CAPITAL PUNISHMENT OF UNINTENTIONAL FELONY MURDER

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Abstract

Under the prevailing interpretation of the Eighth Amendment in the lower courts, a defendant who causes a death inadvertently in the course of a felony is eligible for capital punishment. This unfortunate interpretation rests on an unduly mechanical reading of the Supreme Court's decisions in Enmund v. Florida and Tison v. Arizona, which require culpability for capital punishment of co-felons who do not kill. The lower courts have drawn the unwarranted inference that these cases permit execution of those who cause death without any culpability towards death. This Article shows that this mechanical reading of precedent is mistaken, because the underlying justifications of Eighth Amendment jurisprudence require a rational selection for death of only the most deserving and deterrable offenders, and this in turn requires an assessment of culpability. We argue that the Supreme Court should address this open question in Eighth Amendment law and that it should correct the lower courts by imposing a uniform requirement of at least recklessness with respect to death for capital punishment of felony murder.

Introduction

That a defendant could be executed for causing death inadvertently might seem absurd. Nevertheless, the great majority of American courts to have considered the question have concluded that the Eighth Amendment of the U.S. Constitution permits such executions. In so doing, they have interpreted Supreme Court doctrine to allow capital punishment of any person who causes death during the commission of a felony, regardless of that person's mental state with respect to the resultant death. Under this reading of precedent, the following defendants are eligible for the death penalty: the driver of a getaway car who kills a jaywalker, the burglar who startles an elderly homeowner and causes a fatal heart attack, and the robber who unknowingly punches a hemophiliac.

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Such counterintuitive results become conceivable when eligibility for the death penalty is untethered from the defendant's culpability. This disconnect results from an overly mechanical interpretation of the Supreme Court's two key cases applying the Eighth Amendment to the felony murder context: *Enmund v. Florida*[1] and *Tison v. Arizona*.[2] Although these cases have been read to permit execution of nonculpable *killers*, the holdings of both decisions impose a high level of culpability for execution of *accomplices* in felony murder, on the ground that death should be reserved for the most culpable offenders. In overturning the death sentence of an accomplice in a fatal felony, the *Enmund* majority stated that a participant in a fatal felony is ineligible for capital punishment if he "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[3] In upholding the death sentences of two accomplices in a fatal felony, the *Tison* majority permitted capital punishment of felons "whose participation is major and whose mental state is one of reckless indifference to the value of human life."[4]

Thus, subsequent readings of *Enmund* and *Tison* that permit the execution of actual killers regardless of culpability are largely based on what they did *not* say about a question that was not before them. To be sure, the *Enmund* majority did not say that those who "kill" are eligible only if they intend death, but neither did it say they are eligible regardless of their mental state. The *Tison* majority concluded that *Enmund* "held" that capital punishment could be imposed on "the felony murderer who actually killed,"[5] but only "when the circumstances warranted."[6] Because both cases concerned accomplices of intentional killers, neither Court specified whether those who "killed" included all who caused death, by any means, and with any mental state. Yet most lower courts have assumed that anyone causing death in a predicate felony is death-eligible, regardless of any culpability.

Omitting consideration of a culpable mental state is at odds with a central background principle of Eighth Amendment law: that we may only execute people to advance deterrence and retribution and that neither can be furthered if the person does not act with culpability. Culpability is the essential inquiry when narrowing the class of murderers to those who are most deserving of death, yet a mechanical reading of the *Enmund-Tison* test seems to allow for execution without it. This is the tension—familiar to any lawyer—between the mechanical application of a legal rule and fidelity to the rule's animating justifications.

In this Article, we both diagnose this problem (previously unremarked by legal scholarship) and attempt to solve it. First, we summarize the operation of felony murder rules and the considerations that might justify severe

1 458 U.S. 782 (1982).

2 481 U.S. 137 (1987).

3 *Enmund*, 458 U.S. at 797.

