EXECUTING THOSE WHO DO NOT KILL: A CATEGORICAL APPROACH TO PROPORTIONAL SENTENCING

Joseph Trigilio & Tracy Casadio*

ABSTRACT

For over a century, the Supreme Court has crafted a specific analysis for determining whether a particular sentence is proportionate to the crime under society's norms and to the culpability of the offender. Such an analysis informs whether a sentence is "cruel or unusual punishment" and thus unconstitutional. In the capital context, the Court has examined the proportionality of a death sentence for the crimes of murder and rape. It has also examined the penalty in light of specific categories of defendants, including non-triggermen accomplices, the mentally retarded, and juvenile offenders.

Over twenty years ago, the Court decided a trilogy of cases that appeared to limit the capacity of proportionality principles to regulate death penalty eligibility. That trilogy of cases began with *Tison v. Arizona*, which found that a death sentence was proportionate for an offender who neither killed nor intended to kill, but who was a major participant in a felony and acted with a reckless disregard for life. Around the same time, the Court found that a defendant's status as a juvenile offender or a mentally retarded person—characteristics impacting culpability—did not render the death penalty disproportionate.

In the beginning of the twenty-first century, however, the Court altered its analysis and ruled that the execution of the mentally retarded and juvenile offenders is categorically disproportionate to our society's evolving norms and to the offender's level of culpability. Yet, having reversed two of its prior decisions, the Court has not had occasion to review the holding of *Tison*. This Article prepares the ground for that challenge. It argues that, under the proportionality analysis articulated in *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana*, the contemporary "standards of decency" require a further narrowing of death penalty eligibility for those who do not kill nor intend to kill. This conclusion is supported by a survey of the death penalty schemes in all fifty states as they apply to felony-murder non-triggermen, the extraordinarily low number of defendants in this category who are either on death row or who have been executed, international law, and a reasoned analysis of culpability principles as applied to felony-murder accomplices.

---

* Joseph Trigilio and Tracy Casadio are both Deputy Federal Public Defenders in California's Central District Capital Habeas Unit. We express our deepest gratitude to Professor Steven F. Shatz, who was integral in developing and refining this Article, and to our colleague Jonathan Aminoff.

TABLE OF CONTENTS

INTRODUCTION

On August 14, 1996, near San Antonio, Texas, Kenneth Foster joined his friends Mauriceo Brown, DeWayne Dillard, and Julius Steen in a night of drinking and smoking marijuana.[1] In the course of the night, they committed as many as two armed robberies.[2] Later, with Foster at the wheel, they began tailing two cars driven by Michael LaHood and Mary Patrick.[3] Brown got out of the car, told Patrick to go inside, began fighting with LaHood, and eventually drew a gun and shot him.[4] Foster anxiously tried to drive away, but he was talked into staying by Dillard.[5] The group was soon arrested.[6] Brown, the man who shot LaHood, eventually admitted to the murder and was tried and sentenced to death.[7] Dillard and Steen, on the other hand, were offered plea agreements.[8] Foster was not so fortunate. He was tried jointly with Brown and sentenced to death even though the prosecution conceded that he neither intended to kill Michael LaHood nor fired a single shot.[9]

As Foster's execution date approached, outrage in the community—both locally and internationally—grew intense.[10] Many wondered how a man who had no intention of taking a life and who in fact did not take a life, could have his life taken by the State.[11] While many blamed a perceived appetite for executions in Texas, Foster's death sentence for a murder he did not commit or intend to commit was condoned by the United States Supreme Court almost two decades earlier in *Tison v. Arizona*.[12] In *Tison*, the Supreme Court held that an accomplice to a felony who neither kills nor intends to kill may be constitutionally executed for a killing committed by one of his co-felons so long as the accomplice is a major participant in the underlying felony and acts with a reckless disregard for human life.[13]

Despite the constitutionality of Foster's execution, the Governor of Texas commuted Foster's sentence to life in prison hours before the time appointed for his execution.[14] The Governor's political decision spared Foster from being one of

---

1. *See* William Marra, *He Didn't Kill, but He Will Be Executed,* ABC NEWS (Aug. 14, 2007), http://abcnews.go.com/TheLaw/Story?id=3475381&page=1; Free Kenneth Foster, http://www.freekenneth.com (last visited May 10, 2011).
2. Foster v. Quarterman, 466 F.3d 359, 362 (5th Cir. 2006).
3. *Id*. at 363.
4. *Id.*
5. *Id.* at 366.
6. *Id.* at 363.
7. *Id.*
8. *Id.* at 366.
9. *Id.* at 363, 366.
10. *See* Marra, *supra* note 1.
11. *See id.*
12. 481 U.S. 137 (1987).
13. *Id.* at 137–38.
14. Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES, Aug. 31, 2007, *available at* http://www.nytimes.com/2007/08/31/us/31execute.html (last visited May 10, 2011).

the very few individuals executed in the United States after having been convicted of capital murder despite neither killing nor intending to kill anyone.

The Texas Governor's decision to commute Foster's sentence is but one indication that the "evolving standards of decency" that place constitutional limitations on the use of the death penalty under the Eighth Amendment no longer permit the State to execute felony-murder accomplices who neither kill nor intend to kill.[15] While the change in the law affecting this standard requires overruling *Tison*, there are many reasons to believe the time is ripe for doing so.

Tison leads a trilogy of cases, including *Stanford v. Kentucky*[16] and *Penry v. Lynaugh*,[17] that represent a sharp break from a tradition of careful scrutiny on proportionality that considers both objective and subjective criteria in determining whether a certain category of defendants is constitutionally eligible for a death sentence. In the last decade, however, the Court has overturned both *Stanford* and *Penry*, leaving *Tison* as the last case standing in this aberrational jurisprudential line. The Court's recent proportionality cases, *Atkins v. Virginia*,[18] *Roper v. Simmons*,[19] and *Kennedy v. Louisiana*,[20] rejuvenate the Court's earlier proportionality precedents and render *Tison* questionable authority.

Since *Tison*, significant changes in state capital punishment authorization schemes have limited the availability of the death penalty for felony-murder accomplices who neither kill nor intend to kill. Capital punishment for this category of defendants is no longer anywhere close to approaching the majority rule. In addition, the Court's contemporary analysis resurrects culpability as the touchstone for determining whether the use of the death penalty is justified by the penological goals of retribution and deterrence. In consideration of the changes at the state level, representing both objective indicia of evolving standards and a renewed focus on culpability, *Tison*'s rule that felony-murder accomplices are death eligible under the Eighth Amendment regardless of their intent to kill should be abrogated.[21]

This Article explores the evolution of the Eighth Amendment proportionality analysis adopted by the Court and how that evolution impacts the constitutionality

---

15. Trop v. Dulles, 356 U.S. 86 (1958).

16. 492 U.S. 361 (1989) (upholding death sentences for crimes committed when defendant is sixteen or seventeen years of age).

17. 492 U.S. 302 (1989) (upholding death sentences for the mentally retarded).

18. 536 U.S. 304 (2002).

19. 543 U.S. 551 (2005).

20. 554 U.S. 407 (2008).

21. Theoretically, the principle of requiring intent to kill could be extended to felony-murder triggermen as well. However, that question is beyond the scope of this Article. For thoughtful exploration of the need to narrow death penalty eligibility for felony-murder defendants more generally, *see* Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719 (2007).

of executing felony-murder accomplices.[22] Part I provides the historical background of the Court's Eighth Amendment analysis before *Tison v. Arizona.* Part II examines the departure that occurred with the *Tison* trilogy. Part III looks at the Court's return to the pre-*Tison* approach to proportionality and implicit rejection of *Tison*. Finally, Part IV revisits the *Tison* rule, surveying both the authorization and the application of the death penalty to felony-murder accomplices in all fifty states and the federal government, and discusses how its use is no longer justified by penological goals absent an intent-to-kill requirement. To strengthen our claim of a significant shift in the national consensus, an appendix at the end of this Article provides a brief analysis of the capital sentencing schemes of all thirty-five states that permit the death penalty as it relates to the authorization of capital punishment for felony-murder accomplices.[23]

I. THE SUPREME COURT'S PRE-*TISON* PROPORTIONALITY CASES

The Eighth Amendment forbids the state from imposing punishments that are "cruel and unusual."[24] This mandate has been interpreted by the Court to ensure that a defendant's punishment is proportionate to the crime for which he is convicted and that the standards by which a court determines the proportionality of a punishment are constantly evolving along with our society. The Court first discussed the evolving nature of the Eighth Amendment almost a century ago in *Weems v. United States*, identifying an American belief that "punishment for crime should be graduated and proportioned to offense."[25] In doing so, the Court acknowledged that the framers of the Eighth Amendment deliberately left "cruel and unusual punishment" without a static definition.[26] Instead, the Amendment was said to be enacted from an "experience of evils," that should not "be necessarily confined to the form that evil had theretofore taken. *Time works changes, brings into existence new conditions and purposes*."[27]

Nearly forty years after *Weems*, the Court in *Trop v. Dulles*[28] revisited the

---

22. For purposes of this Article, the term "felony-murder accomplices" is defined as offenders who neither kill nor intend to kill, but have liability imputed to them through a felony-murder theory.

23. While we have made our best effort at categorizing current state practice, based on statutes and court opinions, we acknowledge there is room for disagreement. However, although the statistics themselves may be subject to disagreement, they can nonetheless be reliable for the purpose of reflecting the required consistency in the direction of change. *Kennedy v. Louisiana*, 554 U.S. 407, 424 (2008).

24. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

25. Weems v. United States, 217 U.S. 349, 367 (1910). In *Weems*, the Court found the sentence of "twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, [and] no participation even in the family council" to be cruel and unusual punishment under the Eighth Amendment for the crime of falsifying two public documents. *Id*. at 366.

26. *See id.* at 366–68.

27. *Id*. at 373 (emphasis added).

28. 356 U.S. 86 (1958).

proportionality analysis and cemented the idea that punishments must be determined according to the "evolving standards of decency that mark the progress of a maturing society."[29] The Court realized that determining "evolving standards of decency" cannot be achieved by simply looking at public notions of decency alone.[30] Instead, a penalty must also be consistent with the "dignity of man[,]" which is the "basic concept underlying the Eighth Amendment . . . ."[31] *Trop*'s acknowledgment that the Court must examine both society's standards of decency and inherent notions of human dignity set up the two-part framework for the Court's proportionality analysis that survives to this day.

A. Gregg v. Georgia*: The Court's First Application of the Two-Part Proportionality Analysis in a Capital Case*

The Court first applied the two-part proportionality analysis to a death sentence in *Gregg v. Georgia*.[32] In *Gregg*, the Supreme Court reexamined Georgia's death penalty scheme, which had been amended after Georgia's original scheme was found unconstitutional four years earlier in *Furman v. Georgia*.[33] In assessing the proportionality of a death penalty for the crime of murder, the *Gregg* plurality looked first to objective evidence of society's evolving standards of decency.[34] The plurality found legislative enactments to be the "most marked indication of society's endorsement of the death penalty" given that thirty-five states had enacted new death penalty statues since *Furman*.[35] The plurality also found "the jury" to be a "significant and reliable objective index of contemporary values . . . ."[36] It noted that more than 460 people had been sentenced to death since *Furman*.[37]

The plurality then looked to see if the death penalty comported with inherent notions of dignity by examining whether it served "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."[38] To this question, the plurality concluded "that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[39] Accordingly, the Court held that the "death penalty is not a form of punishment

---

29. *Id.* at 101. *Trop* held that legislation stripping the citizenship of a deserter of the armed forces violated the Eighth Amendment's ban on cruel and usual punishment. *Id.*

30. *Id.* at 100.

31. *Id.*

32. 428 U.S. 153 (1976).

33. 408 U.S. 238, 239–40 (1972).

34. *Gregg*, 428 U.S. at 173.

35. *Id.* at 179–80. The Court also looked to the statute passed by the United States Congress in 1974 and the proposition passed by the California electorate enacting a death penalty after the California Supreme Court had struck it down. *Id.* at 180–81.

36. *Id.* at 181.

37. *Id.* at 182.

38. *Id.* at 183.

39. *Id.* at 187.

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."[40]

B. Coker v. Georgia*: A Death Penalty for Adult Rape Fails the Two-Part Proportionality Analysis*

In *Coker v. Georgia,*[41] the Court again revisited the proportionality of a death sentence. In *Coker*, a plurality of the Court found the death penalty unconstitutional as applied to defendants convicted of raping an adult woman.[42] Justice White wrote the opinion for the plurality, and began by stating that while the death penalty is not per se "barbaric," it may be disproportionate given a particular crime or defendant.[43]

The Court applied the *Trop* framework for analyzing the proportionality of a death sentence. First, the Court examined "objective evidence of the country's present judgement concerning the acceptability of death as a penalty" for a particular crime—in Coker's case, rape of an adult woman.[44] For this analysis, the Court looked primarily to legislative and jury actions concerning death sentences for the crime of rape. Initially, the Court noted that at "no time in the last 50 years have a majority of States authorized death as a punishment for rape," and no state that previously excluded rape as a capital offense subsequently made it so.[45] Moreover, Georgia was the only jurisdiction authorizing a death sentence "when the rape victim is an adult woman, and only two other jurisdictions provide[d] capital punishment when the victim is a child."[46]

The Court also looked to juries' sentencing decisions "made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried."[47] The Court concluded that juries formed a consensus against giving a death sentence for rape where "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence" for rape.[48] Finally, the *Coker* Court looked to international opinion to support its conclusion. "It is . . . not irrelevant here," the Court stated, "that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."[49]

---

40. *Id.*
41. 433 U.S. 584 (1977).
42. *Coker* is the first time since *Weems* that the Court declared a punishment to be disproportionate to the crime in violation of the Eighth Amendment. *See* Enmund v. Florida, 458 U.S. 782, 813 (1982) (O'Connor, J., dissenting).
43. *Coker*, 433 U.S. at 584.
44. *Id.* at 593.
45. *Id.*
46. *Id.* at 596.
47. *Id.*
48. *Id.* at 597.
49. *Id*. at 596 n.10.

The Court then subjectively determined the excessiveness of the penalty in light of inherent notions of human dignity.[50] In judging whether a death sentence is "excessive," the *Coker* Court looked to see if death "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[51] To answer these questions, the Court focused on the question of culpability.[52] In examining defendant Coker's culpability, the Court looked to the culpability of rapists as a *category of defendants*, rather than at Coker's culpability given *his particular facts and circumstances*.[53] The plurality acknowledged the high level of culpability of a rapist and the depravity of the crime of rape,[54] yet found "it does not compare with murder."[55] Finally, the Court concluded that, since it is not comparable to murder, "the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, *does not take a human life.*"[56]

C. Enmund v. Florida*: The Court Addresses the Proportionality of Executing a Felony-Murder Accomplice*

Five years after *Coker*, the Court applied the two-part proportionality analysis to executing a felony-murder accomplice who was a minor participant in the underlying murder in *Enmund v. Florida.*[57] *Enmund* involved a classic felony murder where a get-away driver who was not present during the shooting was convicted and sentenced to death for the murder committed by his cohort.[58] Enmund drove two accomplices to an elderly couple's house where he waited in the car.[59] While he was waiting, his accomplices robbed and eventually shot the couple inside.[60] Enmund drove the killers to safety.[61]

---

50. *Id.* at 597.
51. *Id.* at 592.
52. *Id.* at 597–98.
53. *See id.*
54. According to the Court,

> [rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established . . . . Because it undermines the community's sense of security, there is public injury as well.

