckless indifference is especially important for felony murder cases. *Id.* He noted that in *Lockett*, Justice White had previously commented directly on this issue when he said: "[s]ociety has made a judgment, which has deep roots in the history of the criminal law . . . distinguishing at least for the purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy life." *Tison*, 107 S. Ct. at 1695 (Brennan, J., dissenting) (quoting *Lockett v. Ohio*, 438 U.S. 586, 626-28 (1978)). Justice Brennan also cited the *Enmund* Court for recognizing that "American criminal law has long considered a defendant's intention — and therefore his [or her] moral guilt — to be critical to the 'degree of [his or her] criminal culpability.'" *Id.* at 1696 (Brennan, J., dissenting) (quoting *Enmund*, 458 U.S. at 800 (citation omitted)).

<sup>215</sup> *Id.*

<sup>216</sup> See *id.* (quoting *Cabana v. Bullock*, 106 S. Ct. 689, 697 (1986)).

<sup>217</sup> *Id.* at 1697 (Brennan, J., dissenting).

<sup>218</sup> *Id.* According to Justice Brennan, thirteen states and the District of Columbia had abolished the death penalty at the time of the *Tison* decision. *Id.* at 1697 n.13 (Brennan, J., dissenting) (citing NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. (Aug. 1986)).

<sup>219</sup> *Id.* at 1697. For states requiring a finding of actual and intentional killing, see *id.* at 1697 n.13 (Brennan, J., dissenting) (citing MO. REV. STAT. §§ 565.001, 565.003, 565.020 (1986) (death penalty to those who intentionally, knowingly, and deliberately cause death); 18 PA. CONS. STAT. §§ 2502(a), (b), (d), 1102 (1982) (death penalty only for intentional killers); VT. STAT. ANN. tit. 13,

dard.<sup>220</sup> Justice Brennan calculated that approximately sixty percent of American jurisdictions disagreed with the majority's substantial participation and reckless indifference standard.<sup>221</sup>

Justice Brennan also faulted the majority for focusing on those jurisdictions whose statutes authorize sentencers to impose the death penalty on defendants who have not intended to kill, while ignoring the limited number of instances that those jurisdictions in fact imposed the sentence under those circumstances.<sup>222</sup> Had the majority examined the number of executions since *Enmund*, Justice Brennan explained, the Court would have found that all of the sixty-five people executed had killed, attempted to kill, or intended to kill.<sup>223</sup> Furthermore, of the sixty-four death row inmates in Arizona, the

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§§ 2303(b), (c) (Supp. 1986) (only murderers of correctional officers may receive the death penalty); WASH. REV. CODE §§ 9A.32.030, 10.95.020 (1985) (death reserved for only those who kill with premeditation and at least one aggravating circumstance)). The dissent also pointed out two other states that would not impose the death penalty under the majority's standard, although, for other reasons, might impose death on the facts of *Tison*. *Id.* (citing MD. ANN. CODE art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1), 413(d)(5) (1957 & Supp. 1986) (death reserved for person committing killing with possible exception if victim is a child); N.H. REV. STAT. ANN. §§ 630:1, 630:1(111), 630:1-a(1)(b)(2) (1986) (death reserved for killing law enforcement officer, murder for hire and killing during a kidnapping)).

<sup>220</sup> 107 S. Ct. at 1697 n.13 (Brennan, J., dissenting). For those state statutes that prohibit the death penalty under the *Tison* standard, see *id.* at 1686 n.10 (citing ALA. CODE §§ 13A-2-23, 13A-5-40(a)(2), (b), 13A-5-51, 13A-6-2(a)(2) (1982 & Supp. 1986); LA. REV. STAT. ANN. § 14:30(A)(1) (West 1986); MISS. CODE ANN. § 99-19-101(7) (Supp. 1986); NEV. REV. STAT. ANN. §§ 200.030(1)(b), 200.030(4), 200.033(4)(a)-(b) (Michie 1986); N.J. STAT. ANN. §§ 2C:11-3a(a), (c) (West Supp. 1986); N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-20A-5 (1984); OHIO REV. CODE ANN. §§ 2903.01(B)-(D), 2929.02(A), 2929.04(A)(7) (Anderson 1982); OR. REV. STAT. §§ 163.095(d), 163.115(1)(b) (1985); TEX. PENAL CODE ANN. §§ 19.02(a), 19.03(a)(2) (Vernon 1974 & Supp. 1986); UTAH CODE ANN. § 76-5-202(1) (Supp. 1986); VA. CODE ANN. § 18.2-31 (Supp. 1986)).

Justice Brennan also cited to two other states that rejected the death penalty where the defendant substantially participated in a felony and manifested an extreme indifference to human life. *Id.* (citing MD. ANN. CODE art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1), 413(d)(5) (1957 & Supp. 1986) (death penalty reserved for actual killer with potential exception if victim is a child); N.H. REV. STAT. ANN. §§ 630:1, 630:1(111), 630:1-a(1)(b)(2) (1986) (killing a law enforcement official, murder for hire, and killing during a kidnapping are the only crimes warranting death penalty)).

<sup>221</sup> *Id.* "Thus it appears that about three-fifths of the States and the District of Columbia have rejected the position the Court adopts today." *Id.*

<sup>222</sup> *Id.* at 1697. As for the "handful of state cases" that the majority relies upon to help support its holding, *id.* at 1696, Justice Brennan, in his dissent, cautioned against overemphasizing their importance. According to Justice Brennan, those cases differed from *Tison* in that the courts there intimated that the defendants participated in the killing, attempted to kill, or intended to kill. *Id.* at 1696 n.12 (Brennan, J., dissenting) (citing *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983) (appellants discussed necessity of murder), *cert. denied*, 465 U.S. 1051 (1984); *Deputy v. State*, 500 A.2d 581, 599 (Del. 1985) (appellant present and involved in murders), *cert. denied*, 107 S. Ct. 1589 (1987); *Ruffin v. State*, 420 So.2d 591, 594 (Fla. 1982) (evidence clear that appellant jointly participated in premeditated killing); *People v. Davis*, 95 Ill. 2d 1, 52-53, 447 N.E.2d 353, 378-79 (1983) (defendant participated in several burglaries in all of which cofelon murdered victim); *Selvage v. State*, 680 S.W.2d 17, 22 (Tex. Crim. App. 1984) (appellant used lethal force to effectuate escape and attempted to kill others)).

<sup>223</sup> See *id.* at 1698 (Brennan, J., dissenting) (quoting *Enmund*, 458 U.S. at 796). Justice Brennan noted that of the sixty-five, in only two was there some doubt as to whether the defendant actually murdered the victim; but in both cases, the defendant was found to have intended the deaths. *Id.* at 1698 n.16 (Brennan, J., dissenting) (citing *Green v. Zant*, 738 F.2d 1529, 1533-34 (11th Cir.) (case was presented to jury on malice-murder rather than felony murder theory, and evidence

Arizona Supreme Court found that all who unsuccessfully challenged their capital sentences based on *Enmund* had killed or intended to kill.<sup>224</sup> The statistics, suggested Justice Brennan, conveyed a clear message: the *Tison* sentence was an aberration within Arizona and the United States.<sup>225</sup> Moreover, Justice Brennan argued that the Court's reliance on roughly twenty states was an inadequate substitute for a proper proportionality analysis and lacked sufficient persuasive force to deviate from the *Enmund* holding.<sup>226</sup>

Justice Brennan continued by charging that the Court's opinion did not coincide with the traditional concept of proportionality, which held that a punishment should not exceed a crime's severity or a defendant's own actions and culpability.<sup>227</sup> Justice Brennan also pointed out the majority holding's inconsistency with proportionality principles laid out in recent Supreme Court cases, an inconsistency derived from a failure to examine the full evidentiary record.<sup>228</sup> Had the majority conducted a proper proportionality

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supported verdict on that theory), *cert. denied*, 469 U.S. 1098 (1984); *Skilern v. Estelle*, 720 F.2d 839, 844 (5th Cir. 1983) (evidence supports finding that Skilern agreed and "plotted in advance" to kill the eventual victim), *cert. denied*, 469 U.S. 1067 (1984).