4 *Tison*, 481 U.S. at 152.

5 *Id.* at 150.

6 *Id.*

penalties for felony murder. Next, we examine the further problem of justifying capital punishment of felony murder as proportionate under the Eighth Amendment. At this point, the essential conundrum becomes apparent—the Eighth Amendment appears to require substantial culpability for capital punishment, yet *Enmund* and *Tison* appear to require culpability only for some capital murders. We then discuss two ways to read these cases. One possibility is to read them mechanically, permitting execution of one who causes death inadvertently in committing predicate felonies. Another is to understand that the conflict between this result and Eighth Amendment principles invoked in these very cases invites a more reflective approach. This more reflective interpretation would acknowledge the inadvertent actual killer as an open question, to which Eighth Amendment principles remain to be applied.

After presenting this dilemma, we review the application of *Enmund* and *Tison* in the lower courts, showing how the reflective interpretation we recommend was soon displaced by the mechanical interpretation that now prevails. In the years immediately after *Enmund* was decided, a number of courts assumed that the principles invoked in that case required an assessment of the culpability of killers as well as their accomplices. Today, however, rather than considering how Eighth Amendment principles apply to capital punishment of inadvertent causation of death, most courts simply presume actual killers to be death-eligible, citing *Enmund* and *Tison.*

The mechanical interpretation of these cases has taken three forms. Some courts read these cases as explicitly holding that the Eighth Amendment permits execution of inadvertent killers.[7] This unjustifiably broadens the holdings of these cases, which left open the question of the culpability required for execution of actual killers.

Other courts read the holdings of these cases more narrowly, as not applying to actual killers. Yet they also ignore the Eighth Amendment principles justifying these holdings. In treating *Enmund* and *Tison* as inapplicable to killers, these courts treat the Eighth Amendment itself as inapplicable.[8]

A third group acknowledges that execution of inadvertent killers may offend Eighth Amendment principles, but reasons that discretionary decisionmaking will generally prevent such executions.[9] Indeed, we will see that most death sentences upheld on the ground that felony murderers are death-eligible regardless of culpability could also have been justified on the ground that the defendant killed recklessly. Yet the rarity of death sentences for inadvertent killing only reinforces the claim that such sentences are disproportionate.[10]

7 *See infra* Section IV.B.

8 *See infra* Section IV.C.

9 *See infra* Section IV.D.

10 *See infra* text accompanying note 228; *see also* Section IV.E. That such sentences are rarely imposed supports arguments that they would violate "evolving standards of decency," Atkins v. Virginia, 536 U.S. 304, 321 (2002), and would be arbitrary in the sense

Having shown the dominance of the mechanical interpretation, we next show why it is wrong—not because it offends our moral views, but because it ignores the doctrinal pronouncements of the Supreme Court. The Court's own decisions have required that capital punishment serve retribution and deterrence by punishing culpable conduct, and have reserved death for the worst crimes and the most culpable criminals. These decisions authorize lower courts to condition capital punishment on a culpable mental state of at least reckless indifference to human life for all defendants convicted of felony murder, including actual killers.[11] Yet, a better solution is for the Supreme Court to finally answer the question left open in *Enmund* and *Tison*, by making such a requirement explicit.

Why should the Supreme Court bother to bar capital sentences for inadvertent killers if, as we concede, such sentences are rarely imposed and even more rarely executed? There are two reasons. First, because the threat of disproportionate capital punishment can force a plea to a noncapital charge. Second, because even one disproportionate execution is one too many. Eighth Amendment violations need not be frequent to be worth correcting and preventing. Executions are—by design—rare.[12] Disproportionate execution is an important problem, not because it is a big problem, but because it is a matter of life and death.

