The Constitutionality of Imposing Death on a Felony-Murder Accomplice

Robert E. Tardif Jr.*
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Abstract

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KEYWORDS: accomplice, murder, death
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I. Introduction

The history of the death penalty in America has been marked by a continual and controversial struggle between two opposing forces. Each capital punishment issue represents another battleground for the retentionists who seek to retain the death penalty and the abolitionists who seek to abolish it. The Supreme Court recently struggled again in the case of Coker v. Georgia (1977) when it decided whether the imposition of capital punishment on a felony-murder accomplice who does not kill or intend to kill offends the Eighth Amendment bar against cruel and unusual punishment. The cases decided by the Court have a significant impact upon those convicted accomplices who may receive the death penalty.

In attempting to resolve the issue, the Court employed what has commonly become known as the proportionality test. The test determines whether a punishment is a proportionate penalty for the severity of the crime committed. The primary focus of this Note will be the Court's proportionality jurisprudence in felony-murder cases where the death penalty is a possible punishment. The Note will trace the history of proportionality and its emergence in felony-murder accomplice cases. This Note will examine the Court's division on whether the death penalty is proportionate for felony-murder accomplices. Finally, the Note will discuss the Court's current view of proportionality in felony-murder accomplice cases and how it allows states to impose the death penalty more easily.

II. The Felony-Murder Doctrine and Accessorial Liability

In order to better understand this area of death penalty jurisprudence, it is important to have a working knowledge of the felony-murder doctrine and accessorial liability law. It is also important to realize that both doctrines work together in certain situations to produce what

1. The Death Penalty in America 3-4 (H. Bedau ed. 1982).
2. Id.
3. U.S. CONST. amends. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
may appear to be odd results. This is especially true when the death penalty is a possible punishment for the felony-murder accomplice.

A. Felony-Murder Doctrine

In its most basic form, the felony-murder rule states that any killing which occurs during the commission or attempted commission of a felony constitutes murder even if the killing is accidental. Under this doctrine, the law transfers and transforms the defendant's intent to commit the underlying felony into malice, an element the law requires for conviction of murder. Although some commentators have criticized the doctrine, almost all states retain some form of the felony-murder rule.


5. Malice generally refers to an intentional killing of another human being without justifiable excuse, or an unlawful killing without the intention to kill. Am Jur 2d Homicide § 50 (1968).


8. Two states have abolished the felony-murder doctrine by statute. See HAW. REV. STAT. § 707-701, commentary 137-58 (1983); K.Y. REV. STAT. § 707-020 (1985). Michigan abolished the common-law felony-murder rule judicially. People v. Aaron, 409 Mich. 672, 727, 299 N.W.2d 304, 326 (1980). Ohio has effectively abolished the felony-murder rule. A death proximately caused by an offender's committing or attempting to commit a felony is only involuntary manslaughter. OHIO REV. CODE ANN. § 2903.04 (Anderson 1987). By definition, manslaughter does not require malice. Since the primary purpose of the felony-murder rule is to supply malice, in Ohio the rule has no significant effect.

9. Some jurisdictions limit the application of the felony-murder rule. Some of these limitations include applying the rule only to: (1) felonies recognized as common law, Commonwealth v. Euler, 243 Pa. 155, 89 A. 968 (1914); (2) inherently dangerous felonies, People v. Washington, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130 (1965); TEXAS PENAL CODE ANN. § 19.01 (Vernon 1974); (3) forcible felonies, Ill. ANN. STAT. ch. 38 para. 9-1 (Smith-Hurd 1979 & Supp. 1987); or (4) killings committed by a co-felon, Commonwealth v. Redline, 391 Pa. 486, 508, 137 A.2d 472, 482 (1958); ALA. CODE § 13A-6-6(c)(3) (1982).

10. For a very detailed look at the common law theory of parties to a crime, see R. Perkins & R. Boyce, supra note 6, at 727-56.


12. Westerfield, supra note 11, at 155; Drescher, Jurisprudence, supra note 11, at 157.

13. Drescher, Jurisprudence, supra note 11, at 44; see also M. Barbour, supra note 4, at 145.

14. Westerfield, supra note 11, at 156; W. Lafave & A. Scott, supra note 4, at 146.

15. Westerfield, supra note 11, at 156; Drescher, Jurisprudence, supra note 11, at 157.

16. The label placed upon the party affected rules which apply to jurisdiction, findings, and ability to charge and convict. See R. Perkins & R. Boyce, supra note 6, at 751-58; W. Lafave & A. Scott, supra note 4, at 372-73. The law treated accessories differently because accessories were considered less deserving of capital punishment. Drescher, Reassessing the Theoretical Underpinnings of Acquiesce Liability: New Solutions to an Old Problem, 37 Hastings L.J. 91, 96-97 (1985) [hereinafter Drescher, Reassessing].

17. Westerfield, supra note 11, at 156; W. Lafave & A. Scott, supra note 4, at 374-78.

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**B. Parties to a Crime**

At common law,10 accessory law characterized felony participants as either principals or accessories.11 The principal in the first degree, or perpetrator, committed, directly or indirectly, the elements of the substantive crime.12 The law subdivided non-perpetrators, or accessories, into principals in the second degree and accessories before or after the fact.13 Principals in the second degree remotely assisted the crime and were either present or constructively present at the scene of the crime.14 Accessories before the fact and accessories after the fact assisted the crime, but were neither present nor constructively present at the scene of the crime.15

Although each participant could receive the same punishment for the crime, there were distinctions in the manner of proving guilt between principals and accessories.16 Today, state statutes have abrogated virtually all distinctions that were once made between principals and accessories.17 Ultimately, if an accomplice in any way procures or assists the crime, states may charge, convict and punish the accomplice for the crimes committed by the principal.18

10. For a very detailed look at the common law theory of parties to a crime, see R. Perkins & R. Boyce, supra note 6, at 727-58.


12. Westernfield, supra note 11, at 155; Dressler, Jurisprudence, supra note 11, at 44.

13. Dressler, Jurisprudence, supra note 11, at 44; see also M. Barbour, supra note 4, at 145.

14. Westernfield, supra note 11, at 156; W. Lafave & A. Scott, supra note 4, at 571.

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17. Westernfield, supra note 11, at 156; W. Lafave & A. Scott, supra note 4, at 574-75.

As a result of the interaction of the felony-murder doctrine and accessorial liability law, states can convict a felony-murder accomplice for a murder committed by a co-felon. This is true even if the principal kills the victim by accident. Thus, an accomplice could receive the same punishment as the felon who committed the actual killing. States retaining the death penalty could sentence a felony-murder accomplice to death.

III. The Supreme Court’s Eighth Amendment Jurisprudence

Before the landmark decision of Furman v. Georgia, constitutional challenges against the imposition of capital punishment were largely unsuccessful. The United States Supreme Court rejected challenges attacking the methods of execution and the jury’s absolute, unguided discretion to impose the death penalty. With its decision in Furman, however, the Court began to participate more actively in determining the constitutionality of the states’ imposition of capital punishment under certain circumstances and upon certain offenders.

In modern Eighth Amendment jurisprudence, the Court employs one of two different modes of analysis. The Court employs either a procedural analysis or a substantive analysis to determine whether a punishment is cruel and unusual. Under a procedural analysis, a state’s power to use certain procedures to impose capital punishment is limited.