<sup>224</sup> *Id.* at 1698-99 (Brennan, J., dissenting). For the cases in which the Arizona Supreme Court has rejected an *Enmund* challenge, see *State v. Correll*, 148 Ariz. 468, 477-78, 715 P.2d 721, 730-31 (1986) (defendant intended to kill victims); *State v. Hooper*, 145 Ariz. 538, 551, 703 P.2d 482, 495 (1985) (defendant killed, attempted to kill, or intended to kill), *cert. denied*, 474 U.S. 1073 (1986); *State v. Martinez-Villareal*, 145 Ariz. 441, 449-50, 702 P.2d 670, 678-79 (1985) (defendant actively and deliberately participated in killing and intended to kill victim), *cert. denied*, 474 U.S. 975 (1985); *State v. Bishop*, 144 Ariz. 521, 521 n.2, 698 P.2d 1240, 1240 n.2 (1985) (facts demonstrate intent to kill within meaning of *Enmund*); *State v. Poland*, 144 Ariz. 388, 403, 698 P.2d 183, 198 (1985) (defendant killed, attempted to kill, or intended to kill), *aff'd*, 476 U.S. 147, 157 (1986); *State v. Villafuerte*, 142 Ariz. 323, 331, 690 P.2d 42, 50 (1984) (defendant killed, attempted to kill, or intended to kill), *cert. denied*, 469 U.S. 1230 (1985); *State v. Fisher*, 141 Ariz. 227, 253, 686 P.2d 750, 776 (defendant killed victim), *cert. denied*, 469 U.S. 1066 (1984); *State v. Harding*, 141 Ariz. 492, 501, 687 P.2d 1247, 1256 (1984) (defendant killed victim); *State v. James*, 141 Ariz. 141, 148, 685 P.2d 1293, 1300 (defendant killed and intended to kill), *cert. denied*, 469 U.S. 990 (1984); *State v. Libberton*, 141 Ariz. 132, 137, 685 P.2d 1284, 1289 (1984) (defendant intended to kill victim); *State v. Smith*, 138 Ariz. 79, 85, 673 P.2d 17, 23 (1983) (defendant participated in killing and intended to kill), *cert. denied*, 465 U.S. 1074 (1984); *State v. Jordan*, 137 Ariz. 504, 507, 672 P.2d 169, 172 (1983) (defendant killed and intended to kill victim); *State v. Richmond*, 136 Ariz. 312, 318, 666 P.2d 57, 63 (defendant intended to kill victim), *cert. denied*, 464 U.S. 986 (1983); *State v. McDaniel*, 136 Ariz. 188, 200, 665 P.2d 70, 82 (1983) (defendant killed victim); *State v. Gillies*, 135 Ariz. 500, 515, 662 P.2d 1007, 1022 (1983) (defendant's participation in the murder was substantial and intentional), *aff'd*, 142 Ariz. 564, 691 P.2d 655 (1984), *cert. denied*, 470 U.S. 1059 (1985).

<sup>225</sup> *Tison*, 107 S. Ct. at 1699 (Brennan, J., dissenting).

<sup>226</sup> *Tison*, 107 S. Ct. at 1699 (Brennan, J., dissenting). The dissent contended that the results of the *Enmund* challenges in Arizona were clear:

Thus, like *Enmund*, the *Tisons'* sentence appears to be an aberration within Arizona itself as well as nationally and internationally. The Court's objective evidence that the statutes of roughly 20 States appear to authorize the death penalty for defendants in the Court's new category is therefore an inadequate substitute for a proper proportionality analysis, and is not persuasive evidence that the punishment that was unconstitutional for *Enmund* is constitutional for the *Tisons*.

*Id.*

<sup>227</sup> *Id.* at 1700 (Brennan, J., dissenting). Justice Brennan wrote that one of the eighth amendment's limiting principles is that "States may not impose punishment that is disproportionate to the severity of the offense or to the individual's own conduct and culpability." *Id.*

<sup>228</sup> *Id.* at 1699 (Brennan, J., dissenting). Brennan cited three Supreme Court decisions as illustrative of the proportionality principles. *Id.* In *Enmund v. Arizona*, 458 U.S. 782, 798 (1982), the Court stated that "the focus [of the constitutional inquiry] must be on [Enmund's] culpability, not on that of those who committed the robbery and shot the victims . . ."

inquiry, Justice Brennan claimed, the Court would have found the *Tison* case factually similar to *Enmund*.<sup>229</sup> The majority failed to do so, however, and for that reason, Justice Brennan stated the *Tison* holding could not be reconciled with prior cases.<sup>230</sup>

Justice Brennan's final remarks, and those in which Justices Blackmun and Stevens did not join, concerned the implications of the majority's decision. Based on the infrequency of death sentences for those who did not kill or intend to kill,<sup>231</sup> Justice Brennan warned that the *Tison* holding could conceivably reawaken concerns the Court had expressed about capital sentencing fifteen years earlier in *Furman v. Georgia*; the Court still had not achieved a system capable of distinguishing those individuals who deserved the death penalty from those who did not.<sup>232</sup> Decisions like the majority's, Justice Brennan contended, that did not attempt to delineate behavior worthy of capital punishment, combined with such doctrines as felony murder, which allowed excessive discretion in determining criminal culpability, illustrated that the Court had not yet issued guidelines that ensured that capital punishment determinations complied with the eighth amendment's principles.<sup>233</sup> Such discretion lent itself to arbitrary rulings which, in turn, illustrated that capital sentencing still did not comport with the eighth amendment.<sup>234</sup>

### III. THE *TISON* REASONING: AN UNSUBSTANTIATED ANALYSIS

The *Tison* Court created a new standard for determining when the state may validly impose a capital sentence on a defendant. Under *Tison*, capital punishment does not offend the eighth amendment where the individual substantially participated in a felony

In *Coker v. Georgia*, 433 U.S. 584, 598 (1977), the Court undertook a comparison of the crimes of rape and murder to determine that death was a disproportionate punishment for rape. Justice White, writing for a plurality, said that "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life." *Coker*, 433 U.S. at 598.