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of being "wanton" and "freakish," Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

11 At this point we say "at least recklessness" to distinguish two differing levels of recklessness. What we might call "simple recklessness" is that defined in Model Penal Code § 2.02: a person is reckless when he

> consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985). In regard to homicide, that level of recklessness establishes involuntary manslaughter, *see* MODEL PENAL CODE § 210.1 (AM. LAW INST. 1980), but a nonpurposeful killing can establish murder under MPC § 210.2 if the killer acted "recklessly under circumstances manifesting extreme indifference to the value of human life," *id.* § 210.2. What thus can be called "gross recklessness" presumably means that either the degree of risk, the degree of conscious adversion to risk, or the lack of justification (i.e., the disutility of the actor's motive) are more severe than what suffices for simple recklessness. The higher recklessness required for murder is most often conditioned on either the exposure of multiple potential victims to risk, or a particularly antisocial motivation for imposing risk. We will argue that a plausible reading of the Eighth Amendment cases would call for a minimal constitutional test of some version of gross recklessness; but insofar as felony murder is conditioned on a felonious (and so antisocial) end, a constitutional requirement of simple recklessness towards death arguably suffices to condition death-eligibility on one interpretation of gross recklessness.

12 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) ("In reaching our conclusion [barring capital punishment of child rape] we find significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder.").

I. Felony Murder Liability and Proportionality

Eighth Amendment law justifies capital punishment, and its imposition in particular cases, on the basis of two purposes only: retribution and deterrence.[13] It limits capitally punishable offenses against persons to murder, deeming no other crime sufficiently culpable or harmful to merit this extreme penalty.[14] Finally, it conditions death on proof of at least one circumstance distinguishing the offense as worse than other murders.[15]

Accordingly, determining when Eighth Amendment principles justify capital punishment of felony murder requires understanding what felony murder involves and how it compares with other forms of murder.

Felony murder rules impose murder liability on those who cause death (usually foreseeably) in the commission or attempt of certain felonies. These felonies are usually either enumerated by statute or limited to those committed in a way foreseeably dangerous to human life.[16] Most enumerated predicate felonies inherently involve violence or danger to life—robbery, rape, arson, kidnapping, and escape are among the most common.[17] In death penalty jurisdictions, death-eligible felony murders are usually predicated on enumerated felonies.[18] Felony murder liability often does not require proof of a culpable mental state with respect to the victim's death, although requirements of foreseeable causation and dangerousness to life effectively require negligent disregard of danger to life.[19]

In addition to imposing liability on those causing death, a felony murder rule may extend liability to other participants in the felony who meet certain criteria. In most felony murder jurisdictions, accomplices in a fatal felony are also accomplices in felony murder if a co-felon caused death by conduct undertaken in furtherance of and foreseeable as a result of the felony.[20] By conditioning complicity in felony murder on the foreseeability of death as a result of the felony, such rules require of accomplies the same negligent disregard of the danger of death usually required for the killer's causal responsibility. In a minority of jurisdictions, no distinction is drawn between felons

13 Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

14 *Kennedy*, 554 U.S. at 420; Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion); *see* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 321–25 (1907) (discussing harm and culpability as the components of desert); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J.L. & Pub. Pol'y 359, 367–69 (1985) (same).

15 Zant v. Stephens, 462 U.S. 862, 877 (1983); Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion).

16 Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. Rev. 403, 415 (2011).

17 Although one prevalent predicate felony—burglary—usually involves very little danger to life. Model Penal Code § 210.2, at 38 (Am. Law Inst. 1980).

18 *See generally* David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?—An Empirical and Normative Analysis*, 49 Santa Clara L. Rev. 1 (2009).

19 *See* Binder, *supra* note 16, at 484–87.