Id. at 597–98.
55. *Id.* at 598.
56. *Id*. (emphasis added) (internal citations omitted).
57. 458 U.S. 782 (1982).
58. The felony-murder doctrine allows a defendant to be guilty of first degree murder if he is engaged "in the perpetration of or in the attempt[ed] . . . perpetrat[ion of]" a statutorily designated crime, and "the unlawful killing occurred in the perpetration of [that crime] . . . ." *Id.* at 785 (internal citations omitted) (quoting the trial judge's instruction to the jury).
59. *Id.* at 786.
60. *Id.*

A jury found defendant Enmund guilty of two counts of first-degree murder under a felony-murder theory.[62] He was sentenced to death based on the aggravating circumstance that "the capital felony was committed while Enmund was engaged in or was an accomplice in the commission of an armed robbery . . . ."[63] Justice White, again writing for the Court, found that a death sentence for "accomplice liability in felony murders" is unconstitutional because for a class of defendants who "did not kill, attempt to kill, *and* . . . did not intend to kill, the death penalty is disproportionate . . . ."[64]

Just as the pluralities did in *Gregg* and *Coker*, the *Enmund* Court looked to objective measures—the actions of juries and legislatures—as well as to its subjective judgment to determine the proportionality of executing a non-triggerman.[65] First, the Court found that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."[66] The Court then added that in nine states a defendant "could be executed for an unintended felony murder if sufficient aggravating circumstances are present . . . ."[67] The Court looked to these seventeen states in light of all American jurisdictions, including those that did not authorize the death penalty under any circumstances, to find that "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder

---

61. *Edmund*, 458 U.S. at 784.

62. *Id.* at 785.

63. *Id.*

64. *Id.* at 794–96. This rule was foreshadowed in *Lockett v. Ohio*, 438 U.S. 586 (1978). Lockett was sentenced to death after participating in a robbery in which his partner killed the victim. *Id.* at 590–92. The Court reversed his sentence after finding Ohio's capital sentencing scheme unconstitutional for failure to allow consideration of mitigating evidence. *Id.* at 608–09. However, in a number of concurring opinions, several Justices addressed the problem of sentencing a defendant to death without any finding of *mens rea*. *See, e.g.*, *id.* at 588. Justice Marshall, asserting that Lockett had been "convicted under a theory of vicarious liability," found that "the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition . . . ." *Id.* at 619–20 (Marshall, J., concurring). Justice Blackmun also objected to the imposition of the death penalty without "any consideration by the sentencing authority of the extent of [Lockett's] involvement, or the degree of her *mens rea*, in the commission of the homicide," acknowledging that "[i]t might be that to inflict the death penalty in some situations would skirt the limits of the Eighth Amendment proscription . . . against gross disproportionality . . . ." *Id.* at 613–14 (Blackmun, J., concurring). Justice White opined that, at a minimum, the Eighth Amendment required a finding of "purpose to cause the death of the victim." *Id.* at 624 (White, J., concurring). Although allowing that the inference of "purpose" might be taken from the facts, Justice White stated,

> [b]ut there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done.

Id. at 627.

65. *Id.* at 788–89.

66. *Id.* at 792.

67. *Id.*

occurred to be sentenced to die."[68]

The Court also again looked to jury sentencing and the actual number of felony-murder accomplices executed. With respect to jury sentencing, the Court found only three defendants were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim.[69] Moreover, Enmund was the only defendant who had been sentenced to death with "no finding of an intent to kill and [where] the defendant was not the triggerman."[70] Finally, the Court concluded that no "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" has been executed,[71] while "only three persons in that category are presently sentenced to die."[72]

The Court looked to international law as an "additional consideration" in objectively determining our nation's evolving standards of decency.[73] The Court noted that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."[74]

Subjectively, the Court examined the blameworthiness of Enmund to determine if his culpability was proportionate to his death sentence. Just as it did in *Coker*, rather than look at Enmund individually, the Court placed him in a category of defendants (this time as a felony-murder accomplice lacking an intent to kill) to assess his culpability. The Court found it "fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[75] Enmund and any other defendant who neither kills nor intends to kill are "plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims.]"[76] This, the Court ruled, was unconstitutionally disproportionate.[77] Moreover, the Court expressly examined the two penological purposes behind the death penalty: retribution and deterrence. First, it found that if an offender did not intend to take a life, it is unlikely that the punishment of death imposed for his accomplices' actions will deter the offender from participating in the underlying felony.[78] As for retribution, the Court found that executing Enmund for a murder he had no intention of committing "does not measurably contribute to the

68. *Id.*
69. *Id.* at 796.
70. *Id.* at 795.
71. *Id.* at 796.
72. *Id.*
73. *Id.* at 796 n.22.
74. *Id.* at 797 n.22.
75. *Id.* at 798 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).
76. *Id.*
77. *Id.* at 801.
78. *Id.* at 798–99.

retributive end of ensuring that the criminal gets his just deserts."[79]

Through this reasoning, the *Enmund* Court categorically excluded certain defendants from death-eligibility, regardless of whether an individual non-triggerman could be more culpable than one who murders with premeditation.[80] Implicitly, the Court found that allowing juries to choose which non-killer is the worst of the worst carried too great a risk that an excessive and disproportionate death sentence may be inflicted.[81] Instead, as a category, felony-murder accomplices who were minor participants lacking an intent to kill could not be subject to the death penalty. Five years after *Enmund*, however, the Court departed from the categorical proportionality framework it had followed for over thirty years.

II. THE *TISON* TRILOGY: ABRIDGING THE ESTABLISHED PROPORTIONALITY ANALYSIS

Both *Enmund* and *Coker* broadly prohibit the death penalty for certain classes of defendants: rapists of adult women (*Coker)* and felony-murder accomplices who lack an intent to kill (*Enmund*). In both decisions (as well as in *Gregg*), the Court looked not just to statutory enactments, but also to international law and jury sentences as compelling objective evidence of society's evolving standards. In both decisions, the Court asked whether, categorically, a rapist or accomplice could be the worst of the worst, and by doing so, took that discretion away from a jury. Not many years later, however, the Court in *Tison v. Arizona*[82] abridged and altered its approach to proportionality, limiting its objective analysis and adopting a hyper-individualized assessment of proportionality.[83]

Tison examined the proportionality of executing a non-triggerman who harbored no intent to kill.[84] In *Tison*, two brothers were sentenced to die for their role in aiding their father's escape from prison and assisting in a subsequent robbery.[85] The Tison brothers entered an Arizona prison carrying an ice chest full of guns.[86] They dispersed the guns, locked the guards away, and fled the prison with their

---

79. *Id.* at 801. Interestingly, the Court also tied culpability to another line of cases that require an "individualized consideration as a constitutional requirement on imposing a death sentence." *Id.* at 798 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). Justice White reasoned that a felony-murder theory is inconsistent with this requirement because it does not look at Enmund's *personal* culpability, as "his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]." *Id.*

80. *See id.* at 799 ("[I]t seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation . . . .") (internal citations omitted).

81. *See also* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1109–10 (1990) (arguing the Court's focus "has been the process of selecting those to be killed, with the overarching goal of ensuring that those defendants chosen for execution be in some way worse, or materially more depraved than those other first degree murderers not executed") (internal citations omitted).

82. 481 U.S. 137 (1987).

83. Justice O'Connor, who wrote the dissent in *Enmund,* would now write the majority opinion in *Tison,* making her departure from *Enmund* unsurprising.

84. *See infra* Introduction.

85. *Tison*, 481 U.S. at 143.

86. *Id*. at 139.

father and another inmate.[87] While escaping from their prison-break, the Tison family car blew a tire.[88] The group devised a scheme to flag down a passing motorist and steal a car.[89] After other motorists passed the group of men, the Lyon family stopped to assist the Tisons and were robbed.[90] The father then shot out the radiator of the Lyons' car and ordered the Lyon family to stand in front of the headlights.[91] After one of the victims pleaded for his life, the Tisons' father responded that he was "thinking about it."[92] He then told his sons to fetch water for the victims while the father watched over the Lyon family with a loaded shotgun.[93] While the brothers were getting water, the father murdered the family.[94] It is accepted that the two sons did not intend for the family to die.[95] Eventually, one brother was killed by police; the father escaped in the desert but died of heat exposure, and the other two brothers were captured, convicted, and sentenced to death for the father's murder of the Lyon family.[96] On appeal, the Tison brothers argued that their death sentence should be reversed pursuant to *Enmund* since they did not kill, attempt to kill, or intend to kill.[97]

The majority, in an opinion written by Justice O'Connor, allowed the Tison brothers to be executed without overruling *Enmund*.[98] Instead, it limited *Enmund*'s holding to two divergent factual scenarios: (1) where there is a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state," and (2) where there is "the felony murderer who actually killed, attempted to kill, or intended to kill."[99] In the first situation, *Enmund* holds the death penalty is a disproportionate sentence, while in the second, *Enmund* allows a death sentence.[100] For the majority in *Tison,* that left ample middle ground that was out of *Enmund*'s reach.[101] Though the Tison brothers lacked an intent to kill, they had a "degree of participation in the crime

87. *Id*.
88. *Id.*
89. *Id.* at 139–40.
90. *Id.* at 140.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id*. at 141.
95. *Id.* at 143.
96. *Id.*
97. *Id.* at 143–44.
98. *Id.* at 149.
99. *Id.* at 149–50.
100. *Id.* at 151.
101. Justice O'Connor, writing for the *Tison* Court, claims that *Enmund* only found a death sentence disproportionate for those who do not actually kill and (1) are minor participants and (2) do not have an intent to kill—leaving wiggle room if the defendant was a major participant. *Id.* at 149. However, this assessment seems inconsistent with her original take in *Enmund*. Indeed, Justice O'Connor wrote in her dissent of *Enmund* that the majority's decision "fails to take into account . . . the defendant's actual participation during the commission of the crime." Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting).

[that was] major rather than minor," so the *Enmund* holding did not control.[102]

The middle ground marked out by the *Tison* Court not only created a new rule, but also advanced an entirely novel proportionality analysis that gave short shrift to the careful reasoning of *Furman*, *Coker*, and *Enmund* in favor of a truncated analysis that favored broadening eligibility for the death penalty.

A. Tison*'s Altered Proportionality Analysis*

Consistent with its prior cases, the *Tison* majority first examined objective evidence of society's standards by looking at state legislative enactments.[103] The majority grouped jurisdictions supporting the execution of felony murderers into five categories: (1) jurisdictions authorizing the death penalty in felony-murder cases upon a showing of a culpable mental state with a recklessness or extreme indifference to human life,[104] (2) jurisdictions that require the defendant's participation to be substantial,[105] (3) jurisdictions that take minor participation in the felony into account in the mitigation of the murder,[106] (4) jurisdictions that permit the death penalty for felony murder *simpliciter*,[107] and (5) jurisdictions that only require some additional aggravation before imposing the death penalty on an accomplice.[108] These five categories represented twenty jurisdictions that allowed for the execution of defendants who met the *Tison*-culpability requirement (i.e., a major participant acting with reckless disregard for life).[109] In contrast, the *Tison* Court identified only eleven jurisdictions that would forbid the imposition of the death penalty for those same defendants.[110] From these numbers, the Court determined that "our society does *not* reject the death penalty as grossly excessive under these circumstances . . . ."[111]

Notably, while recognizing that the *Enmund* Court "examined the behavior of juries . . . in its attempt to assess American attitudes toward capital punishment in felony-murder cases," the majority in *Tison* refused to look at jury verdicts in its objective analysis.[112] It also failed to take into account jurisdictions that had abolished the death penalty. Moreover, the majority did not consider international law in its objective analysis. These analytic shortcuts were inconsistent with

---

102. *Tison*, 481 U.S. at 151.
103. *Id*. at 154.
104. *Id.* at 153 n.5 (Arkansas, Delaware, Kentucky, and Illinois).
105. *Id.* at 153 n.6 (Connecticut and the Federal Government).
106. *Id.* at 153 n.7 (Arizona, Colorado, Indiana, Montana, Nebraska, and North Carolina).
107. *Id.* at 153 n.8 (California, Florida, Georgia, South Carolina, Tennessee, and Wyoming).
108. *Id*. at 153 n.9 (Idaho, Oklahoma, and South Dakota).
109. *Id.* at 152–54.
110. *Id.* at 154 (Alabama, Louisiana, Mississippi, Nevada, New Jersey, New Mexico, Ohio, Oregon, Texas, Utah, and Virginia).
111. *Id.*
112. *Id*. at 148.

decades of prior precedent.[113]

The *Tison* majority's subjective analysis also showed a similar departure from previous holdings. Rather than look, as the *Enmund* Court did, to see if a felony-murder accomplice categorically lacked sufficient culpability, the majority in *Tison* was concerned with the *possibility* that a felony-murder accomplice *could individually* be placed among the worst of the worst on the particular facts before it. Justice O'Connor stated that creating a category of defendants who have an "intent to kill" is not a very satisfying way of figuring out who is eligible for the death penalty.[114] She explained that many defendants who do have an intent to kill may still lack culpability if they acted out of self-defense, while many defendants lacking an intent to kill may be among the worst and most culpable in our society.[115] Hence, the majority refused to apply a "narrow focus on the question of whether or not a given defendant intended to kill,"[116] but rather found death a proportionate penalty for a defendant who does not actually kill but has "reckless disregard for human life."[117] Thus, the *Tison* majority made the inquiry highly fact-based, thereby giving a jury discretion to choose when an individual accomplice is suitable (i.e., culpable enough) to be executed.[118] The majority's only other limit on the jury's discretion was to require that the defendant's participation in the crime be "major."[119]

B. Stanford v. Kentucky: *Court Approves Executing Juvenile Offenders*

In the next two years the Court adopted *Tison*'s hyper-individualized approach to allow the execution of juveniles in *Stanford v. Kentucky*[120] and of the mentally retarded in *Penry v. Lynaugh*.[121] The Court in *Stanford* was faced with the question

---

113. *See* Enmund v. Florida, 458 U.S. 782, 788–89, 795–96 (1982) (explaining that the *Coker* analysis looks to "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter" and proceeding with the same analysis); Coker v. Georgia, 433 U.S. 584, 596 & n.10 (1977) (recognizing that international opinion also played a role in the analysis under *Trop*); Gregg v. Georgia, 428 U.S. 153, 181 (1976) (citing Furman v. Georgia, 408 U.S. 238, 439–40 (1972) (Powell, J., dissenting)); Trop v. Dulles, 356 U.S. 86, 102 (1958) (finding a punishment violated the Eighth Amendment in part because it was "a condition deplored in the international community of democracies"); *see also Furman*, 408 U.S. at 440–41 (Powell, J., dissenting) ("Any attempt to discern . . . where the prevailing standards of decency lie must take careful account of the jury's response to the question of capital punishment.").

114. *Tison*, 481 U.S. at 157.

115. *Id.* ("[S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies . . . .").

116. *Id.* (internal quotation marks omitted).

117. *Id.*

118. *Id.* at 158.

119. *Id.*

120. 492 U.S. 361 (1989) (upholding death sentences for crimes committed when defendant is sixteen or seventeen years of age).