Finally, in *Solem v. Helm*, 463 U.S. 277, 279 (1983), the Court was faced with whether the eighth amendment prohibits life imprisonment without the possibility of parole for a seventh nonviolent felony. In holding that the punishment was not constitutionally allowable because it was disproportionate to the offense committed, *id.* at 303, Justice Powell approached the constitutional question by stating: "In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

<sup>229</sup> See *Tison*, 107 S. Ct. at 1701 (Brennan, J., dissenting). Justice Brennan pointed out that those similarities included the following: neither the *Tisons* nor Earl *Enmund* killed, attempted to kill or intended to kill anyone; and both the *Tisons* and Earl *Enmund* received capital sentences for their accomplices' intentional acts which they could not control. *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* Justice Brennan stated: "[s]o rarely does any State (let alone any Western country other than our own) ever execute a person who neither killed nor intended to kill that 'these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" *Tison*, 107 S. Ct. at 1701 (Brennan, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

<sup>232</sup> *Id.* at 1701 (Brennan, J., dissenting) ("[t]his case thus demonstrates . . . that we have yet to achieve a system capable of 'distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not.'" (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring))).

<sup>233</sup> *Id.* at 1702 (Brennan, J., dissenting).

<sup>234</sup> *Id.*

and manifested an extreme indifference to human life.<sup>235</sup> Upon closer examination, though, the reasoning used to reach the *Tison* decision lacks judicial soundness. When analyzed in light of available precedent, *Tison* represents a major departure from *Enmund*<sup>236</sup> and the proportionality principle.<sup>237</sup> Furthermore, public sentiment, as measured through legislative enactments<sup>238</sup> and sentencing decisions,<sup>239</sup> rejects death as a sanction where a defendant did not kill or intend to kill. Finally, application of the *Tison* standard, by its inherently amorphous nature, will yield unpredictable results and will lead to the same arbitrary capital sentencing that the Supreme Court has held to violate the eighth amendment's cruel and unusual prohibition.<sup>240</sup> For the states to administer the death penalty so as not to run afoul of the Constitution, the Court should abandon the *Tison* standard and return to the intent requirement that *Enmund* promulgated.

#### A. Departure from Precedent

*Enmund v. Florida* marked the first case in which the Supreme Court addressed and ruled as a cohesive body on the issue of the death penalty and the nontriggerperson defendant charged with felony murder.<sup>241</sup> *Enmund's* holding is relatively clear: the eighth amendment precludes executing one who has not killed, attempted to kill, or intended to kill.<sup>242</sup> The *Tison* Court unnecessarily departed from this precedent; the facts in *Tison* are sufficiently similar to those in *Enmund* to warrant a similar result.

Two important facts stand out in *Enmund*. First, the Court acknowledged the Florida Supreme Court's finding that, as the getaway driver, Earl Enmund aided and abetted the commission of a felony.<sup>243</sup> Second, and more importantly, the Court declared that Enmund did not intend to commit or facilitate the commission of a murder.<sup>244</sup> Because Enmund did not intend to take a life, the Supreme Court held that Florida could not sentence him to death.<sup>245</sup>

On these two points, the *Tisons'* case is indistinguishable. Although Ricky and Raymond Tison actively participated in the felonies of armed robbery and escape from prison, and may have contemplated the use of lethal force during the breakout,<sup>246</sup> they did not possess the same state of mind after stealing the Lyons' automobile. For the Tison brothers, the getaway car's malfunctioning and the subsequent armed robbery, kidnapping, and murder all represented unexpected events. Thus, the Arizona and

<sup>235</sup> *Id.* at 1688.

<sup>236</sup> See *infra* notes 241–58 and accompanying text for a discussion of the *Tison* majority's departure from precedent.

<sup>237</sup> See *infra* notes 259–82 and accompanying text for a discussion of the proportionality principle.

<sup>238</sup> See *infra* notes 283–97 and accompanying text for a discussion of the legislature, the death penalty and felony murder.

<sup>239</sup> See *infra* notes 298–318 and accompanying text for a discussion of sentencing, the death penalty, and felony murder.

<sup>240</sup> See *infra* notes 319–25 and accompanying text for a discussion of the consequences of *Tison*.  
<sup>241</sup> 458 U.S. 782 (1982).

<sup>242</sup> *Id.* at 797.

<sup>243</sup> See *id.* at 788.

<sup>244</sup> *Id.* at 798.

<sup>245</sup> *Id.* at 797.

<sup>246</sup> See *Tison*, 107 S. Ct. at 1691 n.4 (Brennan, J., dissenting); see also Brief for Respondents at 4, *State v. Ricky Wayne Tison*, 142 Ariz. 446, 690 P.2d 747 (1984); *State v. Raymond Curtis Tison*, 142 Ariz. 454, 690 P.2d 755 (1984) (No. 84-6075).

United States Supreme Courts both made significant findings: neither Ricky nor Raymond Tison killed the Lyons family, and neither Ricky nor Raymond intended, anticipated, or desired in any way to facilitate the victims' deaths.<sup>247</sup> Several facts buttressed these determinations: the Tisons conditioned their participation in the escape on their father's promise that no one would be injured, the brothers retrieved water for the family prior to the murders, and the Tisons felt remorse over the killings.<sup>248</sup>

The Tison brothers and Earl Enmund stood, therefore, on basically equal ground; none intended the killings to occur, but their respective states sentenced them to death for the intentional acts of others. The Supreme Court vacated Enmund's sentence because he did not possess the requisite intent to kill. The facts of *Tison* were sufficiently similar to justify the same result. Nonetheless, the Court reached different conclusions in the two cases.

Not only did the *Tison* majority fail to hold that *Enmund* governed its facts, but the Court also contradicted its own later applications of the *Enmund* standard. Justice White, writing for the majority in the 1986 case of *Cabana v. Bullock*,<sup>249</sup> asserted that *Enmund* imposed a categorical rule prohibiting the state from executing the class of criminals who did not kill, attempt to kill, or intend to kill.<sup>250</sup> Thus, the *Tison* Court, in holding that a state need not require that a defendant intend to kill before imposing the death penalty on him or her, conflicts directly with *Cabana*.

The *Tison* holding also deviates from the Court's landmark holdings in *Gregg v. Georgia*,<sup>251</sup> and *Coker v. Georgia*,<sup>252</sup> which established the principle that punishment must measurably contribute to accepted penological goals to be valid.<sup>253</sup> For the *Tison* decision to be consistent with this principle, death must further the retributive or deterrent goals of capital punishment when applied to the recklessly indifferent felon. Upon closer examination, death does not advance either of the two ends in such circumstances.

Underlying the retributive goal of any punishment is the notion that the level of punishment should directly relate to the criminal's personal culpability.<sup>254</sup> An analysis of

<sup>247</sup> The Arizona Supreme Court, prior to the 1982 *Enmund* decision, found "that [the Tisons] did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds . . ." *State v. Ricky Wayne Tison*, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981) (emphasis added). In the Tisons' appeal after *Enmund*, the Arizona Supreme Court seemingly ignored this finding, instead craftily interpreting intent to include those situations where the defendant could foresee the possibility of bloodshed. See *supra* note 51 for a discussion of the Arizona Supreme Court's interpretation.

The United States Supreme Court agreed with petitioners that "there [was] no evidence that either Ricky or Raymond Tison took any act which he desired to, or was substantially certain would, cause death." *Tison*, 107 S. Ct. at 1684.

<sup>248</sup> See *supra* notes 21, 27, and 32 and accompanying text for a discussion of these mitigating factors.

<sup>249</sup> 106 S. Ct. 689 (1986).

<sup>250</sup> *Id.* at 696. To resolve any doubt as to the import of *Enmund*, Justice White made the following statement in the *Cabana* majority opinion: "*Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death. Nonetheless, the rule remains a substantial limitation on sentencing . . ." *Id.* at 697.