20 *Id.* at 484.

who cause death and their co-felons: all participants in a predicate felony that causes death (again, usually foreseeably) are liable as principals in felony murder.[21]

While felony murder requires a death and an attempted or completed felony, it is generally considered a homicide offense rather than an aggravated grade of the predicate felony. Felony murder is grouped with other forms of murder in criminal codes.[22] Since killing during an attempted felony suffices for felony murder liability, felony murder does not require all the elements of the completed felony. Since the felony does not require death, it does not require all the elements of felony murder. This means that under the prevailing test for double jeopardy, a felony murder conviction need not bar conviction for the completed felony.[23] On such reasoning, about half the felony murder jurisdictions have determined that the predicate felony can be punished in addition to the felony murder.[24] If the harm ascribed to felony murder is death only, it does the same harm as any other homicide.[25] If instead, we conceive felony murder as a compound crime, combining a homicide with a predicate felony or attempt, felony murder involves the additional harm of the completed or attempted felony.[26]

21 *Id.* at 484–86.

22 *See, e.g.*, N.Y. PENAL LAW § 125.27 (McKinney 2013).

23 Blockburger v. United States, 284 U.S. 299 (1932).

24 *See* Todd v. State, 917 P.2d 674, 683 (Alaska 1996); State v. Siddle, 47 P.3d 1150 (Ariz. Ct. App. 2002); People v. Holt, 937 P.2d 213, 260–61 (Cal. 1997); State v. Rose, 33 A.3d 765, 777 (Conn. App. Ct. 2011); Whalen v. State, 434 A.2d 1346, 1371 (Del. 1981); Brinson v. State, 18 So. 3d 1075, 1078 (Fla. Dist. Ct. App. 2009); Sivak v. State, 731 P.2d 192, 206, 208 (Idaho 1986); State v. Rhode, 503 N.W.2d 27, 40–41 (Iowa Ct. App. 1993); State v. Waller, 328 P.3d 1111, 1126 (Kan. 2014); State v. Reardon, 486 A.2d 112, 121 (Me. 1984); People v. Ream, 750 N.W.2d 536, 547 (Mich. 2008); Walker v. State, 394 N.W.2d 192, 200 (Minn. Ct. App. 1986); State v. Barker, 410 S.W.3d 225, 236 (Mo. Ct. App. 2013); State v. Turner, 877 P.2d 978, 983 (Mont. 1994); Talancon v. State, 721 P.2d 764, 768 (Nev. 1986); People v. Lucas, 481 N.Y.S.2d 789, 792 (N.Y. App. Div. 1984); State v. McClary, 679 N.W.2d 455, 464 (N.D. 2004); State v. Campbell, 738 N.E.2d 1178, 1205 (Ohio 2000); Commonwealth v. Harper, 516 A.2d 319, 320 (Pa. 1986) (per curiam); State v. Garza, 854 N.W.2d 833, 841–42 (S.D. 2014); State v. Godsey, 60 S.W.3d 759, 777–78 (Tenn. 2001); State v. McCovey, 803 P.2d 1234, 1239 (Utah 1990); Spain v. Commonwealth, 373 S.E.2d 728, 731–32 (Va. Ct. App. 1988).

25 *See* JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 472–73 (6th ed. 2008).

26 About half of felony murder jurisdictions to have considered the issue bar the punishment of both the predicate felony and the felony murder as double punishment. *See* Washington v. State, No. CR-13-1369, 2015 WL 6443149, at *4–5 (Ala. Crim. App. Oct. 23, 2015); Boulies v. People, 770 P.2d 1274, 1281 (Colo. 1989) (en banc); Sumrall v. State, 442 S.E.2d 246, 247 (Ga. 1994); People v. Gillespie, 23 N.E.3d 641, 645–49 (Ill. App. Ct. 2014); Stewart v. State, 945 N.E.2d 1277, 1285 (Ind. Ct. App. 2011); State v. Staden, 154 So. 3d 579, 582–83 (La. Ct. App. 2014); Newton v. State, 373 A.2d 262, 266, 269 (Md. 1977); Commonwealth v. Wilson, 407 N.E.2d 1229, 1250 (Mass. 1980); Williams v. State, 94 So. 3d 324, 329 (Miss. Ct. App. 2011); State v. McHenry, 550 N.W.2d 364, 370 (Neb. 1996); State v. Arriagas, 487 A.2d 1290, 1292 (N.J. Super. Ct. App. Div. 1985); State v. Best, 674 S.E.2d 467, 474 (N.C. Ct. App. 2009); Perry v. State, 764 P.2d 892, 898 (Okla. Crim. App. 1988);