121. 492 U.S. 302 (1989) (upholding death sentences for the mentally retarded); *see also* Rosen, *supra* note 81, at 1161–63 (discussing *Tison*'s elimination of bright-line categorical exemptions for the death penalty established in *Coker* and *Enmund*).

of whether the death penalty was disproportionate for a category of defendants who were sixteen and seventeen years old at the time of the offense.[122] Over the objection of four Justices,[123] a plurality found that the execution of juveniles did not violate the Eighth Amendment.[124] The plurality began its objective analysis by explicitly stating that it would not look to international standards in considering society's evolving standards of decency.[125] It then went on to consider only the thirty-seven states that, at the time, imposed capital punishment.[126] The plurality found that of those thirty-seven states, fifteen declined to impose the death penalty for juvenile offenders.[127] The plurality found "[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."[128]

The *Stanford* plurality then looked to the number of jury sentences and actual executions. It found that out of 2,106 death sentences from 1982 through 1988, "only 15 were imposed on individuals who were 16 or under when they committed their crimes, and only 30 on individuals who were 17 at the time of the crime."[129] Moreover, "actual executions for crimes committed under age 18 accounted for only about two percent of the total number of executions that occurred between 1642 and 1986."[130] However, hewing to *Tison*'s divergent path, the plurality found these numbers to "carry little significance."[131] Rather, the plurality argued "the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed."[132]

The *Stanford* plurality only briefly discussed the subjective step of the proportionality analysis. First, it dismissed the scientific evidence concerning the psychological and emotional development of sixteen- and seventeen-year-olds.[133] It asserted that it has "no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism."[134] Moreover, even if the evidence could be considered, the Court found that "it is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred."[135] The

---

122. *Stanford*, 492 U.S. at 381.
123. *Id.* at 382. Justices Brennan, Marshall, Black, and Stevens dissented.
124. *Id.* at 381.
125. *Id.* at 369 n.1 ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.").
126. *Id.* at 371 n.2 (rejecting the dissent's view that non-death penalty states should be counted).
127. *Id.*
128. *Id.* at 370–71 (noting that in *Coker*, only one jurisdiction sanctioned death for raping an adult woman).
129. *Id.* at 373.
130. *Id.* at 373–74.
131. *Id.* at 374; *see supra* note 113.
132. *Id.*
133. *Id.* at 378.
134. *Id.*
135. *Id.*

plurality hence followed *Tison*'s individualized approach of allowing the jury to determine whether it is *possible for* a juvenile, on an individual basis, to have the requisite culpability for a death sentence. Indeed, the dissent took issue with this method, arguing that the Court should return to its original analysis and examine the culpability of juveniles as a category of defendants.[136] It argued that, categorically, juveniles lack a level of culpability that would allow their execution to be proportionate.[137]

C. Penry v. Lynaugh*: Court Approves Executing the Mentally Retarded*

In *Penry*, the Court addressed the constitutionality of executing a mentally retarded[138] defendant. Justice O'Connor again wrote for the majority, finding that the execution of a mentally retarded defendant did not violate the Eighth Amendment's requirement of proportionality. Objectively, the Court found that of jurisdictions that have a death penalty, only three prohibit the execution of a person who is mentally retarded.[139] Further, the majority dismissed public opinion polls and amicus briefs by the American Association of Mental Retardation supporting the petitioner's argument against executing the mentally retarded.[140] Instead, the Court said this data "may ultimately find expression in legislation . . . [but until then] there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses . . . ."[141] As it had done in *Tison* and *Stanford*, the *Penry* Court deferred to the decisions of state legislatures to the exclusion of all other objective evidence of society's standards.[142]

Subjectively, the *Penry* Court followed the approach of *Tison* and *Stanford* to look to the individual culpability of the defendant given particular facts and circumstances, rather than at the category of defendants of which the petitioner was a part. It dismissed the argument that, per se, mentally retarded defendants lacked the culpability to face a proportionate death sentence. Rather, the Court found "that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act" in a particular circumstance.[143] Hence, the Court declined to "conclude that all mentally retarded people . . . by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with

---

136. *Id.* at 395 (Brennan, J., dissenting).

137. *Id.*

138. While the case law adopts the term "mental retardation," the currently accepted terminology is "intellectual disability."

139. Penry v. Lynaugh, 492 U.S. 302, 334 (1989). At the time, the federal government, Georgia, and Maryland were the only jurisdictions precluding the execution of the mentally retarded.

140. *Id.* at 334–35.

141. *Id.* at 335.

142. *See id.*

143. *Id.* at 337.

the death penalty."[144]

The *Tison* line of cases gave short shrift to the categorical two-part proportionality framework applied in *Enmund* and its progeny. However, over a decade later, the analytic vigor of the two-part approach would again take hold, reversing—with the exception of *Tison* itself—every case in the line.

III. RESURRECTING THE CATEGORICAL APPROACH TO PROPORTIONALITY

The twenty-first century brought about a shift in the way the Supreme Court examined the proportionality of death cases. This shift was expressed first in *Atkins v. Virginia,*[145] where the Court overruled *Penry,* and then again in *Roper v. Simmons*,[146] where the Court overruled *Stanford*. More recently, the Court solidified this shift in *Kennedy v. Louisiana*,[147] where it found the death penalty disproportionate to the crime of child rape.

A. Atkins v. Virginia

On August 16, 1996, Daryl Atkins and William Jones kidnapped Eric Nesbitt, drove him to an ATM to get more cash, then took him to an "isolated location" and shot him eight times.[148] Both Atkins and Jones were arrested and charged with first-degree murder.[149] Jones agreed to testify against Atkins in exchange for a life sentence.[150] Atkins was found guilty and sentenced to death.[151]

Atkins argued unsuccessfully to the Virginia Supreme Court that his death sentence violated the Eighth Amendment because of his mental retardation.[152] Dissenting from the state court's rejection of Atkins' claims, Justices Koontz and Hassell stated that "'the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive.'"[153]

The Supreme Court, in part because of the "gravity of the concerns expressed by the dissenters," agreed to review the decision of *Penry* allowing the execution of the mentally retarded.[154] Justice Stevens, writing for the majority, began by first looking to objective factors and second to the Court's own judgment "'on the question of the acceptability of the death penalty under the Eighth Amend-

144. *Id*. at 338.
145. 536 U.S. 304 (2002).
146. 543 U.S. 551 (2005).
147. 554 U.S. 407 (2008).
148. *Atkins*, 536 U.S. at 307.
149. *Id.* at 307 n.1.
150. *Id.*
151. *Id*. at 309.
152. *Id*. at 310.
153. *Id.* (quoting Atkins v. Virginia, 534 S.E.2d 312, 323–24 (Va. 2000) (Koontz, J., dissenting)).
154. *Id.*

ment.'"[155]

1. Objective Indicia

The Court began by examining legislation concerning the sentencing of mentally retarded defendants.[156] It then compared the instant situation with that which existed at the time the Court decided *Penry*, noting that "[m]uch has changed since then."[157] At the time of *Penry*, only the federal government, Georgia, and Maryland prohibited the execution of the mentally retarded.[158] However, the Court noted that after *Penry*, eighteen states passed legislation banning the execution of the retarded.[159] Overall, thirty states banned the death penalty for the retarded, twelve of which did not have the death penalty at all and eighteen that had a death penalty but excluded the mentally retarded.[160]

The Court recognized that "[i]t is not so much the number of these States that is significant, but the *consistency of the direction of change*."[161] Moreover, these statistics were said to be even more compelling "[g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime . . . ."[162]

Next, the Court noted the rarity of states executing a mentally retarded defendant, harmonizing the infrequency of executions with the relatively low number of legislatures banning the practice. It reasoned that in the states that *do* allow the execution of the retarded, "the practice is uncommon."[163] Hence, "there is little need to pursue legislation barring the execution of the mentally retarded in those States."[164]

In addition to looking to legislatures, the *Atkins* Court examined other objective factors to help determine a national consensus. In a footnote, the Court looked at the international community, medical organizations, religious groups, and other entities writing amicus briefs in other death penalty cases.[165] While the Court was careful to emphasize that "these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue."[166]

---

155. *Id.* at 312 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).
156. *Id.* at 313.
157. *Id.* at 314.
158. *See* Penry v. Lynaugh, 492 U.S. 302 (1989).
159. *Atkins*, 536 U.S. at 314–15.
160. *Id.* at 313–315.
161. *Id.* at 315 (emphasis added).
162. *Id.*
163. *Id*. at 316.
164. *Id.* The Court also noted that even in Texas, where the Governor vetoed legislation banning the execution of the retarded, the Governor cited as his reason the fact that "'[w]e do not execute mentally retarded murderers today.'" *Id.* at 315 n.16.
165. *Id.* at 317 n.21.
166. *Id*.

2. Subjective Analysis

After examining the objective indicia of a national consensus, the Court looked to its own judgment to see if such executions are excessive.[167] The Court rigidly examined the penological justifications for the death penalty, without which a death sentence would be excessive. It first looked to the retributive effect of executing the retarded.[168] Justice Stevens defined retribution as "the interest in seeing that the offender gets his 'just deserts'—the severity [of which] . . . necessarily depends on the culpability of the offender."[169] The Court then recalled that death "has consistently [been] confined . . . to a narrow category of the most serious crimes."[170] Hence, a defendant with the culpability of an ordinary murderer cannot receive the death penalty absent evidence that she is more culpable than the others.[171] The Court found that mentally retarded defendants, as a group, act more impulsively and are more prone to coercion and other influences than "average" murderers, having less capacity to communicate and understand meanings, to learn from mistakes, or to process information.[172] Accordingly, reasoning that "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State," the Court concluded that "the lesser culpability of the mentally retarded offender" categorically does not merit that level of retribution.[173]

Next, the Court examined the deterrent effect of executing the mentally retarded. It began by affirming the principle espoused in *Enmund* that "'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation . . . .'"[174] By definition, the mentally retarded have an inhibited ability to premeditate and deliberate on their decisions.[175] Hence, executing the mentally retarded cannot deter other mentally retarded individuals from committing crimes, since they will likely not take consequences into consideration.[176] Further, a ban on executing the retarded would not "lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded" since those defendants would be "unprotected by the exemption . . . ."[177]

Lastly, the Court noted the danger in simply applying a case-by-case analysis of

---

167. *Id.* at 318.
168. *Id.* at 319.
169. *Id.*
170. *Id.*
171. *Id.* This point seems also to address a *Furman* concern for arbitrariness and ensuring that the pool of death eligible defendants is qualitatively and quantitatively more limited.
172. *Id.* at 318–19.
173. *Id.* at 319.
174. *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 799 (1982)).
175. *Id.* at 319–20.
176. *Id.* at 320.
177. *Id.*

mental retardation as another mitigating factor.[178] The Court found too great a risk "'that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . .'"[179] Mentally retarded defendants are less likely to assist their counsel, tend to be bad witnesses, and may have their status of mental retardation used against them to show they will be dangerous in the future.[180] In sum, the Court, as it did in *Enmund* and *Coker*, implicitly found that giving juries discretion in choosing which mentally retarded inmate is suitable to die poses too great a risk of an arbitrary execution.

B. Roper v. Simmons

Christopher Simmons, at the age of 17, planned to commit a murder.[181] He and a friend met late at night and broke into the home of Mrs. Shirley Crook to carry out that plan.[182] They tied Mrs. Crook's hands, covered her eyes and mouth with duct tape, and drove her to a state park in her minivan.[183] They then tied her hands and feet, put a towel around her head, and threw her over a bridge.[184] Simmons was unremorseful for the killing, bragging that he killed the woman "'because the bitch seen my face.'"[185] Simmons was arrested at his high school, confessed to the crime during interrogation, and was convicted of murder.[186] The jury sentenced Simmons to death.[187]

Simmons' first round of post-conviction challenges was unsuccessful. He was denied post-conviction relief by the Missouri Supreme Court, and the federal courts denied his writ of habeas corpus.[188] However, after his writ was denied, the Supreme Court handed down *Atkins*, and Simmons filed a new petition. This time, the Missouri Supreme Court found that the reasoning in *Atkins* had changed the death penalty landscape enough to make executing juvenile offenders unconstitutional.[189] The State appealed and the United States Supreme Court granted review.

Justice Kennedy, writing for the majority, began by summarizing the history of Eighth Amendment jurisprudence as applied to the death penalty.[190] He noted that the Court in *Stanford v. Kentucky*[191] upheld executions against juvenile offenders who were sixteen- or seventeen-years-old at the time of the crime and, on the same

178. *Id.*
179. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).
180. *Id.* at 320–21.
181. Roper v. Simmons, 543 U.S. 551, 556 (2005).
182. *Id.*
183. *Id.*
184. *Id.* at 557.
185. *Id.*
186. *Id.*
187. *Id.* at 558.
188. *Id.* at 559.
189. *Id.* at 559–60.
190. *Id.* at 560.
191. 492 U.S. 361 (1989).

day, handed down *Penry v. Lynaugh*,[192] which upheld executions of the mentally retarded. Justice Kennedy declared that just as *Atkins* reconsidered *Penry*, here the Court would reconsider *Stanford*.[193]

1. Objective Indicia

Beginning with the "objective indicia of consensus," the *Roper* Court first looked to legislative enactments.[194] It found that thirty jurisdictions prohibited the death penalty for juveniles.[195] That number included twelve states that have "rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."[196] As in *Atkins*, the Court looked beyond the number of states alone to determine a consensus, also considering the rate of change. It recognized that the legislative rate of abolishing juvenile offender executions had been slower than it was for the mentally retarded.[197] However, the Court found that the "less dramatic" shift was attributable to the already large number of states—twelve—that outlawed the practice at the time of *Stanford*.[198]

In addition to looking at legislative action, the *Roper* Court looked to the frequency of executions evidencing a national consensus. The Court noted that in the sixteen years since *Stanford*, only six states had executed prisoners for crimes committed as juveniles, and in the last ten years, only Oklahoma, Texas, and Virginia had done so.[199]

2. Subjective Analysis

In conducting the subjective analysis, Justice Kennedy articulated the concept that certain classes of offenders cannot be executed regardless of how heinous they or their crime may be.[200] This broad exclusion "vindicate[s] the underlying principle that the death penalty is reserved for a narrow *category* of crimes and

---

192. 492 U.S. 302 (1989).
193. *Roper*, 543 U.S. at 564.
194. *Id.*
195. *Id.*
196. *Id.* The Court also noted that the numerical breakdown of states was the same in *Atkins*. *Id.*
197. *Id.* at 565.
198. *Id.* On this point, the Court quoted the Missouri Supreme Court, adding,

> [i]t would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred.