21. Wilkerson v. Utah, 99 U.S. 130 (1877) (shooting offender for crime of first-degree murder is not cruel and unusual punishment within the meaning of the Eighth Amendment); In re Kemmler, 136 U.S. 436 (1890) (execution of offender is not cruel and unusual punishment); McElvain v. Brush, 142 U.S. 155 (1891) (same).

The Court determines whether the sentencing procedures employed in imposing a sanction make its imposition cruel and unusual. A death penalty statute will fail under this analysis if it allows a state to impose the death penalty in an arbitrary or capricious manner or prohibits the sentencer from individually considering each offender.

Substantive Eighth Amendment analysis falls into three categories. First, the Eighth Amendment forbids criminalizing certain behavior. Second, the cruel and unusual punishment clause proscribes certain methods of punishment in all circumstances. Third, the Amendment prohibits imposing particular punishments on specific offenders or for particular offenses. The Eighth Amendment bars punishment in the third category because it is excessive or disproportionate to the severity of the crime.

A. Substantive Eighth Amendment Analysis

A substantive challenge under the Eighth Amendment in a capital punishment case is a constitutional challenge to the imposition of the death penalty. The main thrust of the challenge revolves upon the question of whether the death penalty is cruel or unusual punishment. In the earliest capital punishment cases raising substantive Eighth Amendment claims, the Court addressed whether particular methods of execution constituted cruel and unusual punishment.

25. Furman, 408 U.S. at 240-57 (Douglas, J., concurring); id. at 306-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring); see also Woodson, 428 U.S. at 306 (mandatory death penalty statutes invalid because offender not found on individual basis); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (state death penalty statute may not prohibit the sentencer from considering mitigating factors not provided by statute).
28. Coker v. Georgia, 433 U.S. 584, 592, 600 (1977) (imposing the death penalty for raping an adult woman where the woman does not die as a result constitutes cruel and unusual punishment); Weems v. United States, 217 U.S. 349, 382 (1910) (punishing by cadena temporal for falsifying an official document constitutes cruel and unusual punishment).
30. M. BAHOUT, supra note 4, at 122.
31. See supra note 21.
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22. Weiler v. California, 402 U.S. 183 (1971). The Supreme Court decided in Weiler v. California, McGough due process clause of the Fourteenth Amendment. The Court's decision under the Eighth Amendment was issued in Furman, while not expressly overruling McGough, casts considerable doubt on the validity of that decision.

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25. Furman, 408 U.S. at 240-47 (Douglas, J., concurring); id. at 206-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring); see also Woodson, 428 U.S. at 304 (mandatory death penalty statutes invalid because offender not tried on individual basis); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (state death penalty statute may not prohibit the sentencing factor not provided by statute).
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30. M. BRIAND, supra note 4, at 122.
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execution violated the Eighth Amendment when the punishment resembled torture or other archaic methods of punishment. Substantive analysis under the Eighth Amendment, however, prohibited more than merely torturous methods of punishment. In a 1892 case, *O'Neil v. Vermont*, three justices realized that the Eighth Amendment embodied the idea of proportionality. Proportionality requires that the punishment imposed on a defendant not be grossly disproportionate to the severity of the crime committed.

In *O'Neil*, the justice of the peace found the defendant guilty of 307 counts of selling liquor illegally and fined him $6,638. If *O'Neil* could not pay the fine, he was to serve more than fifty-four years in prison at hard labor. Although a majority of the Court did not reach the issue of proportionality, a few justices argued that the sanction was unconstitutional. Justice Field, while noting that the cruel and unusual punishment clause usually applies to torturous punishments, argued that the Eighth Amendment also prohibited "all punishments which by their excessive length or severity are greatly disproportionate to the offenses [sic] charged." Justice Harlan and Brewer argued that the punishment imposed, in view of the nature of the offense, was cruel and unusual.

In 1910, in *Weems v. United States*, a majority of the justices supported incorporation of the concept of proportionality into the Eighth Amendment. The *Weems* Court held that the Philippine punishment of *cadena temporal*, imposed for the crime of falsifying an official document, constitutes cruel and unusual punishment. The court stated, "it is the precept of justice that punishment for crime be gradu... and proportioned to [the] offense." The Court agreed that the cruel and unusual punishment clause is a progressive concept, stating that the Eighth Amendment may "acquire meaning as public opinion becomes enlightened by a humane justice."

To support its conclusion that *cadena temporal* was a disproportionate punishment for the crime, the Court undertook a proportionality test. The Court noted that more severe crimes in the Philippines carried less severe sanctions than *Weems's* crime. In addition, the analogous federal offense in the United States and a very similar offense in the Philippines carried less severe punishments. Since the Philippine Legislature imposed a less severe penalty for an equally or more serious offense, the Court concluded that a more severe punishment for a less severe crime was cruel and unusual.

In the 1958 case of *Trop v. Dulles*, the Court held that denationalization of a citizen who deserted the U.S. Army for less than a day was unconstitutional. The Court, concluding that denationalization was not an excessive punishment for war-time desertion, employed a proportionality test which vastly differed from the test used in *Weems*. Since the maximum available punishment for war-time desertion was death, and Trop received a penalty less than death, "there [could] be no argument that the penalty of denationalization [was] excessive in relation to the gravity of the crime." Under this analysis, if the defendant received a punishment less severe than that which the legislature could validly authorize for the crime, the less severe sanction could not be excessive.

Although the Court did not find the punishment of denationalization excessive, it held that the punishment was nevertheless cruel and unusual. The Court stated that the underlying principle of the Eighth Amendment is "nothing less than the dignity of man," noting that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." De...
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32. Gregg, 428 U.S. at 170.
33. 144 U.S. 323 (1892).
34. Gregg, 428 U.S. at 173; see also Coker, 433 U.S. at 592; Radin, supra note 24, at 1000.
35. O’Neil, 144 U.S. at 331-32. Although the Eighth Amendment claim was not correctly pled, the Court stated in dicta that the Eighth Amendment did not apply to the states.
36. Id. at 339-40 (Field, J., dissenting).
37. Id. at 371 (Harlan, Brewer, JJ., dissenting).
38. 217 U.S. 349 (1910).
39. Cadena temporal, which was subdivided into categories of minimum, medium, and maximum, included imprisonment from 12 to 20 years in chains at hard and painful labor. Besides imprisonment, certain accessory penalties were imposed, such as deprivation of parental rights, the right to vote, and subject to lifetime surveillance.
40. Id. at 382.