<sup>251</sup> 428 U.S. 153 (1976).

<sup>252</sup> 433 U.S. 584 (1977).

<sup>253</sup> *Id.* at 592.

<sup>254</sup> *Tison*, 107 S. Ct. at 1683.

the two mental states with which the *Tison* Court wrestled — reckless indifference and intent — reveals a difference in the conscious objects of the intentional actor and the recklessly indifferent actor. The intentional actor chooses to bring about results differently than the recklessly indifferent actor.<sup>255</sup> This distinction suggests that the actors have different culpabilities and different levels of moral responsibility. Thus, their punishments should differ.<sup>256</sup> The finality of death underscores the importance of reserving it for the most culpable of criminals.<sup>257</sup> Thus, where death is the sanction involved, the recklessly indifferent felon deserves a different punishment than the intentional killer.

Capital punishment's second function is to deter individuals from participating in an activity to which they know a certain sanction will attach. In *Enmund*, the majority rejected the contention that death would measurably deter one who has no intention or purpose to take another's life.<sup>258</sup> Nothing in the *Tison* majority opinion suggests that the likelihood of a capital sentence will deter defendants who lack the intent to kill, but possess a reckless indifference for human life. Like Earl Enmund, Ricky and Raymond Tison probably would not have been deterred from participating in the inherently dangerous felonies of armed escape and robbery because they did not intend to facilitate or participate in the homicides that accompanied such crimes. Moreover, the *Tison* standard fails to deter the recklessly indifferent actor because "reckless indifference to human life" is an inherently vague phrase. Predicting which fact situations satisfy the standard becomes a futile task. As a result, one cannot appreciate the punishment resulting from a certain act, and refrain from that act, if one cannot comprehend the state of mind warranting the punishment.

Thus, the *Tison* ruling departs from precedent in two respects. First, the facts of *Tison* are so closely analogous to those in *Enmund* that the *Enmund* decision should govern. Moreover, *Tison* contradicts *Cabana*, in which the Court declared that sentencers must find an intent to kill prior to imposing the death penalty. Second, the *Tison* punishment does not further either of the two judicially recognized goals of capital punishment, retribution or deterrence.

### B. A Departure from the Proportionality Principle

The Court has recognized that the eighth amendment embodies the principle that punishment must be proportional to the crime.<sup>259</sup> In cases where punishment is disproportional, the Court has invalidated the sanction.<sup>260</sup> A proportionality analysis involves

<sup>255</sup> *Id.* at 1695 (Brennan, J., dissenting). See *supra* note 213 and accompanying text for a discussion of the difference between the two states of mind.

<sup>256</sup> *Enmund v. Florida*, 458 U.S. 782, 798 (1982) ("causing harm intentionally must be punished more severely than causing the same harm unintentionally") (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

<sup>257</sup> *Tison*, 107 S. Ct. at 1695 (Brennan, J., dissenting).

<sup>258</sup> *Enmund*, 458 U.S. at 798-99.

<sup>259</sup> In *Solem v. Helm*, 463 U.S. 277, 303 (1983), the Court declared unconstitutional a statute proscribing a life sentence without the possibility of parole after a seventh nonviolent felony. The Court did so through the proportionality principle which it found to be "deeply rooted and frequently in common law jurisprudence." *Id.* at 284. The Court also commented that the eighth amendment adopted the language of the English Bill of Rights which was meant to include "the right to be free from excessive punishments." *Id.* at 285-86.

<sup>260</sup> See, e.g., *Solem*, 463 U.S. at 287 (citing *Robinson v. California*, 370 U.S. 660, 667 (1962) (90 day sentence excessive for crime of narcotic addiction)); *Enmund v. Florida*, 458 U.S. 782, 796-97

two determinations. First, the Court determines whether the punishment exceeds the crime for which it is imposed.<sup>261</sup> Second, the Court examines the mental state and the criminal culpability of the actor, and attempts to discover if a nexus exists between the two.<sup>262</sup> Reviewing the *Tison* holding in light of these two elements, *Tison* clearly conflicts with the proportionality principle.

Death is a unique sanction,<sup>263</sup> reserved for the most extreme crimes.<sup>264</sup> Rape, albeit a serious offense, does not fit into this select group of crimes.<sup>265</sup> Not until *Enmund* did the Court clearly define the constitutional confines of the capital sentence. Only in cases where the defendant killed, attempted to kill, or intended to kill will the Court hold that the death penalty is proportional to the crime and thus consistent with the eighth amendment.<sup>266</sup>

The Tisons' situation was similar to Earl Enmund's in several important respects. As the Florida Supreme Court did in *Enmund*, Arizona convicted Ricky and Raymond under its felony murder statute.<sup>267</sup> Both the Arizona Supreme Court and the United States Supreme Court concluded that, like Earl Enmund, the Tisons did not intend anyone's deaths even though the Tisons actively participated in an armed robbery and kidnapping from which the deaths resulted.<sup>268</sup> By definition, the crimes of armed robbery<sup>269</sup> and kidnapping do not involve death to the victim.<sup>270</sup> If one examines the Tisons' actions and states of mind, and not the triggerperson's, it is apparent that *Tison* does not fall within that category of crimes for which, according to *Enmund*, death is an acceptable punishment. Thus, although the state may convict the Tisons of first degree

(1982) (death penalty excessive for one who does not kill, attempt to kill, or intend to kill); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (death penalty is grossly disproportional for crime of rape and forbidden by eighth amendment); *Weems v. United States*, 217 U.S. 349, 366-67, 382 (1910) (15 year sentence to include hard labor and chains and loss of certain civil rights unconstitutional under eighth amendment).

<sup>261</sup> *Solem*, 463 U.S. at 290. The Court there said, "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.*

<sup>262</sup> See *Tison*, 107 S. Ct. at 1687. Justice O'Connor, writing for the majority, said, "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." *Id.*; cf. *supra* note 104.

<sup>263</sup> See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("imposition of death by public authority is so profoundly different from all other penalties").

<sup>264</sup> In *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), the Court called the death penalty "an extreme sanction suitable to the most extreme of crimes."

<sup>265</sup> See *Coker v. Georgia*, 428 U.S. 584, 600 (1976).

<sup>266</sup> *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

<sup>267</sup> See *supra* note 35 for the pertinent text of the statute under which the Tisons were convicted.

<sup>268</sup> See *supra* note 246-47 and accompanying text for a discussion of the Tison brothers' participation in the crime.

<sup>269</sup> Armed robbery is an "aggravated form of robbery in which the defendant is armed with a dangerous weapon, though it is not necessary to prove that he used the weapon to effectuate the robbery." BLACK'S LAW DICTIONARY 99 (5th ed. 1979).

<sup>270</sup> A state may convict an individual of kidnapping if the person unlawfully removes another from his place of residence or business, . . . with any of the following purposes: (a) to hold for ransom . . . or hostage; or (b) to facilitate commission of any felony . . . ; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function.

BLACK'S LAW DICTIONARY 781-82 (5th ed. 1979) (citing MODEL PENAL CODE, § 212.1).



murder,<sup>271</sup> *Enmund* mandates that death is a disproportionate punishment for the felony murders they committed.