Id. at 567.
199. *Id.* at 564. The Court added that the defendant in *Stanford* had his life sentence commuted by the Governor of Kentucky despite the Court's ruling that he was eligible to be executed. *Id.* at 565.
200. *Id.* at 568.

offenders."[201] The Court gave three reasons why juveniles "cannot with reliability" be placed in that narrow category of the "worst" offenders.[202] First, juveniles are less mature and more likely to engage in irresponsible behavior, which explains why they cannot vote, marry without parental consent, or serve on juries.[203] Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[204] Third, the personality traits of juveniles are "less fixed" and more likely to develop and change over time; hence, "[o]nly a relatively small proportion of adolescents who experiment in . . . illegal activities develop entrenched patterns of problem behavior that persist into adulthood."[205]

The Court explained that an individual juvenile may be among the worst of the worst, committing a heinous crime with "sufficient psychological maturity, and at the same time demonstrat[ing] sufficient depravity . . . ."[206] However, the Court found too great a risk in allowing a jury to determine, on a case-by-case basis, which juvenile is culpable enough to be executed: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[207]

The Court also tied a juvenile offender's lessened culpability (as a class) to the two purposes of the death penalty: retribution and deterrence.[208] With regards to retribution, the Court followed the logic in *Atkins* to find that the diminished culpability of a juvenile offender warrants a lesser punishment, whether retribution is "viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim . . . ."[209] Moreover, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . ."[210] As for deterrence, the Court found an absence of evidence that the possibility of a death sentence would have any deterrent effect on juveniles as a class, particularly given that they are less capable of engaging in cost-benefit analyses than adults and that just the possibility of life in prison without parole, by itself, would be a severe sanction for a person of young age.[211]

---

201. *Id.* at 568–69 (emphasis added).
202. *Id.* at 569.
203. *Id.*
204. *Id.*
205. *Id.* at 570.
206. *Id.* at 572.
207. *Id.* at 573.
208. *Id.* at 572.
209. *Id.* at 571.
210. *Id.*
211. *Id.* at 572.

C. Kennedy v. Louisiana

Five years after deciding *Roper*, the Court again revisited its proportionality analysis in *Kennedy v. Louisiana*.[212] In *Kennedy*, the Court addressed whether a death sentence was proportionate to the crime of raping a child. The facts of the crime were grisly. Petitioner Patrick Kennedy had been convicted of raping his eight-year-old stepdaughter, resulting in extensive injuries to the child that required immediate emergency surgery.[213] Evidence also revealed that Kennedy spent some three hours covering up the crime, including calling in carpet cleaners to remove blood stains, before calling 911.[214] Nevertheless, the Supreme Court reversed Kennedy's death sentence. Relying expressly on the analytical framework of *Roper*, *Atkins*, *Coker*, and *Enmund*, the Court concluded that capital punishment was a disproportionate sentence for a defendant who "raped but did not kill a child, and who did not intend to assist another in killing the child . . . ."[215]

1. Objective Indicia

The *Kennedy* Court's objective analysis began by looking at the historical use of capital punishment for the crime of rape. The Court noted that, although in 1925, eighteen states, the District of Columbia, and the federal government authorized capital punishment for rape, in the post-*Furman* era only six states reenacted those provisions.[216] By 1989, all six of these state statutes had been invalidated on state or federal grounds. Louisiana once again reenacted capital punishment for child rape in 1995, and five states followed, resulting in six states that had made recent legislative judgments that the death penalty was an appropriate punishment for this limited category of sexual offenders.[217] That left forty-four states that prohibited the death penalty for child rape, as well as the federal government, despite a recent expansion of death eligible crimes in the Federal Death Penalty Act.[218] The Court then compared this figure (forty-five jurisdictions) to the statistics in *Atkins* and *Roper* (thirty jurisdictions) and *Enmund* (forty-two jurisdictions) to conclude that child rape presented even a greater consensus than that which had moved the Court to limit death eligibility in those cases.[219]

Next, the Court considered the Government's argument that state legislatures had not authorized the death penalty for child rape because of an overly expansive interpretation of *Coker*.[220] The Court rejected the argument, finding that *Coker*'s

---

212. 554 U.S. 407 (2008).
213. *Id.* at 412–13.
214. *Id.* at 415.
215. *Id.* at 421–22.
216. *Id.* at 422.
217. *Id.* at 423.
218. *Id.*
219. *Id.* at 425–26.
220. *Id.* at 426–31.

holding was clearly limited to the context of adult rape.[221] The Court refused to assume that state legislatures viewed the decision more broadly in the absence of direct evidence, citing several state-court decisions correctly interpreting *Coker* to bolster its conclusion that this argument did not undermine the relevance of its state-counting analysis.[222]

The Court also rejected the Government's argument that the six states that had authorized the death penalty for child rape represented a consistent direction of change.[223] In doing so, the Court indicated that this factor was only relevant in cases involving an "otherwise weak demonstration of consensus."[224] It simultaneously rejected any reliance on legislation pending in the state courts.[225] Finally, the Court compared the six "change" states before it to the same statistic in its other proportionality cases, such as *Atkins* (with eighteen states listed in the change column) and *Roper* (with five states).[226] The Court concluded that, in light of these cases, the rate of change on statutory authorization for capital punishment of defendants who committed child rape was not significant.[227] In doing so, it reasoned that even though there was one more "change" state in *Kennedy* than in *Roper*, the *Roper* decision was based not so much on the rate of change as on the total number of states prohibiting the juvenile death penalty.[228]

Finally, the Court looked to the actual executions of rape offenders. Two facts were decisive. First, the last execution for rape occurred in 1964—thirty-four years before *Kennedy* was decided.[229] Second, the only state to sentence a convicted rapist to death since that time was Louisiana, and it had only done so twice.[230] Accordingly, the Court concluded that there was "a national consensus against capital punishment for the crime of child rape."[231]

2. Subjective Analysis

The Court began its subjective analysis by recognizing the serious moral objections to barring capital punishment for child rapists given the "permanent psychological, emotional, and sometimes physical impact" of the crime on its victims.[232] Nonetheless, the Court placed great emphasis on the fact that the Eighth Amendment's evolving standards support restricting the use of the death

221. *Id.* at 428.
222. *Id.* at 427–431.
223. *Id.* at 431.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 433.
228. *Id.* at 432.
229. *Id.* at 433–34.
230. *Id.* at 434.
231. *Id.* at 434.
232. *Id.* at 435.

penalty.[233] The Court ultimately was strongly influenced by the understanding that rape of any kind is not comparable to murder in either its "severity" or its "irrevocability."[234]

The Court was also concerned about opening capital punishment up to a population of offenders potentially far bigger than that which commits murder.[235] The Court noted that child rape has an incidence rate that is almost twice as high as the murder rate.[236] Even more troubling, under the state law before it, all child rapists would be death-penalty eligible, as compared to only a tiny percentage of first-degree murderers who received the ultimate sentence.[237]

Finally, the Court considered and rejected any possibility of a limiting principle that would reliably result in a consistent application of the penalty after a consideration of individualized circumstances.[238] On the one hand, the Court recognized that the nature of the crime might "overwhelm" the judgment of the fact-finder in the weighing of aggravating and mitigating circumstances.[239] On the other hand, the Court found that the very infrequency of the penalty's use in these circumstances "would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty."[240]

The Court also continued its focus on retribution and deterrence. With regard to retribution, the fact that no life was taken raised a significant issue for the Court as to whether the degree of retribution involved was justified.[241] The Court was also swayed by the unique involvement of the child victim in the process of securing the death sentence, both prolonging the pain of the rape and essentially asking the child to make a moral choice regarding her assailant's deservingness of the penalty—a decision that the child was not mature enough to make.[242] Finally, the Court noted some concern with the extent to which both the conviction and the sentence would turn on the testimony of the child, which might not be sufficiently reliable because of the child's age.[243]

As to deterrence, the Court raised concerns that extending the death penalty to child rape might deter victims from reporting the crime and might remove a possible motivation for the perpetrator to avoid taking the additional step of killing

233. *Id.*
234. *Id.* at 438.
235. *Id.* at 439.
236. *Id.* at 438.
237. *Id.* at 439.
238. *Id.* 439–40.
239. *Id.* at 439.
240. *Id.* at 441.
241. *Id.* at 442–43.
242. *Id.*
243. *Id.* at 442.

his victim.[244] Finally, the Court rejected as unpersuasive the idea that, by barring the death penalty for child rapists, it was preventing the states from reaching a consensus on the issue.[245] Thus, it affirmed its role, dictated by the Eighth Amendment, to constrain the application of the death penalty.[246]

D. Distilling the Revitalized Proportionality Analysis

Taken together, *Atkins*, *Roper*, and *Kennedy* alter the application of the Court's Eighth Amendment proportionality analysis and effectively reject the more truncated and superficial approach of the *Tison* trilogy. In these three decisions, the Court has not only revitalized its earlier approach in *Coker* and *Enmund*, but also solidified the structure of the proportionality analysis, broadened the types of evidence it considers persuasive, and undergirded its approach with a recognition of its constitutional duty to limit juror discretion to make death penalty decisions as to certain categories of defendants.

1. The Components of the Objective Indicia Analysis

The Court still finds evidence of legislative action to be important in determining society's evolving standards of decency. However, a significant change arising from *Atkins* and subsequent decisions is how the Court counts those legislatures. In *Enmund*, the Court looked to all jurisdictions, including those that did not have a death penalty at all, when determining a national consensus.[247] In *Tison*, *Stanford*, and *Penry*, the Court did not factor these states into its objective analysis. The *Atkins* analysis shifted back to *Enmund*'s approach. In *Roper*, the Court marks this shift expressly: "[T]he *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty . . . ."[248] With seventeen jurisdictions banning the death penalty as of 2011, this change alone represents a significant step forward in the Court's state-counting methodology.

Another important development in assessing an objective consensus concerns a move beyond mere legislation-counting to the identification of trends. In *Tison*, the Court was satisfied with simply tallying the states that allowed the death penalty for *Tison* felony-murderers and comparing that number (more than twenty) with how many states outlawed these executions. *Atkins* replaced this "accounting" approach with a more analytical one—instead looking at what lies beneath those numbers. In *Atkins*, the Court identified "the consistency of the direction of change" as a factor militating against permitting the death penalty for the mentally

244. *Id.* at 444–45.
245. *Id.* at 446.
246. *Id.*
247. *See supra* Section II.B.1; *see also* Enmund v. Florida, 458 U.S. 782, 789–92 (1982).
248. Roper v. Simons, 543 U.S. 551, 574 (2005).

retarded.[249] Later, in *Kennedy*, the Court considered the history of permitting the death penalty for rape going back to 1925, tracing it through its post-*Furman* developments to conclude that even though six states had reenacted rape provisions in their capital sentencing schemes, the significance lay in how many states had *not* done so.[250] Thus, *Atkins* and its progeny no longer engage in state-counting in a vacuum, but rather seek a contextual understanding of legislative change.

Part of this contextual understanding is the political context in which those numbers occur. For instance, both *Atkins* and *Roper* took into account the popularity of anti-crime legislation in assessing the significance of the changing legislative landscape.[251] Going a step further, the *Roper* Court explained the relatively low number of states banning the practice of executing juveniles by reasoning that because such executions occur infrequently, there was no onus on the legislatures to pass a law prohibiting it.[252]

As we have already seen, the *Tison* Court limited its consideration of objective indicia to the actions of state legislatures.[253] This narrow view drew sharp criticism from Justice Brennan in his *Tison* dissent. Justice Brennan noted, "it is critical to examine not simply those jurisdictions that authorize the death penalty in a given circumstance, but those that actually *impose* it."[254] *Atkins* and its progeny adhere to this view, looking beyond legislatures to the *imposition* of the death penalty.[255] In each case following *Atkins*, the Court found that the relative infrequency of death sentences imposed against the category of defendants with which it was concerned was persuasive evidence of consensus.[256]

Finally, the Court in *Atkins* and *Roper* returned to *Enmund*'s willingness to look beyond juries and legislatures and consider international law and scholarly data. "[T]he American public, . . . scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal . . . [and] the consensus . . . informs our answer . . . ."[257] Moreover, while not controlling, the Court in *Roper* dedicated a substantial portion of its analysis to international law and opinions.[258] Such opinions were ignored in *Tison*, but were present in the reasoning of *Enmund*[259] and *Coker*.[260] International law that life sentences for juveniles were "rejected the world over" also buttressed the holding

249. Atkins v. Virginia, 536 U.S. 304, 315 (2002).
250. *Kennedy*, 554 U.S. at 422–23.
251. *Roper*, 543 U.S. at 566; *Atkins*, 536 U.S. at 315.
252. *Roper*, 543 U.S. at 567.
253. Tison v. Arizona, 481 U.S. 137, 152–54 (1987).
254. *Id.* at 176 (Brennan, J., dissenting).
255. *See* Furman v. Georgia, 408 U.S. 238 (1972).
256. *See* Kennedy v. Louisiana, 554 U.S. 407, 425–26 (2008); *Roper*, 543 U.S. at 564; Atkins v. Virginia, 536 U.S. 304, 316 (2002).
257. *Atkins*, 536 U.S. at 307.
258. *Roper*, 543 U.S. at 576–78.
259. *See* Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982).
260. *See* Coker v. Georgia, 433 U.S. 584, 596 n.10 (1976).

of the most recent proportionality opinion, *Graham v. Florida*, in which the Court held that life sentences were disproportionate for juvenile offenders.[261]

2. Considerations Governing the Subjective Analysis

The first shift from *Tison*'s subjective analysis is fairly obvious. Whereas *Tison* did not look to the rationales for the death penalty, *Atkins* reaffirmed earlier precedent by stressing the importance of examining the goals of retribution and deterrence. *Tison* held that an offender who neither kills nor intends to kill could be as culpable as an intentional murderer.[262] However, the Court refrained from discussing the ways in which a non-killer's culpability would affect the deterrence or retributive effect of the death penalty.[263] Justice Brennan pointed this out in his dissent when he stated that "the [*Tison*] Court has ignored most of the guidance this Court has developed for evaluating the proportionality of punishment."[264]

More subtly, *Atkins* marked a shift from *Tison* by looking at the culpability attached to a *group* of offenders, of which the individual defendant is but one member. With this view, the possibility that one defendant who is the worst of the worst may be spared a death sentence is *acceptable*. What is more important is that "the death penalty is reserved for a *narrow category* of crimes and offenders."[265] In the wake of these decisions, what is unacceptable is the risk "'that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . .'"[266] Hence, Justice Kennedy in *Roper* expressly recognized that some juveniles, as determined on a case-by-case basis, may be as culpable as the worst criminals most deserving of the death penalty.[267] Yet, the risk of executing someone undeserving of the death penalty outweighs the risk of under-punishment.[268]

Atkins and its progeny thereby reverse the focus from that in *Tison*. *Atkins*, *Roper*, and *Kennedy* were concerned with the possibility that an offender may wrongfully be executed even at the risk of allowing some of the most culpable to escape death. *Tison*, on the other hand, was more concerned with the possibility that an offender may avoid the death penalty even though he or she is sufficiently culpable. Unlike *Tison*, *Atkins* adopts a view of the Eighth Amendment as a

---

261. Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).

262. *See* Tison v. Arizona, 481 U.S. 137, 156, 158 (1987).

263. *See* Andrew H. Friedman, Tison v. Arizona: *The Death Penalty and the Non-Triggerman: The Scales of Justice are Broken*, 75 CORNELL L. REV. 123, 151 (1989) (pointing out that the *Tison* majority "ignored or distorted other factors" previously considered when determining the proportionality of a sentence, including "whether the punishment contributes to the two social purposes of the death penalty—retribution and deterrence").

264. *Tison*, 481 U.S. at 180 (Brennan, J., dissenting).

265. Roper v. Simmons, 543 U.S. 551, 569 (2005) (emphasis added).

266. Atkins v. Virginia, 536 U.S. 304, 320 (2002) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

267. *Roper*, 543 U.S. at 572.