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41. Id. at 367.
42. Id. at 378. The Court refused to fix the meaning of the clause to prohibit only obsolete methods of punishment. See also Gregg, 428 U.S. at 171.
43. Weems, 217 U.S. at 380-81.
44. Id.
45. Id. at 381.
47. Id. at 103.
48. Id. at 99.
49. Id. at 100-01.
nationalization was contrary to the evolving standards of decency because it stripped Trop of his individual rights and political existence.88 Some commentators suggest that the Court's familiarity or lack of familiarity with the respective offenses and punishments imposed explains the disparate proportionality tests.89 Regardless of the differing tests, the Constitution requires that punishment be proportional to the crime. From its decisions in Weems and Trop, the Court made it clear that the cruel and unusual punishment clause is not a static concept.90 Rather, it is a dynamic and flexible concept.91 The meaning of the cruel and unusual punishment clause evolves as the standards of decency change over time. The Court measures the "evolving standards of decency" by determining contemporary attitudes about the imposition of a given punishment for the crime committed.92

When Justices Marshall and Brennan authored separate opinions in Furman v. Georgia,93 substantive analysis appeared in modern Eighth Amendment interpretation in capital punishment cases. In Furman, the defendant argued that society no longer accepted the death penalty as a permissible mode of punishment, and therefore was unconstitutional. The Court, however, did not hold that capital punishment is unconstitutional per se; it only held that the death penalty was unconstitutional as applied in that particular case.94 Three justices stated that the death penalty is unconstitutional when the sentence retains absolute and unguided discretion to impose the death penalty.95 The justices agreed that such discretion results in the arbitrary, capricious, and discriminatory application of the death penalty, which constitutes cruel and unusual punishment.96

While a plurality of the justices focused on the procedural aspect, Justices Marshall and Brennan argued under a substantive analysis that the death penalty is unconstitutional in all circumstances.97 Marshall revitalized the argument that Eighth Amendment analysis must draw its meaning from the evolving standards of decency.98 He argued that citizens, if informed of all relevant facts about capital punishment, would reject its imposition.99

Justice Brennan argued that human dignity is the fundamental principle within the Eighth Amendment which serves to limit the imposition of capital punishment. Under this analysis, a punishment does not comport with human dignity if it is degrading, arbitrary in infliction, or unacceptable to contemporary society.100

Finally, Brennan argued that punishment does not accord with human dignity if it is unnecessary, and therefore, excessively severe.101 A punishment is excessive when "it is nothing more than the pointless infliction of suffering."102 According to Brennan, punishment is an unnecessary infliction of suffering if a significantly less severe punishment could accomplish the same purpose of the sanction at issue.103

50. Id. at 101-02. The Court stated: "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture."
51. Bradley, supra note 24, at 199-200, Packin, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1075 (1964). The Court conveyed its shock when it stated: "Such penalties for such offenses assume those who have fostered the concept of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crimes should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 345, 366-67 (1910).
52. Trop, 356 U.S. at 100-01; see also Gregg, 428 U.S. at 172-73.
53. Gregg, 428 U.S. at 171.
54. Trop, 356 U.S. at 101; see also Gregg, 428 U.S. at 173.
55. 408 U.S. 238 (1972).
56. Id. at 239-40.
57. Id. at 240-57 (Douglas, J., concurring); id. at 306-10 (Stewart, J., concurring); id. at 307-14 (White, J., concurring).
58. See supra note 57.
59. Furman, 408 U.S. at 257-306 (Brennan, J., concurring); id. at 314-74 (Marshall, J., concurring).
60. Id. at 329 (Marshall, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
61. Id. at 360-63. Justice Marshall felt the following would be critical for citizens to have an informed judgment about capital punishment: capital punishment was to no effective a deterrent than life imprisonment; convicted murderers were usually model prisoners; almost all become law abiding citizens upon release from prison; and the costs of execution exceeded the cost of imprisonment an offender for life.
62. Id. at 271 (Brennan, J., concurring).
63. Id. at 271-74.
64. Id. at 274-77. Justice Brennan argued that a state does not respect human dignity when, without good reason, it inflicts punishment upon some persons that it does not inflict upon others.
65. Id. at 277-79. Brennan argued that a judicial determination must be as objective as possible. Courts must review the history of the punishment and society's present use of the punishment. The measure of acceptance of a severe punishment is in use, not its availability.
66. Id. at 279.
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62. Id. Justice Brennan argued that capital punishment fails to serve the goals of deterrence and retribution any greater than by imprisonment. Id. at 360-63, see also...
The Court addressed the issue of whether capital punishment is unconstitutional per se in the 1976 case of Gregg v. Georgia. Although the Court declined to consider procedural grounds, a plurality of the Court held that the death penalty is not unconstitutional in all circumstances. Under its substantive analysis, the Court united versions of Justice Marshall’s and Justice Brennan’s positions in Furman to form a new substantive test. The Court reaffirmed the position that the Eighth Amendment “must draw its meaning from the evolving standards of decency.” Under this portion of the analysis, the Court must look at objective indicia such as history and precedent of the punishment, legislative attitudes, and jury sentencing decisions to determine public attitude about a punishment. The Court also adopted Justice Brennan’s position that punishment must comport with human dignity. To accord with human dignity, the punishment must not be excessive. The Court observed two aspects of excessiveness. First, the “punishment must not involve the unnecessary and wanton infliction of pain.” A punishment will fail this prong if the punishment does not serve some penological goal. Second, the punishment must not be grossly disproportionate to the severity of the crime.

Applying the first part of the test, the Court concluded that contemporary attitudes support imposing the death penalty for intentional murder. To support this conclusion, the Court noted the historical acceptance of capital punishment, state legislative reaction to the Furman decision, and the juries’ willingness to impose the death penalty for intentional murder. Under the second part of the test, the exccesiveness prong, the Court noted that the death penalty may serve two purposes: retribution and deterrence of prospective offenders. Since data upon the principle of deterrence proved inconclusive, the Court left the resolution of that principle to state legislatures. The Court found, however, that the principle of retribution is a constitutional justification for capital punishment. Addressing the second prong of the exccesiveness test, “proportionality,” the Court simply concluded that capital punishment is not disproportionate for the crime of intentional murder.

After Gregg, the Eighth Amendment mandates proportionality in capital sentencing. As a result of the Court’s superficial analysis regarding proportionality, however, the circumstances in which capital punishment is imposed are left to the discretion of state legislatures.

82. Id. at 173, 187; Weems v. United States, 217 U.S. 349, 367 (1910).
83. Gregg, 428 U.S. at 179.
84. Id. at 178-79. The Court noted that the Framework of the Constitution approved the existence of capital punishment. Capital punishment was a common sanction when the states ratified the Eighth Amendment. The Fifth and Fourteenth Amendments contemplate the imposition of the death penalty.
85. Id. at 179-81. The Court’s decision in Furman v. Georgia, 408 U.S. 238 (1972), invalidated most existing death penalty statutes. See also Furman, 408 U.S. at 411-12 (Blackman, J., dissenting) (every death penalty statute in the country invalidated); Note, Capital Punishment: A Review of Recent Supreme Court Decisions, 52 Nw. U. L. Rev. 261, 273 (1978). After Furman, at least 53 states and Congress re-enacted capital punishment statutes for some crimes which result in the death of another person. Gregg, 428 U.S. at 179-78.
86. Gregg, 428 U.S. at 181-82. The Court noted the relative infrequency of jury verdicts imposing the death penalty, however, the Court stressed that juries base the death penalty for the small number of extreme cases.
87. Id. at 183.
88. Id. at 184-86.
89. Id. at 183. The Court stated that although retribution was not the dominant objective of criminal law, it was neither a forbidden objective nor inconsistent with human dignity (quoting Williams v. New York, 337 U.S. 241, 248 (1949)).
90. Gregg, 428 U.S. at 187. The Court refused to consider whether capital punishment was disproportionate to crimes that did not involve the deliberate killing of another human being. Id. at 187 n.35.
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After Gregg, the Eighth Amendment mandates proportionality in capital sentencing. As a result of the Court's superficial analysis regarding proportionality, however, the circumstances in which capital punishment is imposed is still not clearly defined.
punishment would be disproportionate was unclear. The proportionality analysis was unclear because the Court failed to state which factors courts should analyze to determine proportionality. History of the punishment, legislative attitudes, and jury sentencing decisions were factors to consider to determine whether society accepted a punishment. The Court did not indicate whether courts should consider these factors or other factors to determine proportionality.