In addition to a disproportionality between the Tisons' crimes and their punishment, the Tisons' mental states did not warrant the criminal culpability the Court attributed to it. The principle that the more purposeful the offense, the more serious the transgression, and therefore the more severe the punishment, has a rich legal history.<sup>272</sup> Though not purporting to do so, the *Tison* majority effectively equated reckless indifference with intent. The Court reasoned that the potentially shocking nature of a person's reckless indifference to human life, in certain circumstances, warranted equating the two mental states.<sup>273</sup> Admittedly, the reckless disregard implicit in purposefully engaging in criminal activities known to carry a great risk of death constitutes a highly culpable state of mind.<sup>274</sup> An important qualitative difference, however, exists between this state of mind and intent. The difference lies in the choice each actor has made. As the *Tison* dissent recognized, the reckless actor has not chosen to facilitate the killing in the same way as the intentional actor.<sup>275</sup> Thus, not only do the mental states of the intentional and reckless actor differ, but so too, using the *Tison* majority's analysis, does the seriousness of their crimes and, in theory, their deserved punishments.<sup>276</sup>

In capital sentencing cases, the Supreme Court has insisted that the sentencer consider each individual separately.<sup>277</sup> Thus, the sentencer should focus on each individual's record and culpability.<sup>278</sup> The sentencer should distinguish between those who purposefully take life and those who do not.<sup>279</sup> In *Enmund*, the Court resisted attempts to treat *Enmund* like his cofelons who intentionally murdered the victims.<sup>280</sup> In short, the *Enmund* Court held that the eighth amendment prohibited such an approach.<sup>281</sup> In *Tison*, however, the Court failed to follow *Enmund* and, at least for the purposes of imposing punishment, recognized no difference between the intentional killers and those displaying a reckless indifference to human life. By treating the two situations alike, the *Tison* Court dispensed with a societal judgment firmly grounded in criminal law that

<sup>271</sup> In *Lockett v. Ohio*, 438 U.S. 586, 602 (1978), the Court said, "that States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes, is beyond constitutional challenge."

<sup>272</sup> *Tison*, 107 S. Ct. at 1687.

<sup>273</sup> *Id.* at 1688.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1695 (Brennan, J., dissenting).

<sup>276</sup> Because the Tisons did not facilitate the deaths of the victims, their activity was less purposeful than the intentional killer's, and therefore, their punishment should be less severe as compared to the intentional killer.

<sup>277</sup> *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (Court "insist[s] on 'individualized consideration as a constitutional requirement in imposing the death sentence'" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

<sup>278</sup> *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.") (citation omitted).

<sup>279</sup> *Enmund*, 458 U.S. at 798.

<sup>280</sup> *See id.*

<sup>281</sup> *Id.*

distinguishes the culpability of those who acted with a purpose to end a life from those who did not.<sup>282</sup>

In two respects then, the *Tison* decision offends the proportionality principle. Death as a punishment for such criminals as Ricky and Raymond Tison, who in no way participated in or intended to bring about the killings, is excessive. Moreover, the Tisons' mental states did not rise to the level of the intentional actor. Thus, their criminal culpability and punishment should have differed from the intentional actor's. The *Tison* Court ignored the long held principle that the intentional and nonintentional killer have different culpabilities. Therefore, in the case of Ricky and Raymond Tison, death was a disproportionate punishment.

### C. Legislatures, the Death Penalty and Felony Murder

In surveying state statutes imposing the death penalty on defendants who were major actors in inherently dangerous felonies, the *Tison* Court asserted that the number of states authorizing death "powerfully suggests" that society does not reject such punishment as grossly excessive.<sup>283</sup> Upon closer examination, though, the number of jurisdictions forbidding capital punishment in the Tisons' circumstances exceeds the number of states that do permit the penalty by a ratio of three to two.<sup>284</sup> The Court's conclusion is therefore questionable at best. The majority ignored the fact that, at the time, thirteen jurisdictions had no capital sentencing statute at all.<sup>285</sup> In addition, the *Tison* Court acknowledged but disregarded eleven states that do not authorize the death penalty for a defendant who substantially participates in a felony resulting in murder, but manifests only an extreme indifference to life.<sup>286</sup> Of the remaining twenty-six<sup>287</sup> states that had capital punishment statutes at the time of *Tison*, four required that the defendant either killed or intended to kill,<sup>288</sup> and two others rejected capital punishment under the *Tison* substantial participation and reckless indifference standard.<sup>289</sup> Finally, the *Tison* majority cited California as authorizing the death penalty for felony murder absent an intent to kill.<sup>290</sup> The California Supreme Court, however, has stated that the state's capital punishment statute<sup>291</sup> requires the state to prove intent to kill if the defendant is an aider and abettor, but not the actual killer.<sup>292</sup>

In sum, when the Supreme Court decided *Tison* in April 1987, thirty-one states and the District of Columbia did not sanction the imposition of the death penalty on such

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<sup>282</sup> See *Lockett*, 438 U.S. at 625 (White, J., concurring).

<sup>283</sup> See *supra* note 177 and accompanying text.

<sup>284</sup> See *infra* notes 285-93 and accompanying text.

<sup>285</sup> See *Tison*, 107 S. Ct. at 1697 n.18 (Brennan, J., dissenting).

<sup>286</sup> *Id.* at 1686. For a list of those states forbidding imposition of death where a defendant's actions were substantial and the likelihood of death raises an inference of extreme indifference to life, see *id.* at 1686 n.10.

<sup>287</sup> See generally *Tison*, 107 S. Ct. at 1697 & n.13 (Brennan, J., dissenting).

<sup>288</sup> *Id.* For a list of those states that reserve the death penalty for those who actually and intentionally kill, see *id.*

<sup>289</sup> See *id.* See *supra* note 220 and accompanying text for a discussion of the two states rejecting the imposition of the death penalty in most cases.

<sup>290</sup> *Tison*, 107 S. Ct. at 1686 n.8.

<sup>291</sup> *Id.* (citing CAL. PENAL CODE §§ 189, 190.2(a)(17), 190.2(b) (West Supp. 1987)).

<sup>292</sup> See *People v. Anderson*, 742 P.2d 1306, 1325, 240 Cal. Rptr. 585 (1987).

felons as Ricky and Raymond Tison.<sup>293</sup> Significantly, these statistics place the *Tison* majority in the minority,<sup>294</sup> and thus undermine the strength of the Court's reasoning. Moreover, these statistics convey an important message. In the past, the Court has considered contemporary standards central to the determination of whether certain punishments violate the eighth amendment's prohibition against cruel and unusual punishment.<sup>295</sup> As the Court suggested in *Gregg*, legislative enactments are one of the prime indicia of whether society approves of certain punishments.<sup>296</sup> Given that three-fifths of the states disallow capital punishment where a defendant did not kill or intend to kill, American society seems to repudiate the death penalty in such circumstances as the Tisons'. Thus, the *Tison* majority's contention that the legislation "powerfully suggests that our society does *not* reject the death penalty as grossly excessive"<sup>297</sup> in situations where the nontriggerperson lacked the intent to kill is contrary to the facts.