268. *Id.* at 572–73.

safeguard against societal tendencies to inflict unnecessary or disproportionate punishments in the name of vengeance or passion.[269]

The reluctance to put before a jury the decision of life or death for a defendant who belongs to a generally less culpable class of offenders did not enter into the *Tison* Court's calculus.[270] The *Tison* Court's greater concern was that "*some* nonintentional murderers may be among the most dangerous and inhumane of all . . . ."[271] Further, the *Tison* Court was comfortable giving the jury discretion to make such culpability assessments.[272] *Atkins* demonstrates that the Court considers it a duty to actively narrow the opportunity to inflict a death sentence with respect to certain categories of defendants or offenses.[273]

IV. REVISITING *TISON*: EXAMINING THE PROPORTIONALITY OF DEATH SENTENCES OF FELONY-MURDER ACCOMPLICES UNDER THE RESURRECTED PROPORTIONALITY ANALYSIS

When viewed in light of the Court's new approach to proportionality, a death sentence for felony-murder accomplices who neither kill nor intend to kill is outside the bounds of America's evolving standards of decency. Using the Court's approach adopted in *Atkins*, *Tison* is no longer constitutionally sound. The *Tison* Court found support in that "the majority of American jurisdictions clearly authorize capital punishment" for accomplices who were major participants with at least a reckless disregard for life.[274] Based on the *Tison* Court's count, jurisdictions supported the death penalty for accomplices who neither killed nor intended to kill by almost a two-to-one ratio.

Today, this ratio would look dramatically different. Moreover, under a contem-

---

269. This view of the Eighth Amendment was articulated by Justice Marshall in *Furman*, when he stated: "At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves." He went on to add that we "recognize . . . [our] inherent weaknesses and seek to compensate for them by means of a Constitution." Furman v. Georgia, 408 U.S. 238, 344–45 (1972) (Marshall, J., concurring) (footnote omitted).

270. *Roper*, 543 U.S. at 572.

271. Tison v. Arizona, 481 U.S. 137,157 (1987) (emphasis added); *see also* Penry v. Lynaugh, 492 U.S. 302, 337 (1989) ("[The Court] cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Mentally retarded persons are individuals whose abilities and experiences can vary greatly."); Stanford v. Kentucky, 492 U.S. 361, 374 (1989) (holding that the fact that a far smaller percentage of capital crimes are committed by persons under eighteen than over eighteen "does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries").

272. The *Tison* approach was also evident in *Stanford* and *Penry*, where those Courts found it acceptable to give the jury discretion to determine when an offender should be spared because of his mental retardation or youth.

273. *See* Kennedy v. Louisiana, 554 U.S. 407, 435 (2008) ("Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty . . . .").

274. *Tison*, 481 U.S. at 155.

porary proportionality analysis, mere state counting is not the sole basis for determining a national consensus. Modern courts must also look at both how the authorization of the death penalty has changed over time and how it has been used in practice, taking into account the numbers of actual executions. In addition, in assessing whether the direction of change is sufficiently consistent, the Court has compared the statistics in the case before it to those in its prior cases.[275] The following analysis proceeds accordingly, followed by a subjective analysis that places the focus on deterrence and retribution by considering the categorical culpability of felony-murder accomplices who lack an intent to kill.

A. Objective Indicia

As it now stands, there are a total of thirty-three jurisdictions that, if they authorize the death penalty of non-triggermen at all, require a finding that the accused had an intent to kill. Specifically, three states do not authorize the death penalty for felony murder under any circumstances.[276] An additional four states that do authorize the death penalty for felony murder nonetheless draw the line at triggermen. In these states, non-triggermen are never death-penalty eligible.[277]

Finally, sixteen states and the District of Columbia have banned the death

---

275. *Roper*, 543 U.S. at 564–66 (comparing statistics to those found in *Stanford* and *Atkins*); Atkins v. Virginia, 536 U.S. 304, 314–15 (2002) (comparing statistics to those found in *Penry*).

276. In Pennsylvania, felony murder is murder in the second degree whether the accused is a principal or an accomplice. 18 PA. CONS. STAT. ANN. § 2502(b) (West 2011). The same is true of Missouri. MO. ANN. STAT. § 565.021 (West 2011). In Washington, felony murder is first degree murder, but it is not death-penalty eligible. *See* WASH. REV. CODE ANN. §§ 9A.32.030(1)(a), (c), 10.95.020 (West 2011) (making only first degree murder under section 9A.32.030(1)(a) eligible for the death penalty); *see also infra* Appendix.

277. Of the four states limiting the death penalty to triggermen, two states have done so by legislative enactment: Maryland, *see* MD. CODE ANN., CRIM. LAW §§ 2-201(a)(4), 2-202(a)(2)(i), 2-303(g) (West 2011) (making felony murder punishable by death only if the defendant committed the murder); Brooks v. State, 655 A.2d 1311, 1321 (Md. Ct. Spec. App. 1995) (interpreting the statutory scheme to exclude defendants who do not actually kill), and Oregon, *see* OR. REV. STAT. ANN. §§ 163.115(1)(b), 5(a), 163.095(2)(d) (West 2011) (providing that aggravated murder does not include felony murder unless the defendant personally and intentionally committed the homicide); State v. Nefstad, 789 P.2d 1326, 1338–39 (Or. 1990) (interpreting the word "personally" as actually causing the death and not merely a role in the felony). An additional two states have limited the death penalty to triggermen via judicial decision: Georgia, *see* Hulme v. State, 544 S.E.2d 138, 141 (Ga. 2001) ("[U]nder Georgia law, the defendant must directly cause the death of the victim to be convicted of felony murder." (citing Durden v. State, 297 S.E.2d 237 (Ga. 1982); State v. Crane, 279 S.E.2d 695 (Ga. 1981))), and Virginia, *see* Briley v. Commonwealth, 273 S.E.2d 57, 63 (Va. 1980) (requiring that the accused be the triggerman to be eligible for first degree murder). *See infra* Appendix. Significantly, a legislative attempt to expand the death penalty in Virginia to include non-triggermen, known as the "triggerman repeal bill," has failed twice in two years, most recently in February 2010. Alicia P.Q. Wittmeyer, *Most Virginia Death Penalty Expansion Bills Rejected*, THE VIRGINIAN PILOT, Feb. 16, 2010, *available at* http://hamptonroads.com/2010/02/most-virginia-death-penalty-expansion-bills-rejected. Touted as a solution to the problem of being unable to convict John Allen Muhammad (the so-called "D.C. Sniper") of capital murder in the state's courts, it nonetheless failed to muster a majority vote in committee after testimony regarding both the high cost of expanding death eligibility and the toll executions take on those who must carry them out. *Id.*

penalty.[278] An additional nine states affirmatively require that a non-triggerman acted with an intent to kill.[279] This brings the total number of "consensus" jurisdictions—those that have made legislative or judicial decisions against the use of the death penalty for non-triggermen who lacked an intent to kill—to thirty-three.

These thirty-three jurisdictionss pose a stark contrast to the ten jurisdictionss that maintain their adherence to *Tison*'s minimal requirements.[280] *Tison*'s two-to-one ratio now stands at one-to-three. This represents not just a reversal of fortune for the *Tison* rule, but a repudiation.

Many factors contribute to the altered legislative landscape, some having to do with the narrow analysis employed in the *Tison* decision and some having to do with meaningful changes at the state level. First, *Tison* catalogued just thirty-one states to reach its two-to-one ratio.[281] In doing so, it did not give any weight to states that had abolished the death penalty, leaving a full dozen states voiceless on the morality of the death penalty.[282] Four additional states—Illinois, New Jersey,

---

278. The sixteen states are Alaska, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. DEATH PENALTY INFORMATION CENTER, *Facts About the Death Penalty, available at* www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited June 16, 2011).

279. These include Alabama, Connecticut, Indiana, Kansas, Louisiana, Mississippi, Montana, Ohio, and Wyoming. *See infra* Appendix.

280. These ten jurisdictions include the United States (which has defined federal capital murder under the U.S. Code) and nine state jurisdictions: Arizona, California, Colorado, Delaware, Florida, Idaho, Kentucky, South Carolina, and Texas. An additional nine states have authorized the death penalty for non-triggermen only upon an affirmative finding of either complicity, ARK. CODE ANN. § 5-10-101(a)(1), (b), (c) (West 2011) (Arkansas), knowledge that lethal forced would be used, NEV. REV. STAT. ANN. §§ 200.030(1)(b), (4)(a), 200.033(4) (West 2011) (Nevada); TENN. CODE ANN. §§ 39-13-202(a)(2), (b), (c)(1), 39-13-204(i)(7) (West 2011) (Tennessee); UTAH CODE ANN. § 76-5-202(2) (West 2011) (Utah), or a jury finding of aggravation in addition to the felony murder aggravator, NEB. REV. STAT. ANN. §§ 28-303, 29-2523(1) (2011) (Nebraska); N.H. REV. STAT. ANN. §§ 630:1(I), 630.5(VII) (2011) (New Hampshire); N.C. GEN. STAT. ANN. §§ 14-17, 15A-2000(e)-(f) (West 2011) (North Carolina); State v. Gregory, 459 S.E.2d 638, 660–61 (N.C. 1995) (discussing jury findings of aggravating and mitigating factors); OKLA. STAT. ANN. tit. 21, §§ 701.7(B), 701.9, 701.12 (Oklahoma); S.D. CODIFIED LAWS §§ 22-16-4(2), 23A-27A-1 (2011) (South Dakota). *See infra* Appendix.

281. An additional citation categorized a federal statute that no longer appears to be in force. *See* Tison v. Arizona, 481 U.S. 137, 153 n.6 (1987) (citing Connecticut statute).

282. *See id.* at 174–75 (Brennan, J., dissenting) (concluding that three-fifths of American jurisdictions do not authorize the death penalty for non-triggermen). Moreover, the *Tison* decision omitted the status of three additional states and misclassified the status of at least two. *See id.* 175 & n.13 (Brennan, J., dissenting) (placing Maryland, Pennsylvania, and Washington in the category of states not catalogued by the majority opinion "that restrict the imposition of capital punishment to those who actually and intentionally kill"). *Tison* misclassified both Georgia and Oregon. Georgia was listed as a state that permitted the death penalty for felony-murder *simpliciter*. *See id.* at 153 n.8 (listing state statutes argued to support such punishment). However, the *Tison* Court did not consult the judicial decisions on the issue, which foreclosed imposition of the death penalty for nontriggermen. *See Hulme*, 544 S.E.2d at 141 & n.8 ("[U]nder Georgia law, the defendant must directly cause the death of the victim to be convicted of felony murder." (citing *Crane*, 279 S.E.2d 696)). Oregon was listed as an intent state. *Tison*, 481 U.S. at 154 & n.10. However, Oregon's requirement that aggravated felony murder applies only to triggermen has been in force since 1977. *See Nefstad*, 789 P.2d at 1338–39 (distinguishing felony murder from aggravated felony murder by the triggerman requirement expressed in section 163.095(2)(d)).

New Mexico, and New York—have abolished the death penalty since *Tison* was decided—all within the last four years.[283] Several other states have also altered their capital sentencing regimes since that time, each in directions that narrowed the use of capital punishment for felony murder. These include Connecticut,[284] Indiana,[285] Montana,[286] North Carolina,[287] Tennessee,[288] and Wyoming.[289] None of the states that *Tison* classified as requiring more have defaulted to the *Tison* requirements.[290] Thus, a total of ten states now fall into the "change" category deemed relevant to *Atkins* and ignored in *Tison*.

---

283. The Governor of Illinois signed legislation banning the death penalty in that state in 2011. He explained that because "our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it," *See* "Illinois Abolishes Death Penalty; 16th State to End Executions," *available at* http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912 (last visited June 15, 2011). The death penalty was abolished in New Jersey and New York in 2007. New Mexico followed in 2009.

284. The *Tison* majority classified Connecticut in an "intermediate category" requiring that a non-triggerman's "participant be substantial." 481 U.S. at 153 & n.6. Since the *Tison* decision, the Connecticut Supreme Court has construed the state's capital felony murder statute to apply only to intentional murder. State v. Harrell, 699 A.2d 944, 947, 949 (Conn. 1996) (holding, as a matter of statutory construction, that the term "murder" as used in the capital felony murder statute required intentional murder). Thus, Connecticut's status in the *Tison* analysis has changed to require greater culpability for the death penalty.

285. The *Tison* Court appeared to classify Indiana in an "intermediate" category because of the minor-participation mitigating circumstance. 481 U.S. at 153 & n.7. The Indiana state legislature subsequently amended its capital sentencing statute to require intent for felony murder. 1989 Ind. Legis. Serv. 562 (West).

286. The *Tison* majority classified Montana as a state that considered minor participation a mitigating circumstance and, thus, found it to be an "intermediate" state justifying the newly announced constitutional standard. 481 U.S. at 153 & n.7. However, in 1996, the state's highest court decided that *Tison*'s standard "does not provide sufficient guidance for future determination of who can and who cannot be constitutionally sentenced to death." Vernon Kills on Top v. Montana, 928 P.2d. 182, 204 (Mont. 1996). Accordingly, the court announced that the state constitutional standard would mirror the *Enmund* intent standard. *Id.*

287. The *Tison* majority classified North Carolina in an "intermediate" category allowing consideration of minimal participation. 481 U.S. at 153 & n.7. Since then, the North Carolina Supreme Court has decided that felony-murder aggravating circumstance cannot alone justify the death penalty and that additional aggravation is required. State v. Gregory, 459 S.E.2d 638, 665 (N.C. 1995).

288. A revision to Tennessee's felony-murder aggravator in 1995 now requires, at a minimum, "knowing" conduct. TENN. CODE ANN. § 39-13-204(i)(7) (West 2011). While this revision is not to the level advocated here, it still exceeds the *Tison* requirements and narrows death penalty eligibility from the state's *Tison*-era simpliciter standard. *See Tison*, 481 U.S. at 153 & n.8.

289. *Tison* categorized Wyoming as one of the states not requiring any level of culpability for non-triggermen to be death eligible. 481 U.S. at 153 & n.8. Wyoming amended its capital sentencing statute in 1991 to add the intent requirement. *See* Engberg v. Meyer, 820 P.2d 70, 91 (Wyo. 1995) (describing the statutory changes). The Wyoming Supreme Court found it was constitutionally compelled to apply the modified sentencing statute retroactively to assure that all felony murder did not automatically qualify for the death penalty. *Id.* at 87–91. Thus, Wyoming has moved to narrow death-penalty eligibility for felony murder since *Tison* was decided.

290. *Tison* did place Texas into this "more" category. However, in doing so, the *Tison* Court overlooked Texas's infamous "law of parties" law, which it had long used to justify the death penalty for non-triggermen despite a statutory scheme that would seem to preclude the penalty. *See* TEX. PENAL CODE ANN. §§ 7.02(b), 19.03(a)(2) (West 2011); Green v. State, 682 S.W.2d 271, 286–87 (Tex. Crim. App. 1985) (en banc) (involving a pre-*Tison* conviction in which the defendant was sentenced to death under the Texas law of parties statute for a murder committed by one of his co-felons during a robbery, reasoning that defendant was a participant in the robbery and should have anticipated that a killing would occur as a result).