Today, jurisdictions imposing felony murder liability usually define murder as also including causing death with intent to kill or with gross recklessness towards a risk of death.[27] Thus, a felony murder rule extends liability beyond traditional murder to those who cause death in the pursuit of a felony and their accomplices, without one of these mental states. Arguably, then, it involves the same harm as other murder (death), but less culpability with respect to that harm (negligence rather than gross recklessness or intent). Nevertheless, it imposes a similarly severe penalty.

How can this severe penalty be justified? Felony murder liability has many critics who see murder liability as unjustifiable without intent or gross recklessness with respect to death.[28] Some critics have gone so far as to claim that ordinary (noncapital) felony murder liability is unconstitutionally disproportionate. For example, in an article dating from the era of the *Enmund* and *Tison* decisions, Nelson Roth and Scott Sundby characterized felony murder as a form of strict liability and pointed to two lines of cases implying that strict liability could not be imposed for a serious crime.[29] Decisions reading mental elements into federal statutory offense definitions argued that proof of culpability should be required for severely punished crimes, to avoid possible violation of due process.[30] In addition, Eighth Amendment cases, including *Enmund*, treated culpability as important in justifying both death and prolonged imprisonment as proportional.[31] Accordingly, they concluded, felony murder rules violated a constitutional requirement that severe punishment be conditioned on culpability.[32]

From this perspective, death is disproportionate for felony murder, because any severe punishment is disproportionate for felony murder. On this view, the dubious practice is not imposing capital punishment for felony

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State v. Lyons, 924 P.2d 802 (Or. 1996); State v. Villani, 491 A.2d 976, 981 (R.I. 1985); Littrell v. State, 271 S.W.3d 273, 279 (Tex. Crim. App. 2008); State v. Womac, 160 P.3d 40, 48 (Wash. 2007) (en banc); State v. Jenkins, 729 S.E.2d 250, 259 (W. Va. 2012); State v. Krawczyk, 657 N.W.2d 77, 85 (Wis. Ct. App. 2002); Roderick v. State, 858 P.2d 538, 552 (Wyo. 1993).

27 Guyora Binder, Criminal Law: The Oxford Introductions to U.S. Law 229–34 (2016).

28 *See* Binder, *supra* note 16, at 422 ("Influential critics like Herbert Wechsler and Sanford Kadish have charged that '[p]rincipled argument in favor of the felony-murder doctrine is hard to find' because it is 'rationally indefensible.'" (alteration in original) (first quoting Model Penal Code § 210.2 cmt. 6 at 37 (Am. Law Inst. 1980); and then quoting Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 695 (1994))).

29 Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446 (1985).

30 *See id.* at 466–67; *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978); Lambert v. California, 355 U.S. 225 (1957); Morissette v. United States, 342 U.S. 246, 250 (1952); Baender v. Barnett, 255 U.S. 224 (1921); Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

31 *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983); Enmund v. Florida, 458 U.S. 782, 798 (1982).

32 Roth & Sundby, *supra* note 29, at 492.

murder, but imposing felony murder liability itself. Yet this position somewhat overstates the demands of Eighth Amendment proportionality and somewhat understates the culpability implicit in felony murder. Thus, ordinary felony murder liability can be defended as proportionate in three ways.