#### D. Sentencers, the Death Penalty and Felony Murder

*Gregg v. Georgia* and its progeny have established that, in addition to the legislature, the jury also acts as a significant barometer of society's view of the appropriateness of capital punishment.<sup>298</sup> The *Enmund* Court focused on the characteristics of those executed in the past twenty-five years, one aspect of jury sentencing. The Court found that, of the 362 persons executed between 1954 and 1982, only 6 were nontriggerpersons, and all of those executions occurred in 1955.<sup>299</sup> Furthermore, the *Enmund* Court found that juries had rejected the death penalty for such crimes as Earl Enmund's, in which the defendant did not kill or intend to take life.<sup>300</sup> If the *Tison* majority had examined the cases of persons executed since 1982, the Court would have seen that sentencers are still reluctant to impose the death penalty where defendants have not killed or intended to kill. Between 1982 and the *Tison* ruling, states have executed 65 people.<sup>301</sup> In all but two cases, courts found the individual executed to have committed the actual killing.<sup>302</sup> In the two cases where some evidence suggested that the person executed did not actually kill the victim, the record contained sufficient facts to show the defendant intended the

<sup>293</sup> See generally *Tison*, 107 S. Ct. at 1697 n.13 (Brennan, J., dissenting).

<sup>294</sup> In *Tison*, Justice Brennan claimed in his dissent that "contrary to the Court's implication that its view is consonant with that of 'the majority of American jurisdictions,' . . . the Court's view is itself distinctly the minority position." *Id.* at 1697 (Brennan, J., dissenting) (quoting majority at 1687).

<sup>295</sup> In *Woodson v. North Carolina*, 428 U.S. 280, 282, 305 (1976), the Court considered the constitutionality of North Carolina's mandatory death sentence statute. In declaring the law invalid, the Court premised its analysis on the integral part that contemporary values play in eighth amendment applications. *Id.* at 288 (citing *Gregg v. Georgia*, 428 U.S. 153, 176-82 (1976)).

<sup>296</sup> See *Gregg*, 428 U.S. at 179.

<sup>297</sup> *Tison*, 107 S. Ct. at 1686 (emphasis in original).

<sup>298</sup> *Gregg*, 428 U.S. at 181; see also *Furman v. Georgia*, 408 U.S. 238, 439-40 (1972) (Powell, J., dissenting) (jury is reliable index of contemporary attitudes toward the death penalty); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (important jury function in capital sentencing cases is maintaining link between community values and penal system).

<sup>299</sup> *Enmund v. Florida*, 458 U.S. 782, 794-95 (1982).

<sup>300</sup> *Id.* at 795.

<sup>301</sup> *Tison*, 107 S. Ct. at 1698 (Brennan, J., dissenting).

<sup>302</sup> *Id.* at 1698 n.16 (Brennan, J., dissenting).

victim's death.<sup>303</sup> Thus, the conclusion reached in *Enmund*, that the Court was unaware of any individual convicted of felony murder, and executed, over the past quarter century who did not kill or intend the victim's death, still remains valid up to August 1987.<sup>304</sup> The *Tison* standard, however, runs counter to thirty-two years of sentencers' reluctance to impose the death penalty in such cases.

A survey of Arizona cases where death row inmates raised *Enmund* challenges also illustrates sentencing attitudes toward defendants who have not killed, attempted to kill, or intended to kill. Interestingly, of the sixty-four persons on death row in Arizona as of August 1987, the Arizona Supreme Court concluded that all who raised and lost an *Enmund* challenge either killed or intended to kill.<sup>305</sup> As Justice Brennan pointed out in his dissent, the *Tisons'* sentence appears to be an aberration within Arizona as well as the United States.<sup>306</sup>

Perhaps more revealing than the characteristics of those executed from 1955 to the present, and of the Arizona cases where the death row inmates raised *Enmund* claims, is an analysis of those jurisdictions that authorize and impose the death penalty where a defendant substantially participates in a felony resulting in death and displays a reckless indifference to human life.<sup>307</sup> The *Tison* majority cited five cases it considered to represent the "apparent consensus" that substantial participation in an inherently violent felony may justify a capital sentence even absent an intent to kill.<sup>308</sup> Yet the *Tisons'* case is clearly distinguishable from these because, in each of the five sample cases, the state trial or appellate court suggested that the defendants actually participated in or intended the killing.<sup>309</sup>

Thus, the available data on capital sentencing does not support the *Tison* decision. The vast majority of those executed in the last thirty-two years actually committed the murders. In cases where the defendant's role in the murder was unclear, the courts have suggested the defendant either participated in the killing or intended for the victims to die. In addition, the Arizona Supreme Court affirmed all the death sentences appealed on the basis of *Enmund*; the court determined that, in each case, the appellant had killed or intended to kill. A case study of one state which, prior to *Tison*, authorized the death

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<sup>303</sup> In *Green v. Zant*, 738 F.2d 1529, 1533-34 (11th Cir.), *cert. denied*, 469 U.S. 1098 (1984), the petitioner, sentenced to death for murder, claimed the *Enmund* standard barred capital punishment in his case because a witness testified that the murder was committed while petitioner was away getting gasoline. The court of appeals rejected his challenge, noting that petitioner's conviction was based on a malice murder theory — not felony murder — and the evidence supported the verdict on the theory. *Id.* at 1533-34.

In *Skillern v. Estelle*, 720 F.2d 839, 844 (5th Cir. 1983), *cert. denied*, 469 U.S. 1067 (1984), the court of appeals found *Enmund* inapplicable because, although evidence presented showed that Skillern did not kill the victim, it did indicate that he agreed in advance to rob and kill the victim.

<sup>304</sup> See *Enmund*, 458 U.S. at 796.

<sup>305</sup> See *supra* note 224.

<sup>306</sup> *Tison*, 107 S. Ct. at 1699 (Brennan, J., dissenting).

<sup>307</sup> For those states supporting the majority position, see *supra* note 176 and accompanying text.

<sup>308</sup> *Tison*, 107 S. Ct. at 1686-87 (citing *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983), *cert. denied*, 465 U.S. 1051 (1984); *Deputy v. State*, 500 A.2d 581, 599-600 (Del. 1985), *cert. denied*, 107 S. Ct. 1589 (1987); *Ruffin v. State*, 420 So.2d 591, 594 (Fla. 1982); *Allen v. State*, 253 Ga. 390, 395 n.3, 321 S.E.2d 710, 715 n.3 (1984), *cert. denied*, 470 U.S. 1059 (1985); *People v. Davis*, 95 Ill. 2d 1, 52, 447 N.E.2d 353, 378, *cert. denied*, 464 U.S. 1001 (1983); *Selva v. State*, 680 S.W.2d 17, 22 (Tex. Cr. App. 1984)).

<sup>309</sup> See *supra* note 222.

penalty in such circumstances as the 'Tisons', provides a final statistical device that may confirm the capital sentencing trend in the United States.

Arkansas is one of the four states<sup>310</sup> that authorize the death penalty in felony murder cases where the defendant acted with reckless indifference to human life.<sup>311</sup> Specifically, if a person causes the death of another while manifesting an extreme indifference to human life, that person has committed murder for which the punishment may be death.<sup>312</sup> Currently, thirty persons sit on death row in Arkansas.<sup>313</sup> Of the twenty-six on which information is available, Arkansas courts found twenty to have committed the actual killing<sup>314</sup> and suggested the remaining six defendants intended to kill the

<sup>310</sup> *Tison*, 107 S. Ct. at 1685. The other three states that specifically allow capital punishment with a state of mind of reckless indifference are Kentucky, Illinois, and Delaware. *Id.* at 1685 n.5. The reader should be advised that this is a rudimentary case study and the conclusions that have been drawn should be so understood.