B. The Rise of the Proportionality Doctrine

In 1977, the Supreme Court, in Coker v. Georgia, held that imposing capital punishment for raping an adult woman, where the victim did not die as a result of the rape, violated the Eighth and Fourteenth Amendments. Coker is a significant case in modern Eighth Amendment analysis for two reasons. It is the first case in which the Court held capital punishment unconstitutional solely because it is disproportionate to the crime committed. The Court also stated several factors courts must analyze to determine whether capital punishment is disproportionate for a given crime.

A plurality of the Court stated that the death penalty is "an excessive penalty for the rapist who, as such, does not take human life." The Court applied a somewhat reformulated version of the excessive- ness test articulated in Gregg. Capital punishment is excessive when: 1) [it] makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposelessly and needlessly imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime. Applying this test, the Court stated that capital punishment may be unconstitutional if it is disproportionate to the crime committed, even if an acceptable penological goal exists. To determine whether capital punishment is disproportionate for a particular crime, courts must analyze the history of the punishment, legislative attitudes, and jury sentencing decisions.

Analyzing the history and precedent of imposing capital punishment for rape, the Court observed "at no time in the last 50 years have a majority of the States authorized death as a punishment for rape." In addition, after Parman invalidated death penalty statutes for all crimes, only three states out of thirty-five re-enacted death penalty statutes which imposed the death penalty for the rape of an adult woman. Finally, the Court found the fact that juries in Georgia sentenced only six defendants to death for rape since 1973 to be an indication of the juries' unwillingness to impose the death penalty for rape.

Using this analysis, the Court stressed that rape was a crime that deserved serious punishment, but concluded that the crime of rape does not compare with murder, which involves the taking of a human life. The Court concluded that the death penalty was a grossly disproportionate and excessive punishment for the crime of rape.

The Coker decision is an important case in the development of the Court's substantive analysis in felony-murder cases. The Court would soon employ the doctrine of proportionality to determine whether the

96. Id. at 592 n.4.
97. Id. at 593. The Court also observed that international opinion is relevant to the analysis. Id. at 596 n.10. Out of 60 major nations in 1965, only three received the death penalty for rape; see also Edmonds v. Florida, 438 U.S. 782, 796-97 n.22 (1982) (surveying international climate concerning felony murder and capital punishment).
98. Coker, 433 U.S. at 593.
99. See supra note 85.
100. The three states which enacted the death penalty statutes for rape of an adult woman were Georgia, Louisiana, and North Carolina. Coker, 433 U.S. at 594. Although three states enacted capital punishment statutes for rape, only one statute was constitutional. North Carolina and Louisiana enacted mandatory sentencing statutes for rape convictions. The Court held that mandatory death sentences violated the Eighth Amendment barring cruel and unusual punishment. Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 324 (1976). Neither Louisiana nor North Carolina re-enacted the death penalty for rape. Coker, 433 U.S. at 594.
101. Coker, 433 U.S. at 597. Georgia jury sentencing decisions were the only decisions analyzed by the Court because Georgia was the only state which allowed the jury to decide whether to impose the death penalty in rape cases.
102. Id. at 598.
103. Id. at 592, 598.
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IV. Proportionality and the Felony-Murder Accomplice

On prior occasions, the Supreme Court refused to address whether capital punishment is a disproportionate sanction for a felony-murder accomplice who neither kills, attempts to kill, nor intends to kill. In Woodson v. North Carolina, the defendant was the lookout and getaway driver in an armed robbery of a convenience store. During the robbery, a co-felon killed the cashier. The Court decided the case using a procedural analysis and declined to address the issue of whether the death penalty was disproportionate to the nature of Woodson's involvement.

In Lockett v. Ohio, the trial court sentenced the defendant getaway driver to death for her role in an armed robbery, during which a killing occurred. The trial court did not find that Lockett killed or intended to kill the victim. The Supreme Court vacated the defendant's death sentence upon procedural grounds, but never addressed the issue of proportionality. Justice Blackmun's and Justice White's opinions, however, were more important. Both Justices argued that an accomplice's intent is a major factor to consider before imposing capital punishment. Justice White's opinion is most significant because it marked the first time that a justice applied the excessiveness test in a felony-murder accomplice case. This signaled a new direction for the Court's analysis in accessorial liability cases where capital punishment is a possible sentence for the accomplice. Relying on the excessiveness test formulated in Coker v. Georgia, Justice White argued that imposing the death penalty upon an accomplice who does not kill, attempt to kill, or intend to kill fails both prongs of the test. Specifically, White argued that the threat of imposing capital punishment has no deterrent effect upon those who lack an intent to kill. White also noted that any deterrent effect capital punishment may have on an accomplice who does not intend to kill is undercut by society's unwillingness to impose the death penalty upon felony-murder accomplices. These factors justified his conclusion that capital punishment is "grossly out of proportion to the severity of the crime."

A. Proportionality Required in Accomplice Cases

In 1982, the Court, in Enmund v. Florida, considered whether capital punishment is a disproportionate sanction for felony-murder accomplices who do not kill or intend to kill. In Enmund, the Court held that imposing capital punishment on a felony-murder accomplice who does not kill, attempt to kill, intend to kill, or intend the use of lethal force violates the Eighth and Fourteenth Amendments.

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105. Id. at 283.
106. Id.
107. See supra note 100; Woodson, 428 U.S. at 305 n.40.
109. Lockett, 438 U.S. at 604-05. The Court held that the statute under which Lockett was sentenced violated the Eighth and Fourteenth Amendments because it provided the sentence from considering mitigating circumstances which were not provided by state statute. A majority of the Court, in Edmonds v. Oklahoma, 455 U.S. 104, 110-12 (1982), adopted the plurality opinion in Lockett.
110. Justice Blackmun, who concurred in part and concurred in the judgement of the Court, advised the Court to follow a procedural analysis. Blackmun argued that the sentence should have the discretion to consider the degree of the accomplice's involvement in the homicide and the character of the defendant's mens rea. Lockett, 438 U.S. at 615. Blackmun argued that there should be "some limit to the method by which the states assess punishment for actions less immediately connected to the deliberate taking of human life." Id. at 616. He expressly rejected a substantive proportionality analysis for felony-murder accomplices, id. at 614. Justice Blackmun argued that a requirement of an actual intent to kill would require the Court to "impose upon the States an elabo-
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drove the getaway car in an armed robbery during which a co-felon killed an elderly couple. The trial court sentenced Emmund to death without a finding that he intended to kill.118

Justice White, writing for a plurality of the Court, employed the excessiveness test from Coker v. Georgia to determine whether capital punishment for a felony-murder accomplice constitutes cruel and unusual punishment. Analyzing legislative attitudes, the Court noted that out of thirty-six jurisdictions which impose the death penalty, only eight jurisdictions would impose the death penalty in Emmund's case.119 This fact weighed against imposing the death penalty.120 An examination of jury sentencing decisions also pointed toward rejecting the death penalty for Emmund's crime.121 The Court stated, "we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die."122

Stressing individualized consideration, the Court focused on Emmund's personal culpability, stating that the states cannot base an accomplice's culpability upon the culpability of those felons who killed.123 Examining the penological goals, the Court observed that the threat of the death penalty would not deter an accomplice who does not have an intent to kill.124 The thought of receiving capital punishment would fail to deter accomplices because killings rarely occur during felonies.125