Atkins not only looks at the statistics, but it also compares those statistics to the statistics in its other proportionality cases to determine if there is a similar level of consensus or change to justify exempting a class of defendants from death penalty eligibility as a matter of constitutional law. Because the number of consensus states (thirty-three) and change states (ten) is even greater than the numbers the Court found persuasive in *Roper* (thirty and six, respectively), this comparison demonstrates that the time is ripe for overturning *Tison*.[291]

In addition to looking at the scope of the states' capital punishment schemes, the Court's current approach also looks to the frequency of executions for the category of defendant at issue.[292] In this aspect too, the numbers support raising the constitutional standard for felony-murder non-triggermen. Although there are no contemporary nationwide studies, the best information available[293] shows that, since *Tison* was decided, only three felony-murder non-triggermen have been executed.[294] Each of these executions occurred in a different state: Arkansas,

---

291. The number of consensus states here also strongly correlates to the number in *Atkins* (thirty). Because the Court has twice disclaimed the importance of the rate of change in cases where the consensus is this high, the fact that the rate of change here is smaller than that in *Atkins* should not be a stumbling block under the Court's own understanding of the analysis. *See* Kennedy v. Louisiana, 544 U.S. 407, 431 (2008) ("Consistent change might counterbalance an otherwise weak demonstration of consensus." (citing Atkins v. Virginia, 536 U.S. 304, 315 (2002))); Roper v. Simmons, 543 U.S. 551, 566–67 (2004) (finding that a lesser rate of change was not decisive in light of the high number of consensus states and the fact that no state previously banning the death penalty for juveniles had reinstated it). This conclusion is further supported by the Supreme Court's recent analysis in *Graham*, where the Court found a sentence of life without the possibility of parole categorically disproportionate for juvenile offenders despite finding that thirty-seven jurisdictions approved of the practice. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

292. Indeed, actual sentencing practices became the Court's primary focus in *Graham.* 130 S. Ct. at 2025 (concluding that although only six jurisdictions did not authorize life without parole sentences for juveniles, the imposition of that sentence in practice was so rare that "it is fair to say that a national consensus has developed against it").

293. We are aware of two sources compiling death penalty statistics for non-triggermen. First, The Death Penalty Information Center maintains a list of executed defendants who may not have personally killed. DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim (last visited May 10, 2011). Second, Rochelle Hammer has compiled a nationwide list of non-triggermen who have either been executed, are awaiting execution, or have obtained post-conviction relief through August 2005. Rochelle Hammer, Nationwide Non-triggerman Case Reviews (unpublished) (on file with authors).

In reaching our statistics, we reviewed both sources, confirmed the execution or death row status of the defendant, and analyzed the post-conviction judicial opinions in their cases. We include in our statistics those defendants who: (1) were convicted of felony murder; (2) the prosecution had no evidence with which to allege that the defendants were actually triggermen or aiders and abettors of the killing itself; (3) had judicial or jury determinations of culpability that did not exceed "major participation in the underlying felony" and "reckless disregard for life"; and (4) have been executed or are awaiting execution.

While the statistics derived from these studies may not be peer-reviewed, the Supreme Court has accepted similar studies as persuasive in the absence of better evidence. *See Graham* 130 S. Ct. at 2024.

294. The three executions involved G.W. Green in 1991, *see Green,* 682 S.W.2d at 271, Barry Lee Fairchild in 1995, *see* Fairchild v. Norris, 21 F.3d 799 (8th Cir. 1994); Fairchild v. State, 681 S.W.2d 380 (Ark. 1984); and Girvies Davis in the same year, *see* People v. Davis, 447 N.E.2d 353 (Ill. 1983). The execution rate for non-triggermen has decreased slightly since *Enmund.* In that case, the petitioner's survey of executions between 1955 and 1981 revealed that only six non-triggermen had been executed. Enmund v. Florida, 458 U.S. 782, 794 (1982). This execution rate also accords with other studies. *See* Joshua Dressler, *The Jurisprudence of Death by*

Illinois, and Texas.[295] An additional five non-triggermen have been sentenced to death and have not obtained post-conviction relief in Arizona, Florida, Oklahoma, and Texas.[296] That leaves only five *Tison* states—not counting Illinois, which recently abolished the death penalty altogether—that are actively pursuing or obtaining the death penalty for felony-murder non-triggermen who lack intent to kill.[297] Again, these numbers are strikingly similar to the ones in *Roper* (citing six states that had executed prisoners for crimes committed as juveniles since the *Stanford* decision) and *Atkins* (involving five states that had executed defendants with an IQ lower than seventy since *Penry*).

As in *Atkins*, this low execution rate bolsters a finding of consensus by explaining why more states have not taken legislative action to abolish the practice of executing felony-murder non-triggermen. In *Atkins*, the Court explained that some states that still permit the execution of the mentally retarded did not pass legislation banning the practice because their states had not executed anyone in "decades."[298] Hence, "there is little need to pursue legislation barring the execution of the mentally retarded in those states."[299]

It is also noteworthy that, in the ten jurisdictions allowing the execution of felony-murder accomplices without an intent to kill, approximately 591 executions have taken place between the time of the *Tison* decision and October 1, 2010.[300] Yet, only three of these involved felony-murder non-triggermen lacking an intent to kill. At a rate of just 0.51%, the execution of this category of defendants risks

---

Another: Accessories and Capital Punishment, 51 U. COLO. L. REV. 17, 75 (1979) ("The study demonstrates legislative, prosecutorial and jury hesitancy or unwillingness to permit execution of accessories, thereby providing empirical support for the theoretical arguments against applying the death penalty to accessories."); Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 843–49 (1990) (collecting data from various studies, including Bidau, Baldus, and Dressler).

295. *See generally Green*, 682 S.W.2d at 271 (Texas); *see also Fairchild*, 681 S.W.2d at 380 (Arkansas); *Davis*, 447 N.E.2d at 353 (Illinois).

296. The five men awaiting execution include: Gregory Scott Dickens, State v. Dickens, 926 P.2d 468 (Ariz. 1996) (en banc), and Kevin Miles, State v. Miles, 918 P.2d 1028 (Ariz. 1996), both in Arizona; Alphonso Cave in Florida, Cave v. State, 727 So. 2d 227 (Fla. 1999); Michael Wilson in Oklahoma, Wilson v. State, 983 P.2d 448 (Okla. Crim. App. 1998); and Humberto Garza in Texas, Garza v. State, 2008 WL 1914673 (Tex. Crim. App. Apr. 30, 2008). Again, the sentencing rate for non-triggermen appears relatively flat since *Enmund*, in which a survey of the current death row population revealed only three non-triggermen serving death sentences. *Enmund*, 458 U.S. at 796.

297. In fact, the Governor of Illinois announced his intention to commute the sentences of the 15 capital people on death row when he signed the death penalty ban earlier this year. *See* "Illinois Abolishes Death Penalty; 16th State to End Executions," *available at* http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912 (last visited June 15, 2011).

298. Atkins v. Virginia 536 U.S. 304, 316 (2002).

299. *Id.*

300. *See* CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A., 10-31 (Fall 2010), *available at* http://naacpldf.org/ death-row-usa. (listing those executed between the respective dates).

being both arbitrary and capricious.[301]

Finally, the *Atkins* and *Roper* Courts rejected the *Tison* Court's objective analysis by looking at non-traditional indicia of a national consensus.[302] Here, these non-traditional indicators lend support for overruling *Tison*. For example, three bipartisan studies done by The Constitution Project,[303] the Governor's Council of Massachusetts,[304] and the Illinois Governor's Commission on Capital Punishment[305] each found that the execution of felony-murder accomplices should be abolished. These studies suggest that a consensus exists among scholars and those most engaged in the criminal justice system that executing a felony-murder accomplice who lacks intent to kill is excessive.[306]

Thus, just as in *Atkins*, *Roper*, and *Kennedy*, the objective evidence of societal consensus, including the rejection of the death penalty for felony-murder accomplices in most states, the rarity of its imposition, and the consistency in the rate of change against such punishment, offers ample evidence that under today's evolv-

---

301. *See* Shatz, *supra* note 21 at 721 (discussing the Court's concern in *Furman* that the infrequency of the use of the death penalty for a given offense raises the specter of arbitrariness); *see also* Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

302. *See* Roper v. Simmons, 543 U.S. 551, 575 (2004) (looking at international persuasive authority); *Atkins*, 536 U.S. at 316 n.21(discussing the views of interest and religious groups).

303. *See* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 11 (2001), *available at* http://www.constitutionproject.org/pdf/MandatoryJustice.pdf. This project "seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education." *Id.* at ix. The committee making these recommendations includes former judges, prosecutors, and defense lawyers. *Id.* The three co-chairs of the committee include the Honorable Charles F. Baird, former judge on the Texas Court of Criminal Appeals, the Honorable Gerald Kogan, former Chief Justice of the Supreme Court of Florida and former Chief Prosecutor of Capital Crimes in Dade County, Florida, and Beth Wilkinson, a prosecutor who tried the Oklahoma City bombing case. *Id.* at xx. The committee's reforms dealt with all aspects of the death penalty from effective counsel to state court proportionality review and the role of prosecutors. The sixth recommendation dealt with felony-murder accomplices. The committee recommended that "[p]ersons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty." *Id.* at 11.

304. *See Report of the Governor's Council on Capital Punishment*, 80 IND. L.J. 1, 4–5 (2005) (recommending defining capital murder to exclude non-triggermen).

305. *See* REPORT OF FORMER GOVERNOR RYAN'S COMMISSION ON CAPITAL PUNISHMENT 67–68 (Ill. 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf (suggesting the death penalty should be limited only to those who: (1) murder a peace officer, (2) murder while at a correctional facility, (3) murder two or more persons, (4) murder after torture, and (5) murder someone who is part of the investigation of the murderer's charged crime).

306. This conclusion is further bolstered by two studies conducted by Norman Finkel and his colleagues. These studies, conducted under accepted social science principles, revealed that test subjects were reluctant to impose the death penalty against nontriggermen who lacked an intent to kill. *See* Finkel, *supra* note 294, at 887 ("By a ratio of almost 4:1, community sentiment accords with the minority opinion in *Tison*."); Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 LAW & SOC'Y REV. 129, 132 (1993) (discussing the views of judges and other commentators).

ing standards felony-murder accomplices are "'categorically less culpable than'" an actual killer.[307]

B. Subjective Analysis

Stepping back from the more specific question of accomplice liability, the felony-murder rule itself has inspired harsh criticism. It has been decried by both judges and academics as "astonishing,"[308] "monstrous,"[309] "a living fossil,"[310] "an unsupportable 'legal fiction,'"[311] "an unsightly wart on the skin of the criminal law,"[312] and a "barbaric concept."[313] The criticisms are largely two-fold: first, that the doctrine infers an intent to kill where normally such intent would have to be proven beyond a reasonable doubt,[314] and second, that it does so without even the safeguards normally available in civil trials addressing the issue of vicarious or imputed liability.[315] Such criticisms become even more profound when applied to non-triggermen who are "several times removed from the locus of the blame . . . ."[316]

The revitalized subjective analysis required under *Atkins* is better equipped to take proper account of such considerations. It entails an affirmative determination that the death penalty is consistent with the concept of dignity enshrined in the Eighth Amendment as first articulated by the Court almost a hundred years ago in *Weems*.[317] *Atkins* indicates the Court now needs more assurance that the application of the death penalty serves the penological goals of retribution and deterrence—a calculus hinging on a categorical approach to culpability.[318]

The framework has two key components. First, a categorical approach is utilized to limit juror discretion that creates an intolerably high risk of an

---

307. *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316).

308. Finkel, *supra* note 294, at 819; Finkel & Smith, *supra* note 306, at 132; Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985).

309. Roth & Sundby, *supra* note 308, at 446.

310. Tison v. Arizona, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting).

311. Roth & Sundby, *supra* note 308, at 446.

312. *Id.*

313. Finkel, *supra* note 294, at 819.

314. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 771 (1999) ("Making one's mental state so grossly irrelevant as to replace it with a less-than-homicidal mental state denies due process, because the actor becomes blameworthy under fictional rather than true degrees of responsibility."); Roth & Sundby, *supra* note 308, at 461–78 (analyzing the felony-murder rule as operating as a presumption of murderous intent and concluding that under this model, the rule unconstitutionally shifts the burden of proof to the criminal defendant).

315. Gerber, *supra* note 314, at 772–75 (comparing the requirements for liability under the felony-murder rule with those for civil liability and noting that the felony-murder rule, while involving far higher stakes, nevertheless omits issues of proof regarding the actor's state of mind and causation without which a wrongful death liability would never be imputed).

316. *Id.* at 778.

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

318. *See* Atkins v. Virgina, 536 U.S. 304, 319 (2002).

unwarranted death sentence. Second, a focus on the penological goals of retribution and deterrence places culpability at the center of the Court's subjective analysis.

1. A Categorical Approach to Felony-Murder Accomplices

Under the revitalized approach, the Court needs to know that "certain classes of offenders" will not be subject to execution by the state if they are not in a "narrow category of crimes and offenders" who, as a class, comprise "the worst" among us.[319] It is this very focus on culpability that requires that accomplices who neither kill nor intend to kill should be "categorically"[320] exempted from a punishment so reserved.[321]

Arguably, this categorization leaves open the possibility that a unique case may arise where a felony-murder accomplice may be more culpable than an actual killer who is unquestionably death-eligible—the very concern raised in *Tison*. Nevertheless, *Roper*'s reliance on differences that "are too marked and well understood" suggests that when definitional limitations are accessible, and subject to objective fact-finding, the risk of meting out a lesser punishment than could be justified on an individual basis is outweighed by the risk of over-punishment within the class.[322] In particular, the *Roper* Court was concerned with the prejudicial effect of "the brutality or cold-blooded nature of any particular crime" overwhelming the jury's ability to assess the individual defendant's culpability.[323] This danger of jury over-reach is a concern the *Tison* Court wholly disregarded.

The same qualitative concerns are at play with felony-murder non-triggermen who lack an intent to kill. First, non-triggermen who intend to kill represent a category of offenders that can be clearly "marked."[324] Indeed, "intent" is a textbook concept: "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."[325] Therefore, the standard for "intent" is well established, giving sufficient guidance to a jury when determining whether the facts of a case show the defendant harbored an intent to kill.[326] In contrast, the

---

319. Roper v. Simmons, 543 U.S. 551, 569 (2005).

320. *Atkins*, 536 U.S. at 318.

321. "Mens rea has long been the measuring rod for our system of criminal responsibility; without it, the system loses both its moral ballast and its ability to calibrate the extent of culpability." Gerber, *supra* note 314, at 771. Joshua Dressler, who was an early commentator on the issue of accessory liability and proportionality, similarly concluded that "conviction of an accessory who had less than an intent to kill is unconstitutional per se . . . ." Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 58 (1979).

322. *Roper*, 543 U.S. at 572–73.

323. *Id.* at 573.

324. *Id.* at 572.

325. Tison v. Arizona, 481 U.S. 137, 150 (1987) (citations omitted).

326. *See* Cabana v. Bullock, 474 U.S. 376, 386 (1986), *abrogated on other grounds by* Pope v. Illinois, 481 U.S. 487 (1987) (describing the intent requirement as a "categorical rule"); United States v. U.S. Gypsum Co.,

Tison standard lacks clear definition; it is an "indefinite" standard that "rationally can be held to apply to every felony murder accomplice."[327] The *Tison* Court even concedes that its rule does not "precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty . . . ."[328] Yet, despite *Tison*'s warning, legislatures have merely taken the *Tison* language verbatim, thus allowing individual juries and courts to determine exactly how to apply the *Tison* Court's nebulous standard.