<sup>311</sup> *Id.* at 1685.

<sup>312</sup> Section 41-1501(1)(a) of the Arkansas Annotated Statutes defines capital murder as when a person during "the course of and in furtherance of the felony [rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree], or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life." (1977 & Supp. 1985). Section 41-1501(3) makes capital murder punishable by death or life imprisonment without parole.

<sup>313</sup> Telephone interview with Jack Gillean, Assistant Attorney General, Arkansas Attorney General's Office (April 13, 1988).

Other organizations besides state governments monitor death row populations. One such group is the NAACP Legal Defense and Educational Fund. See generally NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. As of March 1, 1988, the NAACP counted thirty persons on death row in Arkansas, including two men imprisoned in other states. Telephone interview with Tanya Coke, Director of Research, Capital Punishment Project, NAACP Legal Defense and Educational Fund (April 15, 1988). These two men are not considered to be on death row by the Arkansas Attorney General's office. Telephone interview with Jack Gillean, Assistant Attorney General, Arkansas Attorney General's Office (April 13, 1988).

<sup>314</sup> See, e.g., *Parker v. State*, 292 Ark. 421, 425, 731 S.W.2d 756, 758 (1987) (defendant entered house to kill victim); *Hill v. State*, 289 Ark. 387, 393, 713 S.W.2d 233, 236 (1986) (inference from evidence that defendant fatally shot state trooper), *cert. denied*, 107 S. Ct. 1331 (1987); *Fretwell v. State*, 289 Ark. 91, 99, 708 S.W.2d 630, 634 (1986) (defendant killed victim); *Snell v. State*, 287 Ark. 264, 265, 698 S.W.2d 289, 289 (1985) (defendant convicted of killing state trooper); *Pruett v. State*, 282 Ark. 304, 311, 669 S.W.2d 186, 190 (1984) (defendant admitted killing victim), *cert. denied*, 469 U.S. 963 (1985); *Rector v. State*, 280 Ark. 385, 388, 659 S.W.2d 168, 169 (1983) (defendant shot and killed policeman), *cert. denied*, 466 U.S. 988 (1984); *Simmons v. State*, 278 Ark. 305, 309, 319, 645 S.W.2d 680, 682, 688 (defendant committed multiple murders), *cert. denied*, 464 U.S. 865 (1983); *Ford v. State*, 276 Ark. 98, 101, 633 S.W.2d 3, 5 (defendant shot and killed policeman), *cert. denied*, 459 U.S. 1022 (1982); *Hill v. State*, 275 Ark. 71, 78, 628 S.W.2d 284, 287 (1982) (robbed gas station; kidnapped and shot repeatedly the owner and game and fish officer; officer died), *cert. denied*, 459 U.S. 882 (1982); *Hayes v. State*, 274 Ark. 440, 446, 625 S.W.2d 498, 501 (1981) (defendant admitted that he murdered girlfriend and cab driver), *aff'd*, 278 Ark. 211, 216, 645 S.W.2d 662, 666, *cert. denied*, 464 U.S. 865 (1983); *Singleton v. State*, 274 Ark. 126, 128-29, 623 S.W.2d 180, 181 (1981) (robbed and stabbed storekeeper, killing her), *cert. denied*, 456 U.S. 938 (1982); *Miller v. State*, 269 Ark. 341, 345, 356, 605 S.W.2d 430, 434, 439 (1980) (defendant robbed and killed deceased to eliminate as a witness), *cert. denied*, 450 U.S. 1035 (1981); *Swindler v. State*, 264 Ark. 107, 110, 569 S.W.2d 120, 121 (1978) (defendant shot and killed policeman), *cert. denied*, 449 U.S. 1057 (1980); *Pickens v. State*, 261 Ark. 756, 761, 551 S.W.2d 212, 215 (1977) (defendant robbed store and killed victim to eliminate a witness), *cert. denied*, 435 U.S. 909 (1978); *Hulsey v. State*, 261 Ark. 449, 451-52, 549 S.W.2d 73, 75 (1977) (defendant shot service station attendant seven times during robbery), *cert. denied*, 439 U.S. 882 (1978).

In several other Arkansas cases, the evidence indicated that the defendant actually murdered

victims.<sup>315</sup> Thus, although the Arkansas statute supports the *Tison* decision, the death row population there is composed primarily of those who killed or intended to kill.

There are several possible reasons for this underrepresentation on Arkansas death row of those who manifested an extreme indifference to human life, but who did not kill or intend to kill: prosecutors do not ask for the death penalty in such circumstances, sentencers do not impose capital punishment in such contexts, or the courts simply have not faced such a set of facts. Whatever the rationale, this brief study suggests that Arkansas supports *Tison* in theory only. Although Arkansas's statute allows the state to execute the felon who possesses an extreme disregard for human life,<sup>316</sup> those whom Arkansas condemns to death are individuals who killed or intended to kill. The presence of such a statute, therefore, at least in Arkansas as of April, 1988, does not necessarily represent acceptance by the public or application in the courts.<sup>317</sup>

Thus, as an objective index of societal attitudes towards the death penalty, sentencers have displayed an unwillingness to impose death on those who did not kill or intend to take life. Characteristics of those who have been executed as well as those who have appealed their capital sentences in Arizona demonstrate this unwillingness. Even in Arkansas, which statutorily permits the death penalty where the defendant possessed a reckless indifference to human life, sentencers choose not to apply the sanction in such circumstances. Therefore, the evidence simply does not support the *Tison* majority's conclusion that an "apparent consensus" supports its holding.<sup>318</sup> Reality, as found in the courts and public sentiment, suggests otherwise.

#### E. *The Consequences of Tison*

The problem with the *Tison* opinion extends far beyond the fact that precedent, legislative enactments, juries and principles of proportionality do not substantiate the holding. The true danger lies in *Tison's* consequences on future capital sentencing cases. The standards announced in *Tison* may very well encourage the kind of arbitrary and unpredictable capital sentencing the Court previously has warned against and has declared unconstitutional.

The Supreme Court, in *Furman v. Georgia*, declared several state capital sentencing statutes unconstitutional because the statutes provided for the wanton administration of

the victim. In Ronald Wilson's case, Wilson acted alone in committing a rape-murder. Telephone interview with Jack Gillean, Assistant Attorney General, Arkansas Attorney General's Office (April 13, 1988). In Jonas Whitmore's case, Whitmore perpetrated a robbery-murder by himself. *Id.* In the case of Michael O'Rourke, the evidence suggested that O'Rourke committed a felony murder by himself, as the state charged no other individual. *Id.* The state sentenced Mark Gardner to death for strangling and killing three persons. Telephone interview with Clint Miller, Assistant Attorney General, Arkansas Attorney General's Office (April 13, 1988). Finally, in Robert Burnett's case, the state convicted Burnett of beating a store clerk to death during a robbery. *Id.*

<sup>315</sup> See, e.g., *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983), *cert. denied*, 465 U.S. 1051 (1984) (circumstances of case bring it within *Enmund* exception); *Ruiz v. State*, 265 Ark. 875, 897, 582 S.W.2d 915, 926 (1979) (defendants charged with premeditated and deliberate murder), *aff'd*, 273 Ark. 94, 106, 617 S.W.2d 6, 13, *cert. denied*, 454 U.S. 1093 (1981).