As for the retributive purpose of criminal sanctions, courts should impose punishment to the degree of the accomplice's culpability.126 The Court stated that harm caused intentionally should carry a more severe penalty than the same harm caused unintentionally.127 Since Emmund did not intend to kill, his culpability was different from that of others who killed.128 His punishment, therefore, should be different from those who did kill. Imposing the death penalty upon one who does not intend to kill, the court concluded, does not contribute to retribution.129

Writing for the dissent, Justice O'Connor stressed that the Court must look beyond contemporary values expressed by legislatures and jury and must also consider the degree of harm inflicted on the victim and the degree of the defendant's blameworthiness.130 While recognizing that the courts must consider an offender's mental state, the dissent argued that mere rea "is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder."131

118. Id.
119. Id. at 800. There was significant disagreement about which death penalty statutes would authorize capital punishment in Emmund's case. Justice White acknowledged that it was possible that nine more states would authorize the death penalty in Emmund's case if sufficient aggravating circumstances outweighed mitigating circumstances, however, he added that this would only mean that one third of American jurisdictions would authorize capital punishment.

The dissent stated that 23 states would authorize imposition of the death penalty upon a felony-murder accomplice who neither kills nor intends to kill: Id. at 822 (O'Connor, J., dissenting). The dissent concluded that almost half of the states, and two-thirds of the states which authorize the death penalty, would allow the death penalty. Id. at 823.

120. Id. at 799.
121. Id. at 794-96. Justice White restored the figures he relied upon in his opinion in Lockett. See supra note 112 and accompanying text.

Justice White also reviewed the nation's death row population. White stated that of 739 inmates for whose present data was available, only 41 did not participate in the killing: Emmund, 458 U.S. at 794-96. Of the 40 among the 41 for whom sufficient data was available, only 16 were not present at the scene of the crime. Of these 16, only three were sentenced to die without displaying an intent to kill.

122. Id. at 796.
123. Id. at 798 (citing Lockett, 438 U.S. at 605).

124. Emmund, 458 U.S. at 794-99. Unless capital punishment measurably contributes to one of the penological goals, it is "nothing more than the purposes and relentless imposition of pain and suffering." Coker, 433 U.S. at 592. But the Court stated, "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Emmund, 458 U.S. at 799.

125. Emmund, 458 U.S. at 799.
126. Id. at 800-01.
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128. Emmund, 458 U.S. at 798.
129. Id. at 801.
130. Id. at 815 (O'Connor, J., dissenting). Justice O'Connor argued that since these two factors are unique to each crime, the doctrine of individual consideration required the Court to consider them. Id. at 815 (citing Lockett, 438 U.S. at 605).

Under his theoretical construct, Professor Dressler agrees that harm and blameworthiness are primary factors to consider when assessing an accomplice's responsibility for crimes committed by another. Dressler, Jurisprudence, supra note 11, at 35, 50-51. He concludes, however, that imposing capital punishment upon an accomplice without proving an intent to kill is unconstitutional per se even if the state can prove that the accomplice caused the harm. Id. at 58.

131. Emmund, 458 U.S. at 825. The dissent argued that an intent to kill requirement makes intent a matter of constitutional law, which interferes with state's categorie for assessing guilt. Id. at 824 (quoting Lockett, 438 U.S. at 616 (Blackmun, J., concurring in part and concurring in the judgment)). The dissent argued.
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Writing for the dissent, Justice O’Connor stressed that the Court must look beyond contemporary values expressed by legislatures and juries and must also consider the degree of harm inflicted on the victim and the degree of the defendant’s blameworthiness.\(^{130}\) While recognizing that the courts must consider an offender’s mental state, the dissent argued that mens rea “is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder.”\(^{133}\)

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120. Id. at 784-96. Justice White reviewed the figures he relied upon in his opinion in Lockett. See supra note 112 and accompanying text.
121. Id. at 794-96. Justice White restated the figures he relied upon in his opinion in Lockett. See supra note 112 and accompanying text.
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B. Culpability Requirement After Enmund

In Enmund, all of the justices agreed that the Eighth Amendment required the states to show some form of intent by the defendant in order to impose the death penalty. They disagreed, however, on the level of intent required. A majority of the Court concluded that the Eighth Amendment required that felony-murder accomplices possess an intent to kill before states could impose the death penalty. The dissent argued that a lesser level of intent analogous to extreme indifference to the value of human life was sufficient. Intent, commonly called mens rea, is the state of mind which reflects the culpability or blameworthiness of the actor. Intent is generally divided into four categories: purpose, knowledge, recklessness, and negligence.

People act purposely with respect to a result when they desire to cause the death of another. People act recklessly with respect to a result if they act knowingly but act without regard for substantial risk that their conduct may cause death.

[The intent-to-kill requirement is crucially crafted; it fails to take into account the complex picture of the defendant’s knowledge of his accomplice’s intent and whether he was aware, the defendant’s contribution to the planning and the success of the crime, and the defendant’s actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentence, who can sift through the facts unique to each case.

Enmund, 458 U.S. at 825.
123. Id. at 807.
124. Id. at 825. The dissent advocated a lower level of intent, such as, “the intent to commit an armed robbery coupled with the knowledge that armed robbers involve substantial risk of death or serious injury to other persons.”

135. MODEL PENAL CODE § 2.02 (1962); W. LAFAVE & A. SCOTT, supra note 4, at 214. Approximately seventy percent of the states revising their criminal codes have adopted essentially similar culpability standards as announced in the Model Penal Code. See Robinson, A Brief History of Distinctions in Criminal Culpability, 31 Hastings L.J. 815, 816 (1980). For a list of states which adopted similar culpability standards, see Robinson & Grall, supra note 134, at 683-84 n.10. The Florida Legislature has not adopted the culpability standards of the Model Penal Code.
136. State of mind with respect to a result is used merely as an example. The Model Penal Code also defines culpable states of mind with respect to conduct and circumstances. MODEL PENAL CODE § 2.02 (1962).
137. MODEL PENAL CODE § 2.02(2)(b)(ii) (1962); Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (defendant must have had a conscious purpose to kill by being guilty of first-degree murder).]
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Intent, commonly called mens rea, is the state of mind which reflects the culpability or blameworthiness of the actor.128 Intent is generally divided into four categories: purpose, knowledge, recklessness, and negligence.129

People act purposely with respect to a result130 when it is their conscious objective to cause the result.131 In the context of murder, people purposely kill when they desire to cause the death of another. People act knowingly with respect to a result if they do not consciously desire the result, yet they are substantially certain that their conduct will cause the result.132 The distinction between these two forms of culpability is that the offender who acts purposefully desires to cause the result while the offender who acts knowingly does not.133 People act recklessly with respect to a result when they consciously disregard a substantial and unjustifiable risk that their conduct may cause.134 The distinction between knowing conduct and reckless conduct is the degree of certainty that the conduct will cause the result.135

Intent-to-kill murder encompasses killings done either with purpose or knowledge.136 One intends to kill when he or she desires to kill or is substantially certain that his or her conduct will cause a death.137 Reckless indifference to the value of human life occurs when a person engages in conduct with knowledge that the risk created may cause death.138 The factor which distinguishes intent-to-kill murder from reckless indifference murder is the manner of proving guilt.139 Intent-to-kill murder requires the state to prove that the offender desired or was certain or was substantially certain that his or her conduct would cause a death.140 Reckless indifference murder, however, does not require that the offender desire to kill or be certain or substantially certain that death will result. The state must prove only that the offender unjustifiably participated in highly risky conduct with a conscious state of mind with respect to a result.