In addition, felony-murder accomplices are subject to the same danger of juror over-reach that was cited in *Roper*—perhaps to even a greater extent. Jurors rendering judgment on felony-murder accomplices are highly likely to feel the need for retribution for a killing that occurred in the course of a rape, robbery, or kidnapping, and to impute that need onto the non-triggerman defendant regardless of his participation in the actual killing. This is especially true in the numerous cases—like Kenneth Foster's—in which the non-triggerman is jointly tried with the triggerman. Either way, the jury will be faced with a senseless crime involving numerous perpetrators. Under most current laws enshrining the felony-murder rule, jurors are rarely asked to make affirmative findings on whether an individual defendant himself participated in the killing or intended it.[329] Under these circumstances, the individual culpability determinations required by the Eighth Amendment simply are not being made, leaving juries to impose a death sentence on the basis of passion or prejudice and little else.

2. The Intent Requirement of Retribution and Deterrence

Felony-murder accomplices who do not intend to kill, as a category of defendants, are less culpable than the "average murderer." Ignoring "rare" exceptions as the *Roper* Court chose to do, defendants who neither committed *acts* of murder nor had an *intent* to murder are less culpable than those who actually kill or intend to kill. Because felony-murder accomplices categorically have "not chosen to kill, [their] moral and criminal culpability is of a different degree than that of

438 U.S. 422, 437 (1978) ("[I]ntent generally remains an indispensable element of a criminal offense."). In contrast, one commentator has stated that *Tison*'s "reckless indifference" standard "is not a fact but a highly subjective evaluative judgment with no common core of meaning." Rosen, *supra* note 81, at 1154.

327. Rosen, *supra* note 81, at 1162; *see also* Finkel, *supra* note 294, at 839 (noting that because "the culpable mental state of reckless indifference can be inferred from participation, the [*Tison*] holding seems to lead back to the felony murder rule itself"); Richard W. Garnett, *Depravity Thrice Removed: Using the "Heinous, Cruel, or Depraved" Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases*, 103 YALE L.J. 2471, 2479–80 (1994) (commenting that "the *Tison* Court provided little guidance on how to distinguish the non-triggermen who should be executed from those who should not").

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

329. *See, e.g.*, State v. Parker, 721 So. 2d 1147 (Fla. 1998) (involving death sentence for first degree felony murder with no findings made as to whether the defendant was the triggerman); Resnover v. State, 460 N.E.2d 922 (Ind. 1984) (same); Brown v. State, 989 P.2d 913 (Okla. 1998) (same); *see also* Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994) (same).

one who killed or intended to kill."[330] To paraphrase *Atkins*, "[i]f the culpability of the average murder is insufficient to justify the most extreme sanction available to the State," then the "lesser culpability" of a defendant who does not himself kill nor intend to kill "surely does not merit that form of retribution."[331]

Accordingly, the penological goal of retribution—premised on individual culpability in *Atkins* and *Roper*—is absent. To accomplish retribution, a punishment must ensure "the criminal gets his just deserts."[332] Hence, the punishment "necessarily depends on the culpability of the offender."[333] The *Tison* Court failed to examine retribution specifically, but did address the culpability of a nontriggerman. The Court noted that "some nonintentional murderers may be among the most dangerous and inhuman of all . . . ."[334] Thus, their culpability allowed their execution *possibly* to serve the penological end of retribution. *Roper* recognized that a juvenile offender may *possibly* demonstrate "sufficient depravity [] to merit a sentence of death."[335] Nonetheless, this possibility was not sufficiently tied to retributive goals to justify permitting the death penalty for juvenile offenders under the Eighth Amendment.

The divergent conclusions of *Tison* and *Roper* can be traced to assumptions underlying the decisions. *Tison* was concerned with crafting a rule that would permit execution in the case before it—a classic case of bad facts making bad law. Thus, the Court only looked to the floor of culpability, finding that as long as the possibility exists that a felony-murder accomplice be sufficiently culpable, a death sentence is permissible. *Atkins* (in line with its forebears *Coker* and *Enmund*) shifted the approach, starting with the principle that the Court's role is to limit the use of the death penalty under the Eighth Amendment to certain *classes* of defendants.[336] Thus, the revitalized proportionality analysis looks to whether the use of the death penalty serves retributive goals for the entire category of defendants—not just the individual before it. In the case of felony-murder accomplices who do not evince an intent to kill and do not participate in the killing, retribution cannot serve as a justification. Indeed, permitting a death sentence for a category of defendants who "did not commit and had no intention of committing or causing [murder] does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[337]

The second penological justification for the death penalty is deterrence, specifically the "interest in preventing capital crimes by prospective offend-

---

330. *Tison*, 481 U.S. at 171 (Brennan, J., dissenting).

331. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

332. Enmund v. Florida, 458 U.S. 782, 801 (1982); *see also Atkins*, 536 U.S. at 319 (stating that retribution is the "interest in seeing that the offender gets his 'just deserts'").

333. *Atkins*, 536 U.S. at 319.

334. *Tison*, 481 U.S. at 157.

335. Roper v. Simmons, 543 U.S. 551, 569 (2005).

336. *Atkins*, 536 U.S. at 319.

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

ers . . . ."[338] When the *Tison* Court allowed the execution of certain felony-murder accomplices, it passed on the question of whether executing someone who did not kill or intend to kill would serve as a deterrent. This is no longer permissible under *Atkins*. Examining deterrence for felony-murder accomplices reveals that executing one who neither kills nor intends to kill will not serve as a deterrent. When a person does not intend to take a life prior to engaging in a felony in which someone else does kill, the possibility of receiving the death penalty will likely not "enter into the cold calculus that precedes the decision to act."[339] It is not possible to deter a person from an action he or she does not intend to commit.[340]

Atkins speaks directly to this idea, reaffirming a principle first articulated sixty years ago: "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'"[341] In *Atkins*, the Court found that the mentally retarded are incapable of the sort of premeditation and deliberation that would make deterrence effective. Here, too, one who neither kills nor intends to kill lacks any premeditation or deliberation to kill, rendering deterrence equally ineffective.

Particularly problematic in trying to reconcile the execution of non-triggermen with penological goals is the fact that, as previously discussed, the death penalty is meted out so infrequently to this class of defendant. This raises exactly the concerns Justice White focused upon in his bedrock opinion in *Furman*—that no penological purpose can be served under such conditions because "common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct . . . ."[342]

---

338. *Atkins*, 536 U.S. at 319.

339. Gregg v. Georgia, 428 U.S. 153, 186 (1976).

340. Gerber, *supra* note 314, at 780–81; Roth & Sundby, *supra* note 308, at 451–53 (citing Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956)). As a judge on the Arizona Court of Appeals—a *Tison* state—Judge Gerber has likely had more opportunity to ponder the deterrence question in case specific ways than most. According to Judge Gerber,

> [t]he deterrence argument is curious at best regarding the vicarious liability of codefendants for the actions of the principal. Simply asked, how does one felon deter another's unexpected or unintended act? Supposedly, the threat of a murder conviction induces felons to commit their felonies with greater care, thereby reducing the number of accidental homicides. Realistically, the rule cannot deter these at all. Unintended consequences and accidents are simply not deterrable. The same problem arises when the rule finds the defendant guilty of murder, when a third party, such as the victim or a police officer . . . causes the death. Having no control over these third party acts, the felon cannot be deterred from this result. Moreover, any potential deterrence against unintentional killings evaporates because few, if any, typically thoughtless felons know that the rule imposes strict liability for resulting deaths or believe that fatalities will result from their felony. Deterrence for felony murder is unlikely where there was no effective deterrence preventing the felony in the first place.

Gerber, *supra* note 314, at 780–81.

341. *Atkins*, 536 U.S. at 319 (quoting *Enmund*, 458 U.S. at 799).

342. Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring).

CONCLUSION

The Court originally applied its proportionality analysis with the motive to make the death penalty available in only a narrow category of cases. However, the Court truncated its proportionality analysis and allowed the execution of felony-murder accomplices in *Tison*, of the mentally retarded in *Penry*, and of juvenile offenders over fifteen years of age in *Stanford.* More recently, at the turn of the millennium, the Court again became concerned with narrowing the *class* of death-eligible defendants. In 2002, the Court overturned *Penry* and barred the execution of the mentally retarded. In 2005, the Court overturned *Stanford*, barring the execution of all juvenile offenders. In 2009, the Court cemented the new proportionality paradigm in *Kennedy*, expressly basing its analysis on the framework of *Roper*, *Atkins*, *Coker*, and *Enmund*.[343] In so doing, the Court abandoned *Tison*'s analytical framework as no longer authoritative. The time has come to overturn *Tison* and to bar the execution of felony-murder accomplices who neither kill nor intend to kill.

343. Kennedy v. Louisiana, 554 U.S. 407, 422 (2008).

APPENDIX

The following provides a state-by-state analysis of capital punishment schemes in this country as they pertain to felony-murder non-triggermen. This analysis seeks to be comprehensive, looking at the laws defining the substantive offense as well as the statutory requirements for death eligibility and judicial opinions construing those requirements. However, the authors acknowledge that no analysis of this kind can perfectly reflect every nuance of each state's statutory requirements. Accordingly, our interpretation of each state's regime may not always correspond with actual practice.

Alabama

Category: Intent State

The law defining capital offenses enumerates eighteen capital crimes, all involving murder. ALA. CODE § 13A-5-40(a) (2011). For purposes of the capital offense statute, murder is defined as requiring an intent to kill. *Id.* §§ 13A-5-40(b), 13A-6-2(1). Furthermore, the definition of capital murder specifically excepts felony murder from its definition. *Id.* §§ 13A-5-40(b), 13A-6-2(a)(3) ("[T]he terms 'murder' and 'murder by defendant' as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3) [which describes felony murder]"). Although a non-triggerman may be guilty of capital murder, to qualify, he must be found guilty of being an accomplice in the murder. *Id.* § 13A-5-40(c). An accomplice must "procure, induce or cause" another to commit the murder, or "aid or abet" the murder, or have a legal duty to try to prevent the murder, which he fails to do. *Id.* § 13A-2-23. It is a mitigating circumstance that though an accomplice, the defendant's participation was minor. *Id.* § 13A-5-51(2)(4). "No defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony-murder doctrine." *Ex parte Woodall*, 730 So. 2d 652, 657 (Ala. 1998).

Arizona

Category: *Tison* State

Felony murder by a non-triggerman is first-degree murder and subject to the death penalty. ARIZ. REV. STAT. § 13-1105(A)(2), (D) (2011) (". . . and in the course of and in furtherance of the [felony] . . . the person or another person causes the death of any person"). "[N]o specific mental state" is required for first degree felony murder other than required for the underlying offense. *Id.* § 13-1105(B). Even though legally accountable for murder, it is a mitigating circumstance where the defendant's participation was minor. *Id.* § 13-751(G)(3).

Arkansas

Category: Complicity

Felony murder by a non-triggerman is first-degree murder and subject to the death penalty. ARK. CODE ANN. § 5-10-101(a)(1), (c)(1) (2011). To support a conviction, the state must prove that the defendant acted with "extreme indifference to human life." *Id.* § 5-10-101(a)(1)(B). However, it is an affirmative defense that the defendant did not commit the act, "or in any way solicit, command, induce, procure, counsel, or aid" in its commission. *Id.* § 5-10-101(b).

California

Category: *Tison* State

Felony murder is first-degree murder and subject to the death penalty. CAL. PENAL CODE §§ 189, 190.2(a) (West 2011). Non-triggermen are eligible for the death penalty if they acted with intent to kill and aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the murder. *Id.* § 190.2(c). "Notwithstanding" the requirements of subdivision (c), non-triggermen are also death eligible under subsection (d) if they meet *Tison*'s minimal requirements. *Id.* § 190.2(d). Although the California courts at one time required intent to kill before the special circumstance requisite to a death sentence could be assessed for an accomplice, *People v. Anderson,* 43 Cal.3d 1104, 1138–39 (1987), that requirement was abrogated by Proposition 15 in 1990. *See Tapia v. Superior Court*, 53 Cal.3d 282, 298 & n.16 (1991) (describing the change as one that brought state law into conformity with *Tison*).

Colorado

Category: *Tison* State

Felony murder by a non-triggerman is first-degree murder and subject to the death penalty. COLO. REV. STAT. §§ 18-3-102(1)(b) (2011) (defining first felony murder as "death of a person . . . caused by anyone"), (3), 18-1.3-1201(1)(a). Non-triggermen have a very narrow affirmative defense available if (1) there were other participants in the underlying felony, (2) they did not in any way aid, abet, or assist in the murder, (3) they were unarmed, (4) they had no reasonable ground for believing the other participants were armed or intended to engage in conduct which might result in death, and, (5) as soon as they realized that such circumstances existed, they attempted to disengage from the commission of the underlying felony. *Id.* § 18-3-102(2). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 18-1.3-1201(4)(d). It is also a mitigating circumstance that the defendant could not have reasonably foreseen that his conduct would cause or risk the death of another. *Id.* § 18-1.3-1201(4)(e).

Connecticut

Category: Intent State

Felony murder is not a capital offense unless it occurs during the commission of a kidnapping or first degree sexual assault, or unless more than one person is killed. CONN. GEN. STAT. ANN. §§ 53a-54c (West 2011) (defining felony murder), 53a-54b(5)-(7) (defining capital murder). Non-triggermen may be guilty of capital felony murder under these limited circumstances only if they also have an intent to kill, as the language of the capital murder statute has been limited by the courts. *State v. Johnson,* 699 A.2d 57 (1997) (holding that felony murder is not a permissible predicate for the death penalty under state law even when the defendant's co-conspirator was convicted of intentional murder); *State v. Harrell*, 699 A.2d 944 (Conn. 1996) (holding, as a matter of statutory construction, that the term "murder" as used in the capital felony murder statute required intentional murder). Furthermore, even if non-triggermen are liable for capital murder as accomplices—which itself requires an intent to kill, CONN. GEN. STAT. ANN. § 53a-9(a)—(West 2011) the "minor participation" mitigating circumstance is not merely weighed against aggravating factors, but preempts an assessment of the death penalty if found. It is also a mitigating circumstance preempting the death penalty that the defendant could not have reasonably foreseen that his conduct would cause or risk the death of another. *Id.* § 53a-46a(h)(4)-(5).

Delaware

Category: *Tison* State

Felony murder is first-degree murder and subject to the death penalty. DEL. CODE ANN. Tit. 11, § 636(a)(2) (2011). Imposition of the death penalty requires only that the defendant's conduct have been reckless. *Id.* The felony murder aggravating circumstance does not require greater culpability and can be applied even though it does not require evidence in addition to that needed for the underlying conviction. *Id.* § 4209(e)(1)(j); *Ferguson v. State*, 642 A.2d 772 (1994). Although the statute technically requires that the defendant "cause" the death, all distinctions between principals and accomplices have been abandoned, so that all that is required is that the non-triggerman intended to promote the underlying offense and that murder was a foreseeable consequence of that offense. *Williams v. State*, 818 A.2d 906 (2002); *Hooks v. State*, 416 A.2d 189 (1980). Mitigating circumstances are not enumerated. *Id.* § 4209(d).