<sup>316</sup> See *supra* note 312 for the Arkansas capital murder statute.

<sup>317</sup> Cf. *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986) (Georgia sodomy statute that did not mention a sexual preference in its language enforcement history demonstrates "Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals." *Id.* at 201 (Blackmun, J., dissenting)).

<sup>318</sup> *Tison*, 107 S. Ct. at 1686 (Brennan, J., dissenting).

the death penalty.<sup>319</sup> Several justices in *Furman* warned that arbitrary capital sentencing constituted cruel and unusual punishment.<sup>320</sup> Justice Brennan, concurring in the opinion, represented this group, stating that the eighth amendment condemns the arbitrary administration of severe punishments.<sup>321</sup>

Subsequent to *Furman*, the Court continued to express the same genuine concern about arbitrary capital sentencing. In its invalidation of a mandatory death penalty statute, the Court held such an automatic sanction incapable of fulfilling *Furman's* basic requirement that rational and reviewable standards should replace arbitrary standards in the infliction of capital punishment.<sup>322</sup> Moreover, in *Gregg v. Georgia*, the Court acknowledged that states could draft standards so as to ensure that sentencers do not impose death in an arbitrary or capricious fashion.<sup>323</sup>

*Tison* neither encourages this concern for reviewable standards nor illuminates the distinction between those cases deserving capital punishment and those that do not. After *Tison*, the courts will, absent legislative action to the contrary, impose the death penalty on defendants who substantially participate in a felony in which they acted with reckless indifference to human life. As for what constitutes "reckless indifference," the *Tison* majority itself offers no assistance.<sup>324</sup> The *Tison* opinion leaves the question open to the kind of speculation and capriciousness the Court had warned about only a decade before. Moreover, the vague standard the *Tison* Court promulgated arguably may be satisfied by every violent felony. As the *Tison* Court and Justice Brennan, in his dissent, pointed out, the possibility of bloodshed inheres in any violent crime.<sup>325</sup> Similarly, by participating in an armed robbery, an actor necessarily exhibits a reckless indifference to human life, regardless of whether he or she desired that any one be injured or killed. As a result, the *Tison* standard blurs the line distinguishing when the death penalty applies from when it does not. This blurring calls for the very arbitrariness that the eighth amendment prohibits.

#### F. A Return to *Enmund*

This casenote has demonstrated that the *Tison* holding is inconsistent with precedent, legislative and jury trends, and principles of proportionality. Left alone, *Tison* fosters the type of arbitrary decision-making that characterized capital sentencing in *Furman* — a type that the Court has constantly opposed. For a holding substantiated by the objective factors that the Court has looked to in its eighth amendment analysis, and for one that avoids capricious capital sentencing, the Court should abandon the substantial participation and reckless indifference standard articulated in *Tison* and return to the kill or intend to kill standard that *Enmund* enunciated.

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<sup>319</sup> See generally *Furman v. Georgia*, 408 U.S. 238, 239, 310 (1972) (Stewart, J., concurring).

<sup>320</sup> See *id.* at 256–57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring).

<sup>321</sup> *Id.* at 274 (Brennan, J., concurring).

<sup>322</sup> See *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

<sup>323</sup> See generally *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976). See also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (state imposing capital punishment has "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty").

<sup>324</sup> *Tison*, 107 S. Ct. at 1688 ("[w]e will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here").

<sup>325</sup> *Id.* at 1684, 1691 (Brennan, J., dissenting).

If one accepts the basic premise that the death penalty is constitutional, then executing one who has in fact killed generates the least controversy in capital sentencing cases. Legislatures authorize and sentencers impose such a sanction for the defendant who murders.<sup>326</sup> Moreover, such punishment may not be disproportionate for one who deliberately takes the life of another.<sup>327</sup> The same reasoning that supports sentencing an actual killer to death also supports a capital sentence for one who intends to kill because the only significant difference between the actual killer and one who intends to kill is the result: the murderer succeeds in his or her action, whereas the individual who attempts or intends to kill, though desiring to succeed, does not. The determination of whether a defendant intended to kill, though, is a difficult inquiry.

In those circumstances where the factfinder cannot clearly establish that the defendant actually killed or attempted to kill, the factfinder must turn to the question of whether the defendant intended to kill. The common law definition of intent may guide this inquiry. Thus, where the factfinder establishes that the defendant desired that his or her acts cause death or knew that death was substantially certain to occur, intent to kill is established, and the state may impose capital punishment.<sup>328</sup> Although establishing that the defendant intended to kill is not an easy determination, it will prove to be less vague and less prone to abuse than the reckless indifference standard. Under a reckless indifference approach, a mere showing that the defendant participated in a felony, which may be sufficient in itself to show reckless disregard, does not establish intent. Therefore, by requiring that the factfinder determine that the defendant intended to kill before permitting the sentencer to impose death on him or her, the number of capital sentences will still reflect society's reservations about limiting the punishment to a small number of extreme cases.

Given the finality of death, capital punishment is a unique sanction. Accordingly, the Court has imposed many restrictions on its administration. Case law, legislatures, juries, and the principle of proportionality provide a constant reminder that society reserves this sanction for a select group of cases. This group has consisted in the past, and should remain comprised in the future, of persons who take or desire to take another's life or who know such a result is likely to occur from their actions. Adopting a less precise standard such as reckless indifference, in all likelihood, will serve to cloud those distinctions separating capital from non-capital offenses, and ultimately lead to arbitrary decision-making in the death sentencing process.

#### CONCLUSION

The Supreme Court in *Tison v. Arizona* held that substantial participation in a felony combined with a reckless indifference to human life satisfies the *Enmund v. Florida* culpability standard as to when a sentencer may impose the death penalty on a nontriggerperson, yet still comply with the eighth amendment. *Tison*, in essence, created a new standard. After considering the tools the Court has utilized in its eighth amendment analysis, however, the *Tison* Court clearly decided the case incorrectly. *Tison* is inconsistent with precedent and the death penalty's goals, as well as with the trends in the state

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<sup>326</sup> See generally *Enmund v. Florida*, 458 U.S. 782, 789 (1982).

<sup>327</sup> Compare *id.* at 797, where the Court held the death penalty invalid where the defendant did not kill, attempt to kill, or intend to kill.

<sup>328</sup> *Tison*, 107 S. Ct. at 1684 (quoting W. LAFAVE & A. SCOTT, *supra* note 108, § 28, at 196).



legislatures and courts. Moreover, *Tison* contradicts the proportionality principle, in that the punishment *Tison* sanctions is excessive when compared to the crime the Tisons committed. Furthermore, the *Tison* standard is disproportionate because the brothers' mental states do not comport with their corresponding criminal culpabilities. Finally, *Tison*, by offering a reckless indifference standard that is inherently vague, encourages the arbitrariness in capital sentencing that the Court has previously held unconstitutional. To comply with precedent, societal attitudes as evidenced by legislative and sentencing trends, and principles of proportionality, the Court should abandon the *Tison* decision and readopt the *Enmund* standard that the Constitution permits death as a sanction only for one who kills, attempts to kill, or intends to kill. Then, and only then, can the courts maintain a rationally reviewable sentencing structure and avoid arbitrary decision-making.

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