126. Enmund, 458 U.S. at 825.
130. Id. at 820.
131. Id. at 825. The dissent advocated a lower level of intent, such as, "the intent to commit an armed robbery coupled with the knowledge that armed robbery involves substantial risk of death or serious injury to other persons.
136. State of mind with respect to a result is used merely as an example. The Model Penal Code also defines culpable states of mind with respect to conduct and circumstances. MODEL PENAL CODE § 2.02 (1962).
137. MODEL PENAL CODE § 2.02(2)(b)(ii)(A) (1962); Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (defendant must have had a conscious purpose to kill to be guilty of first-degree murder).
awareness that the conduct is likely to cause death. The distinction between reckless indifference and purposeful or knowing killings is the difference between a positive desire or high probability on the one hand, and a substantial risk on the other.

Thus, the level of culpability which the state must prove has a significant impact upon when it will be permissible to impose capital punishment on felony-murder accomplices. If states must only prove that an offender acted with reckless indifference to human life, it appears that states could impose capital punishment in more cases than Enmund allows. Although reckless indifference involves risks which are very substantial, the amount of risk is still far less than certainty or substantial certainty.

V. Aftermath of Enmund v. Florida

The Enmund Court recognized a deficiency in the standard used to punish felony-murder accomplices who do not intend to kill. The Court made an attempt to reconcile the felony-murder accomplice rule with a basic substantive criminal law doctrine of punishment — a state should not punish an offender unless he or she has the requisite intent.

The Court, however, failed to adequately reform this area of the law. The Court's failure to clearly state that a felony-murder accomplice must have an intent to kill created confusion for lower courts. At various points in the opinion, the Court stated that the requisite intent is the intent to kill, the intent to use lethal force, contemplation that a killing would take place, and anticipation that lethal force would or might be necessary. This lack of precision allowed lower courts to interpret the state of mind that is necessary in several different ways.

Arguably, anticipation of lethal force is the minimal level of intent required by Enmund, however, this level conflicts with Justice White's concurring opinion in Lockett v. Ohio. In that opinion, Justice White stated that a felony-murder accomplice could not receive the death sentence without a finding that the defendant had a "conscious purpose of producing death." This statement indicates that the level of intent Justice White advocated in Enmund is intent equivalent to purpose or knowledge.

A. Interpretation of Enmund by Florida Supreme Court

Decisions by the Florida Supreme Court after the Enmund decision reveal the difficulty in determining the requisite level of intent required by Enmund. In several cases, the court interpreted the Enmund holding differently to require different levels of intent.

In Brumley v. State, the Florida Supreme Court stated that Enmund required an accomplice to "intend that a killing take place or intend or contemplate that lethal force would be used." In Huffman v. State, an accomplice had to "intend a killing or anticipate the use of lethal force." In Bush v. State, the court interpreted Enmund to hold that proof of "intent to kill or contemplation of death" is required to impose capital punishment. Finally, in Copeland v. State and

147. W. LaFave & A. Scott, supra note 4, at 232, 618-19.
148. Robinson & Grall, supra note 134, at 694-95; W. LaFave & A. Scott, supra note 4, at 239-40.
149. W. LaFave & A. Scott, supra note 4, at 239-40, 618.
150. Dressler, Jurisprudence, supra note 11, at 50.
152. Note, supra note 151, at 869; Ex Parte Dichard, 435 So. 2d 1351, 1357 (Ala. 1983) (defendant must intend that a killing occur); State v. Stokes, 304 S.E.2d 184, 195 (N.C. 1983) (defendant must contemplate that a killing occur); Hopkins v. State, 664 P.2d 43, 58 (Wyo. 1983) (defendant must contemplate that lethal force be used); Clines v. State, 280 Ark. 77, 83, 656 S.W.2d 684, 686 (1983) (defendant must contemplate that lethal force be used); People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, cert. denied, 464 U.S. 1001 (1983).
awareness that the conduct *is likely* to cause death. The distinction between reckless indifference and purposeful or knowing killings is the difference between a positive desire or high probability on the one hand, and a substantial risk on the other. Thus, the level of culpability which the state must prove has a significant impact upon when it will be permissible to impose capital punishment on felony-murder accomplices. If states must only prove that an offender acted with reckless indifference to human life, it appears that states could impose capital punishment in more cases than *Enmund* allows. Although reckless indifference involves risks which are very substantial, the amount of risk is still far less than certainty or substantial certainty.

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149. W. LaFaye & A. Scott, supra note 4, at 239-40, 618.
150. Dressler, Jurisprudence, supra note 11, at 50.

154. Id. at 797.
155. Id. at 801.
156. Id. at 806 n.2, 797-88.
157. Note, supra note 151, at 869; see also Weinberg, supra note 151, at 334 n.119.
159. Id. at 628 (White, J., concurring in part, dissenting in part, and concurring in the judgment).
160. 453 So. 2d 381 (Fla. 1984).
161. Id. at 387.
162. 420 So. 2d 591 (Fla. 1982).
163. Id. at 594.
164. 461 So. 2d 936 (Fla. 1984), cert. denied, 471 U.S. 1031 (1986).
165. Id. at 941.
166. 457 So. 2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985).
Nova Law Review, Vol. 12, Iss. 3 [1988], Art. 16

B. Individualized Consideration of Accomplices

Despite the interpretational shortcomings of the Ermund decision, the Court communicated a message which is consistent with the reason behind prior decisions. The Court intended to require individualized consideration of a felony-murder accomplice’s culpability.¹⁶⁷

Beginning in 1976 with its decisions in Gregg v. Georgia¹⁶⁸ and Woodson v. North Carolina,¹⁶⁹ the Court realized that defendants eligible to receive capital punishment should receive individualized consideration. Because capital punishment is a punishment different from all other sanctions,¹⁷⁰ “the fundamental respect for humanity underlying the Eighth Amendment consideration of the character and record of the individual offender.”¹⁷¹ Refusing individual consideration of each offender would treat “all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty.”¹⁷²

In Lockett v. Ohio,¹⁷³ the Court held that the sentence should consider any mitigating factor regarding an individual’s character or record.¹⁷⁴ Justice White’s concurring opinion, however, had a more significant impact upon the Court’s willingness to consider a felony-murder accomplice’s intent. White argued that it is constitutional to sentence a felony-murder accomplice to death only upon proof that he or she had an intent to kill.¹⁷⁵

Before Justice White enunciated his new position in Lockett, although the Court advocated individualized consideration, the bottom line was that a court could sentence an offender to death even though he or she did not intend to kill.¹⁷⁶ The Constitution required courts to hear any mitigating factors the defendant wished to present.¹⁷⁷ The absence of an intent to kill, however, did not automatically prohibit the imposition of capital punishment. If sufficient aggravating circumstances outweighed the absence of an intent to kill, a defendant could receive the death penalty unless a state statute prohibited its imposition.¹⁷⁸ After Ermund v. Florida,¹⁷⁹ however, the absence of intent to kill was no longer just a mitigating factor which aggravating factors could outweigh. An absence of an intent to kill prohibited the imposition of the death penalty completely.