Florida

Category: *Tison* State

Felony murder is first-degree murder and subject to the death penalty. FLA. STAT. ANN. § 782.04(1)(a)(2), (3) (West 2011). Imposition of the death penalty

requires only that the defendant's conduct have been reckless. *Jackson v. State,* 575 So.2d 181 (1991). The felony murder aggravating circumstance does not require greater culpability. FLA. STAT. ANN. § 921.141(5)(d) (West 2011). Non-triggerman are subject to a lesser penalty only if the death was caused by a third-party not involved in the underlying felony. *Id.* § 782.04(1)(3). There is also a lesser penalty for a killing committed without any design to effect death during the commission of a felony not enumerated. *Id.* § 782.04(1)(4). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 921.141(6)(d).

Georgia

Category: Non-triggermen Ineligible

Felony murder is first-degree murder and subject to the death penalty. GA. CODE ANN. § 16-5-1(c), (d) (2011). However, to be guilty of felony murder, the defendant must have caused the death. *Hulme v. State,* 544 S.E.2d 138 (2001) ("[U]nder Georgia law, the defendant must directly cause the death of the victim to be convicted of felony murder." (citing *State v. Crane*, 279 S.E.2d 695 (1981)). Accordingly, the death penalty is not authorized for non-triggermen.

Idaho

Category: *Tison* State

Felony murder is first-degree murder and subject to the death penalty. IDAHO CODE ANN. §§ 18-4003(d), 19-2515(1) (2011). The defendant need not have caused the death and the only *mens rea* required is reckless indifference. *Id.* § 19-2515(1). The felony murder aggravating circumstance does not require greater culpability but additional evidence above that necessary for conviction is required to satisfy the death penalty statute. *Id.* § 19-2515(9)(g); *State v. Wood*, 967 P.2d 702 (1998). Mitigating circumstances are not enumerated. *Id.*

Indiana

Category: Intent State

Every murder in Indiana is subject to the death penalty, including felony murder. IND. CODE §§ 35-42-1-1 & (2), 35-50-2-3(b) (2011) (excepting defendants who were juveniles or suffered mental retardation). However, the felony-murder aggravating circumstance requires that the defendant "committed the murder by intentionally killing the victim." *Id.* § 35-50-2-9(b)(1); *Ajabu v. State*, 693 N.E.2d 921, 935 (Ind. 1998) ("Our cases have repeatedly emphasized that the (b)(1) aggravating factor requires a finding of intentional killing." (citing *Fleenor v. State*, 514 N.E.2d 80 (1987))). Another aggravating circumstance requires only that the victim was also a victim of felony battery, kidnapping, criminal confinement, or a sex crime, and that the defendant was

convicted of the underlying crime, without reference to *mens rea*, however, no cases reflect the use of this aggravator standing alone. *Id.* § 35-50-2-9(b)(13). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 35-50-2-9(c)(4).

Kansas

Category: Intent State

Capital felony murder requires "[i]ntentional and premeditated killing." KAN. STAT. ANN. § 21-3439(a)(1), (4) (2011). There is no felony murder aggravated circumstance. *Id.* § 21-4625. It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 21-4626(4).

Kentucky

Category: *Tison* State

Every murder in Kentucky is subject to the death penalty. KY. REV. STAT. ANN. § 507.020 (West 2011). Murder includes wanton conduct creating a grave risk of death which also results in a death. *Id.* § 507.020(1)(b). The felony murder aggravating circumstance is limited to the underlying crimes of first-degree arson, robbery, burglary, rape and sodomy. *Id.* § 532.025(2)(a)(2). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 532.025(2)(b)(5).

Louisiana

Category: Intent State

First-degree felony murder requires a "specific intent to kill or inflict great bodily harm." LA. REV. STAT. ANN. § 14:30(A)(1) (2011); *State v. Bridgewater*, 823 So.2d 877, 890–91 (La. 2002) (reversing defendant's conviction for capital felony murder when the state failed to prove the defendant, who was not the triggerman, possessed an intent to kill). When intent is lacking, it is second-degree murder with a maximum penalty of life in prison without parole. LA. REV. STAT. ANN. § 14:30.1(A)(2), (B) (2011); *Bridgewater*, 823 So.2d at 890–91 (finding that non-triggerman who lacked intent to kill was properly sentenced for second-degree murder). Mitigating and aggravating factors do not appear to be governed by statute.

Maryland

Category: Non-triggermen Ineligible

Felony murder is murder in the first degree. MD. CODE ANN., CRIM LAW § 2-201(a)(4) (West 2011). However, imposition of the death penalty for felony murder requires that the defendant be a "principal in the first degree." *Id.* §§ 2-202(a)(2)(i), 2-303(g). To be considered a principal in the first degree, the defendant must be the triggerman. *Brooks v. State,* 655 A.2d 1311, 1321 (Md.

Ct. Spec. App. 1995) (noting that "Maryland is among a minority of states that refuse to impose the death penalty on defendants who did not actually kill"). Thus, non-triggermen are not death-penalty eligible.

Mississippi

Category: Intent State

Felony murder is capital murder in Mississippi "with or without any design to effect death." MISS. CODE ANN. § 97-3-19(2)(e) (2011). Before assessing the death penalty, the jury must make a written finding that the defendant at least contemplated the use of lethal force. *Id.* § 99-19-101(7). The Mississippi Supreme Court has construed this language to require that the defendant either killed, attempted to kill, or intended to kill the victim. *Randall v. State*, 806 So.2d 185, 233–34 (Miss. 2001) (overturning a death sentence when the jury did not find that the defendant killed, attempted to kill, or intended a killing take place, even though the defendant was armed with a gun at the time of the crime). Because the finding that the defendant contemplated lethal force is a threshold inquiry, the weighing of aggravators and mitigators does not come into play if no such finding is made. MISS. CODE ANN. § 99-19-101(3) (2011). Nevertheless, it is a mitigating circumstance that the defendant's participation was minor. *Id.* § 99-19-101(6)(d).

Missouri

Category: Felony Murder not Death Eligible

Felony murder is second-degree murder. MO. REV. STAT. § 565.021 (1)(2) (2011) (defining second degree murder). First-degree murder is limited to persons who "knowingly cause[] the death of another person after deliberation upon the matter." *Id.* § 565.020 (defining first-degree murder).

Montana

Category: Intent State

Felony murder is defined as deliberate murder and thus death-penalty eligible. MONT. CODE ANN. § 45-5-102(1)(b),(2) (2011). Felony murder aggravating circumstances require that the underlying felony be either aggravated kidnapping or sex crimes. *Id.* § 46-18-303(1)(a)(vi), (2). However, even in these circumstances, the Supreme Court of Montana has mandated that the state constitutional standard exceeds *Tison*'s protection, and requires finding intent to kill for non-triggermen. *Vernon Kills on Top v. State*, 928 P.2d 182, 200–07 (Mont. 1996). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 46-18-304(1)(f).

Nebraska

Category: Additional Aggravation Required

Felony murder is murder in the first degree and thus death-penalty eligible. NEB. REV. STAT. § 28-303 (2011). It does not require intent. *Id.* However, felony murder itself does not constitute an aggravating circumstance. *Id.* § 29-2523(1). Accordingly, some additional aggravation is required, such as the killing of more than one person or a killing for the purpose of covering up a crime. *Id.* It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 29-2523(2)(e).

Nevada

Category: Knowledge of Lethal Force

Felony murder is murder in the first degree and thus death-penalty eligible. NEV. REV. STAT. § 200.030(1)(b), (4)(a) (2011). It does not require intent. *Id.* However, the felony murder aggravating circumstance cannot alone justify the death penalty as construed by the courts because it does not sufficiently narrow the class of crimes eligible. *Id.* § 29-2523(1); *McConnell v. State,* 102 P.3d 606, 620-24 (Nev. 2004). Accordingly, some additional aggravation is required. *Id.* In addition, it is also necessary to show that the defendant knew that lethal force would be used. NEV. REV. STAT. §§ 200.030(1)(b), (4)(a), 200.033(4) (2011). It is a mitigating circumstance that the defendant's participation was minor. NEV. REV. STAT. § 200.035(4) (2011).

New Hampshire

Category: Additional Aggravation Required

Felony murder is capital murder and thus death-penalty eligible. N.H. REV. STAT. ANN. § 630:1(I)(b), (e), (f) (2011). The definition of capital felony murder is narrow, and may be based only on kidnapping, aggravated felonious assault, and drug offenses. It does require a knowing act, but not intent. *Id.* However, felony murder itself does not constitute an aggravating circumstance. *Id.* § 630:5(VII). Accordingly, some additional aggravation is required. *Id.* It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 630:5(VI)(c).

North Carolina

Category: Additional Aggravation Required

Felony murder is murder in the first degree and thus death-penalty eligible. N.C. GEN. STAT. ANN. § 14-17 (West 2011). It does not require intent. *Id.* However, the felony murder aggravating circumstance cannot alone justify the death penalty as construed by the courts. State v. Gregory, 459 S.E.2d 638, 665 (N.C. 1995). Accordingly, some additional aggravation is required. *Id.* It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 15A-2000(f)(4).

Ohio

Category: Intent Required

Felony murder is aggravated murder and thus death-penalty eligible. OHIO REV. CODE ANN. § 2903.01(B) (West 2011). It requires purposeful conduct. *Id.* The felony murder aggravating circumstance requires that the defendant be either the principal offender or have committed the murder with premeditation. *Id.* § 2929.04(A)(7); *State v. Taylor,* 612 N.E.2d 316, 325 (Ohio 1993) (holding that death penalty eligibility requires that a defendant be either a principle or have intent to kill regardless of aider and abettor status). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 2929.04(B)(6).

Oklahoma

Category: Additional Aggravation Required

Felony murder is murder in the first degree and thus death-penalty eligible. OKLA. STAT. ANN. tit. 21, §§ 701.7(B), 701.9(A) (West 2011). It does not require intent. *Id.* However, there is no felony murder aggravating circumstance. *Id.* § 701.12. Accordingly, some additional aggravation is required. *Id.* Mitigating circumstances are not defined by statute.

Oregon

Category: Non-triggermen Ineligible

Felony murder is aggravated murder only if the defendant "personally" committed the murder. OR. REV. STAT. ANN. § 163.115(1)(b) (West 2011), 163.095(2)(d); *State v. Nefstad,* 789 P.2d 1326, 1338–39 (Or. 1990).

Pennsylvania

Category: Felony Murder Ineligible

Felony murder is murder in the second degree whether the perpetrator is a principal or accomplice. PA. CONS. STAT. ANN. § 2502(b) (West 2011).

South Carolina

Category: *Tison* State

In South Carolina, murder is committed with malice aforethought "either express or implied." S.C. CODE ANN. § 16-3-10 (2011). All murder is death-penalty eligible. *Id.* §16-3-20(A). The felony murder aggravating circumstance contains no *mens rea* requirement or any requirement that the defendant be the triggerman. *Id.* § 16-3-20(C)(a)(1). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 16-3-20(C)(b)(4).

South Dakota

Category: Additional Aggravation Required

Felony murder is murder in the first degree and thus death-penalty eligible. S.D. CODIFIED LAWS § 22-16-4(2) (2011). It does not require intent. *Id.* However, there is no felony murder aggravating circumstance. *Id.* § 23A-27A-1. Accordingly, some additional aggravation is required. Mitigating circumstances are not statutorily defined. *Id.*

Tennessee

Category: Knowledge of Lethal Force

Felony murder is murder in the first degree and thus death-penalty eligible. TENN. CODE ANN. § 39-13-202(a)(2), (b), (c)(1) (2011). It does not require intent. *Id.* However, the felony murder aggravating circumstance requires "knowing" conduct, either in commission or in aid of the murder. *Id.* § 39-13-204(i)(7). Accordingly, some additional aggravation is required under the statute if "knowing" is not shown. Nevertheless, courts have held that non-triggermen can be held vicariously liable for aggravators, undoing the statute's culpability requirement. *Owens v. State,* 135 S.W.3d 742, 762 (Tenn. Crim. App. 1999). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 39-13-204(j)(5).

Texas

Category: *Tison* State

Felony murder is a capital offense in Texas if the defendant "intentionally" commits the murder. TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2011). Although courts have held that non-triggermen can be held vicariously liable so long as the murder was foreseeable under the law of parties statute, *Whitmire v. State,* 183 S.W.3d 522, 526–27 (Tex. App. 2006), they are not eligible for the death penalty absent a finding of deliberateness, which involves either intent, or knowing conduct, Tex. Code Crim. Proc. Ann. art. 37.071(b) ("in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken"); *Green v. State*, 682 S.W.2d 271, 283–287 (Tex. Crim. App. 1985) (affirming a death sentence pursuant to the law of parties statute for a murder committed by one of defendant's co-felons during an armed robbery, reasoning that defendant was a participant in the robbery and should have anticipated that a killing would occur as a result). Mitigating circumstances are not statutorily defined.

Utah

Category: Knowledge of Lethal Force

Felony murder is aggravated murder if the defendant "intentionally or knowingly" commits the murder. UTAH CODE ANN. § 76-5-202(1)(d) (West 2011). The *mens rea* is reduced to the *Tison* requirements in the case of felonies against children. *Id.* § 76-5-202(2).

Virginia

Category: Non-triggermen Ineligible

Felony murder is first-degree murder. VA. CODE ANN. § 18.2-32 (2011). Capital felony murder requires that the defendant's conduct was "willful, deliberate and premeditated." *Id.* § 18.2-31(1), (4), (5), (10). Virginia courts have construed this as requiring that only the triggerman is death penalty eligible. *Watkins v. Commonwealth,* 331 S.E.2d 422, 434–35 (Va. 1985).

Washington

Category: Felony Murder Ineligible

Felony murder is first-degree murder. WASH. REV. CODE ANN. § 9A.32.030(c) (West 2011). Aggravated first-degree murder, such as to warrant the death penalty, is limited to premeditated murder with aggravated circumstances. *Id.* §§ 10.95.020, 9A.32.030(a), (c).

Wyoming

Category: Knowledge of Lethal Force

Felony murder is first-degree murder. WYO. STAT. ANN. § 6-2-101(a) (2011). It does not require intent. *Id.* However, the felony murder aggravator requires that the defendant acted with "purpose[] and with premeditated malice." *Id.* § 6-2-102(h)(iv) ("The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or abuse of a child under the age of sixteen (16) years."). It is a mitigating circumstance that the defendant's participation was minor. Id. § 6-2-102(j)(iv). Although Wyoming's Supreme Court relies on *Tison* in conducting proportionality review, *Harlow v. State*, 70 P.3d 179, 203 (Wyo. 2003), it has never construed the felony murder aggravating circumstance to require less than intent for non-triggermen. Moreover, in the single case discussing the felony murder aggravating circumstance, the Wyoming Supreme Court decided that the intent element was constitutionally required in order to adequately narrow death eligibility. *Engberg v. Meyer*, 820 P.2d 70, 87–91 (Wyo. 1991).

Federal

Category: *Tison* Jurisdiction

Felony murder is first-degree murder in the United States and thus eligible for the death penalty. 18 U.S.C. § 1111(a) (2006). There is no intent requirement. *Id.* A threshold culpability finding requires only that the defendant engaged in violence with reckless disregard. *Id.* § 3591(a)(2)(D). Felony murder is an aggravating circumstance requiring no additional culpability. *Id.* § 3592(c)(1). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 3592(a)(3).