VI. Tison v. Arizona: A Change in Posture

In the recent case of Tison v. Arizona, the Court again addressed the issue of whether it is constitutional to impose capital punishment upon a felony-murder accomplice who does not intend to kill. The Court ruled, seemingly against its holding in Ermund, that under certain circumstances states can impose the death penalty on felony-murder accomplices who did not intend to kill. Major participation in the underlying felony, combined with reckless indifference for human life, is now sufficient to satisfy the standard of culpability required by

¹⁶⁸. Copeland, 457 So. 2d at 1019; Smith, 424 So. 2d at 733. The court in Smith found that there was enough evidence to find the defendant guilty of premeditated murder. In Copeland, however, the court stated that evidence was sufficient to find that the defendant “contemplated the life would be taken or anticipated that lethal force would be used.” Copeland, 457 So. 2d at 1019. The interpretation in Copeland is similar to the expansive interpretation the United States Supreme Court struck down in Tison v. Arizona, 107 S. Ct. 1676 (1987).
¹⁶⁹. Ermund, 458 U.S. at 800-01.
¹⁷¹. 428 U.S. 280 (1976); see also Gregg, 428 U.S. at 189 (citing Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).
¹⁷². 428 U.S. 304 (Stewart, J., concurring); id. at 286-87 (Brennan, J., concurring).
¹⁷⁴. 428 U.S. 304.
¹⁷⁶. Id. at 604.
¹⁷⁷. Id. at 624 (White, J., concurring in part, dissenting in part, and concurring in the judgment).
¹⁷⁸. Before Justice White’s opinion, the lack of an intent to kill was only a mitigating factor. A defendant could still receive the death penalty absent an intent to kill if the aggravating circumstances outweighed the mitigating circumstances. See, e.g., CAL PENAL CODE § 190.3 (Deering 1983); FLA STAT § 921.141(U)(b) (1985).
¹⁷⁹. Lockett, 438 U.S. at 604.
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170. Lockett, 438 U.S. at 604.
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In Tison, the petitioners, Raymond and Ricky Tison, along with other family members, planned the escape of their father, Gary Tison, from state prison. Their father was sentenced to life imprisonment for killing a guard during a previous escape attempt. The brothers entered the Arizona State Prison with a basket filled with guns and armed their father and his cellmate, Randy Greenawalt, a prison trustee and convicted murderer. The group locked prison guards and visitors in a storage closet and fled in a waiting automobile.

On the group’s way to Flagstaff, Arizona, a tire blew out while driving through the desert at night. Raymond flagged down a passing car while the others hid by the side of the road. A car occupied by John Lyons, his wife Donnelda, their 2-year-old son Christopher, and their 15-year-old niece Theresa Tyson stopped to render aid. When the Lyons family stopped, the other Tisons and Greenawalt emerged from hiding. The group drove the Lyons family farther into the desert and robbed them. After transferring the Lyons’ possessions into the Tison’s disabled car, Gary Tison fired a shotgun into the radiator, presumably to further disable the car. He then ordered the sons to go back to the Lyons’ car and get some water for the family. Although the brothers’ statements conflict to some extent about their location when the following events occurred, both saw their father and Greenawalt murder the Lyons family and Theresa Tyson. Both Tison brothers testified in court that the shootings surprised them. There was also testimony about an agreement between the brothers and their father that nobody would be hurt.

The jury convicted the Tisons of capital murder based upon the Arizona felony-murder statute and the accomplice liability statute. The trial court sentenced the brothers to death. The Tisons attacked the death sentences in a post-conviction relief proceeding. Interpreting the decision in Enmund to require an intent to kill, the Arizona Supreme Court stated “[i]ntend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force

183. Id. at 1688.
184. Id. at 1678.
185. Id.
186. Raymond Tison recalled being at the car filling the water jug. Ricky Tison recalled giving the water to Gary Tison who then, with Randy Greenawalt, went behind the car, away from the Tison brothers. Id. at 1679.
187. Id. at 1691-93 (Brennan, J., dissenting).
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183. *Id.* at 1688.
184. *Id.* at 1678.
185. *Id.*
186. Raymond Tison recalled being at the car filling the water jug. Ricky Tison recalled giving the water to Gary Tison who then, with Randy Greenawalt, went behind the car, away from the Tison brothers. *Id.* at 1679.
187. *Id.* at 1691-93 (Brennan, J., dissenting). Published by NSUWorks, 1988

189. *Tison*, 107 S. Ct. at 1684. The Court stated that the erroneous standard announced to a foreseeability standard, a standard of intent broader than that described in *Enmund*. The majority stated that the possibility of a killing during the commission of a felony is generally foreseeable or foreseeable.
190. *Id.*
191. *Id.*
192. *Id.* at 1684-85
193. *Id.* at 1684. The Court stated "these facts . . . would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life." *Id.* at 1685.
194. *Id.* at 1685-86.
195. *Id.* at 1686 & n.10.
sis, the majority concluded that capital punishment is not grossly disproportionate for the crimes the Tison's committed.

The dissent in Tison, while noting that the Court properly rejected the Arizona Supreme Court's expansive definition of an intent to kill, argued that the majority needlessly created "a new substantive standard for capital liability." The dissent also argued that the evidence did not support the culpable state of mind announced. Finally, the dissent argued that even if the evidence had been sufficient to prove the majority standard, the Court failed to conduct a proper proportionality analysis.

A. Application of the Proportionality Test

In order to expand the reach of the death penalty in felony-murder accomplice cases, the Tison Court displayed a lack of respect for precedent and employed incomplete and faulty analysis. The Court failed to follow the Enmund dictate by requiring felony-murder accomplices to possess an intent to kill. Instead, the majority side-stepped the intent issue almost altogether. The Court also failed to conduct a proper proportionality test to determine whether the death penalty was an appropriate punishment.

The Enmund decision required that a felony-murder accomplice possess an intent to kill. The Tison Court, however, attempted to shift the focus away from an intent to kill. Focusing on whether a defendant had an intent to kill, the majority stated, "is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous.

196. Id. at 1691 (Brennan, J., dissenting).
197. Id. at 1691-93. The dissent argued that the Court ignored evidence which was relevant to the decision. The dissent observed that during the shootings the Tisons were getting water for the family, and disputed whether the Tisons were present at the scene of the crime. Id. at 1692. The dissent also stated that the brothers did not anticipate the killings.
198. Id. at 1693. The dissent was critical of the Court's analysis of state statutes authorizing the death penalty. The dissent concluded that if the Court combined jurisdictions which have abolished the death penalty with those jurisdictions which require a finding of an intent to kill, about three-fifths of the jurisdictions would not authorize the death penalty absent an intent to kill. Id. at 1697.
199. Id. at 1697-99 (Brennan, J., dissenting). The dissent also argued that the majority failed to analyze how states which authorize the death penalty impose capital punishment. Id. at 1697-99 (Brennan, J., dissenting). The dissent noted that out of 85 executions since the Enmund decision, not one state executed a felony-murder accomplice who did not kill or intend to kill.
200. See supra notes 151-59 and accompanying text.
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The Court argued that the reckless indifference displayed by these types of murderers is as shocking as an intent to kill. The majority's attempt to shift focus from an intent to kill was poor at best. There is no question that the nonintentional murderers noted by the Court are some of the most wicked. Yet, as Justice Brennan argues in dissent, the examples are inapposite to the case. All of the majority's examples are of murderers who themselves commit the murder. Cases such as the Tisons involve felony-murder accomplices who do not themselves commit the murder. This is an important distinction because the "defendant has not committed an act for which he or she could be sentenced to death. The applicability of the death penalty therefore turns entirely on the defendant's mental state with regard to an act committed by another." Since the Tisons did not intend to kill, the death penalty was clearly not warranted. This would be the correct result because "society has made a judgment ... (to distinguish) at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who

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200. Id., 107 S. Ct. at 1687.
201. Id. at 1687-88.
202. Id.
203. Id. at 1688.
204. Id.
205. Id. at 1694 (Brennan, J., dissenting).
206. Id. (emphasis in original). Justice Brennan noted that major participation and presence at the scene may be relevant in determining a defendant's mental state. These facts, however, should not serve as an independent basis to impose capital punishment.

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acted without a purpose to destroy human life.\textsuperscript{208} The \textit{Tison} Court also failed to conduct a proper proportionality test. If the Court properly considered current legislative statutes and jury sentencing decisions, it would have found capital punishment to be a disproportionate sanction for felony-murder accomplices who act with extreme indifference to the value of human life.

An analysis of current statutes indicates that capital punishment for felony-murder accomplices who are major participants and have a mental state of reckless indifference to the value of human life is a disproportionate punishment. More than half of the jurisdictions that impose the death penalty and more than three-fifths of all jurisdictions would prohibit capital punishment in this situation.

Out of fifty-one jurisdictions, fourteen jurisdictions prohibit the death penalty in all cases.\textsuperscript{209} Another twenty jurisdictions would prohibit capital punishment even though the accomplice was a major participant and acted with reckless indifference to the value of human life.\textsuperscript{210} Only seventeen jurisdictions would authorize capital punishment for accomplices who play a major part in the felony and act with reckless indifference.\textsuperscript{211} The \textit{Tison} Court also failed to consider jury sentencing decisions. This may have an impact upon the future application of the proportionality test. In \textit{Tison}, the Court only considered legislative statutes concerning the imposition of capital punishment.\textsuperscript{212} The Court has never stated the amount of weight to be given to jury sentencing decisions in the proportionality analysis. To this point, however, consideration of jury sentencing decisions has been constitutionally required in the proportionality analysis.\textsuperscript{213}

To determine proportionality, it is critical to examine not only those jurisdictions which authorize capital punishment, but how those jurisdictions impose the death penalty.\textsuperscript{214} Sentencing decisions are a direct source of information reflecting present public attitudes toward the death penalty.\textsuperscript{215} In its attempt to reach what it felt to be a just result, the Court ignored one of the principle factors in its analysis. The role of jury sentencing decisions in the proportionality analysis is now unclear.
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[Notes and Citations]


B. Future Implications of the Tison Decision

As a result of its decision in Tison, the Supreme Court cast considerable doubt on the effectiveness of its decision in Enmund v. Florida to limit the imposition of capital punishment on felony-murder accomplices. Under the guise of creating a new category of felony-murder accomplices, the Court has indirectly made it possible for states to impose the death penalty on accomplices who should be immune from capital punishment under Enmund.

After the Tison decision, characterization of a felony-murder accomplice as a minor participant or a major participant has a significant impact upon the constitutionality of imposing the death penalty on a felony-murder accomplice. If an accomplice is a minor participant as in Enmund, the state must prove that the accomplice had an intent to kill before imposing capital punishment. If an accomplice is a major participant as in Tison, the state must only prove the lower mental state of reckless indifference to the value of human life. As such, characterization of an accomplice as a major or minor participant will have a significant impact upon the intent level the state must prove to impose the death penalty.

Under the Court’s new approach, participation in some offenses is proof of intent, even though the accomplice did not have an intent to kill. The Court stated that proof of major participation in some felonies can leave no doubt that the accomplice possessed a reckless indifference to the value of human life. Further, the Court stated that if major participation in a felony does not suffice by itself to establish reckless indifference, “that fact would provide significant support for such a finding.”

Although being a major or minor participant determines what level of intent the state must prove, the Tison Court did not give sufficient guidelines for lower courts to follow in order to determine which offenders are major participants and which are minor participants. Without guidelines, lower courts will differ significantly upon whether an accomplice is a major participant or minor participant.

The Court concluded that the Tisons were major participants because they supplied the weapons, participated in the kidnapping and robbery, and were present at the scene of the killing. However, the majority in Tison, which comprised the dissent in Enmund, and the Florida Supreme Court characterized Earl Enmund as a major participant. The Florida Supreme Court concluded from the evidence that Earl Enmund’s participation in the felony was major. The facts that the court felt were important to that determination were that Enmund planned the robbery and disposed of the murdered weapons in an attempt to avoid detection. A minority of the United States Supreme Court in Enmund acknowledged the Florida Supreme Court’s findings and accepted that Enmund was a major participant. So, under the Tison decision, a court could sentence Enmund to death upon finding that he acted only with extreme indifference.

VII. Conclusion

The Court’s decision in Tison has made it easier for states to impose capital punishment on felony-murder accomplices. By lowering the level of intent for some accomplices, those who are major participants and act with reckless indifference to human life, the Court has effectively undermined the Enmund decision. The Enmund Court created a safeguard within the Eighth Amendment to protect certain felony-murder accomplices. It held that the death penalty is a disproportionate sanction to impose on felony-murder accomplices who do not kill, attempt to kill, or intend to kill.

The Tison Court indirectly destroyed the safeguard created by Enmund.

216. Under a causal analysis, Professor Dressler notes that the substantial participation test is slightly better than current accessorial law because it excludes from full punishment those for whom it is clearly inappropriate. Dressler, Reassessing, supra note 16, at 122-23. The test fails, however, because it still fails to link responsibility to causal participation. As a result, a substantial participant forfeits his right to receive a punishment according to his connection to the harm even though he did not cause the harm. On the other hand, an insubstantial participant may play an important part in causing the harm.
217. Enmund, 458 U.S. at 797.
218. Tison, 107 S. Ct. at 1688.
219. Id. The Court refused to precisely delineate which type of conduct or states of mind would warrant the death penalty.
220. Id. at 1688 n.12.
221. Id.
222. Id. at 1684-85.
224. Id.
225. Enmund, 458 U.S. at 806, 812 n.24 (O’Connor, J., dissenting).
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Federal Pre-emption: Time to Reestablish an Old Doctrine

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III. CONCLUSION

1. Federal Pre-emption

State tort claims have traditionally been decided in state courts using state law and without federal interference. For the past fifty years, however, the federal government has played a significant role in shaping the outcome of state common law actions. Federal intrusion on state law has taken the form of an increased federal role in regulating various products, activities and most importantly, the growth, development and implementation of the doctrine of federal pre-emption. The significance of the doctrine has radically altered a state's authority to compensate injured plaintiffs. Today, the doctrine can bar tort remedies by displacing state law with the invocation of the doctrine. This essay focuses on the development of the doctrine and analyzes its current relationship to state tort law. It will also explore the various industries affected by the doctrine, and explain its inconsistent interpretation, but only after a thorough analysis of the doctrine itself.

Pre-emption occurs when a state power interferes with a correlative federal power. In fact, it has long been the view that when a state power interferes with a similar federal power, the federal power...