Felony murder rules are sheltered from constitutional challenge by their long persistence, widespread prevalence, and regular application.[33] Proportionality review generally scrutinizes only penal practices sufficiently unusual to violate "evolving standards of decency."[34] Similarly, due process review protects only those procedural rights traditional enough to have become essential to "ordered liberty."[35]

Second, Eighth Amendment review of lengthy terms of incarceration is less concerned with culpability than Eighth Amendment review of death sentences. Culpability is particularly relevant to two purposes of punishment: desert and deterrence. All else equal, the more culpable wrongdoer obviously deserves more blame. Similarly, the more culpable wrongdoer is generally more aware of the consequences of his act and so more deterrable by the threat of punishment. By contrast, incapacitation and rehabilitation are more concerned with the defendant's personality and future conduct than with the crime itself. While death sentences must be justified as serving desert and deterrence only, the Supreme Court permits terms of imprisonment to be justified by reference to the purposes of incapacitation or rehabilitation.[36] On this basis, the Court has upheld life terms for such nonviolent offenses as theft and cocaine possession.[37] If lengthy terms of imprisonment need not be deserved, and if the crimes punished thereby need not be deterrable, it seems those crimes need not be culpable.

A third obstacle to a proportionality challenge to felony murder liability is provided by arguments that felony murder liability in fact depends on culpability. Courts most often explain felony murder liability in one of two ways: (1) that culpability with respect to death is present because of the foreseeable dangerousness of the predicate felony, or (2) that the culpability of the pred-

33 According to GUYORA BINDER, FELONY MURDER 190, 307 n.64 (2012), forty-three states, the United States, and the District of Columbia impose felony murder liability. By the end of the nineteenth century, most states had passed felony murder statutes or interpreted murder grading provisions to impose felony murder liability. *Id.* at 136.

34 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); *see also* Graham v. Florida, 560 U.S. 48, 60 (2010) (holding that proportionality review of sentencing practices requires a threshold judgment that the practice is rare).

35 Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969); *see also* Twining v. New Jersey, 211 U.S. 78, 106 (1908).

36 Ewing v. California, 538 U.S. 11 (2003) (plurality opinion).

37 Lockyer v. Andrade, 538 U.S. 63 (2003) (affirming fifty years to life for theft); *Ewing*, 538 U.S. at 28 (affirming twenty-five years to life for theft); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (affirming life without parole for cocaine possession). For criticism of the Supreme Court's reliance on incapacitation, see Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 1–4 (2017); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005).

icate felony substitutes for culpability towards death.[38] While neither of these rationales is convincing in isolation, they can be combined to make a stronger argument.

By itself, the foreseeable danger rationale is insufficient to justify murder liability because the foreseeable dangerousness of predicate felonies guarantees only negligence with respect to death, which falls short of the intent to kill or gross recklessness otherwise required for murder.

Similarly, the substituted culpability rationale seems insufficient to justify the felony murder doctrine by itself. The intent to commit the felony is already included in the predicate felony or attempt, for which the defendant can be separately punished in many jurisdictions. Moreover, there is no reason to punish the resultant death as well, unless the defendant is culpable for that result. Nor can the intent to commit the predicate felony be treated as equal in culpability to the intent to kill—in limiting capital punishment of crimes against individuals to homicides, the Court has made clear that the crimes of rape, child sexual abuse, and robbery deserve less punishment than the crime of murder.[39] Indeed, the Court concluded that "in determining whether the death penalty is excessive, there is a distinction between *intentional* first-degree murder on the one hand and nonhomicide crimes against individual persons."[40]

When we combine the foreseeable danger of the felony with its criminal purpose, however, we have a rationale for severely punishing a homicide: "[F]elony murder involves two kinds of culpability: negligently imposing a significant and apparent risk of death, and doing so for a very bad reason."[41] Insofar as felony murder is conditioned on proof of a foreseeably dangerous felony and foreseeable causation of death, it requires proof of negligence. This culpability makes felony murderers morally responsible for the deaths for which they are punished. And while felonious motives do not alone suffice to justify murder liability, they can enhance the culpability of negligent wrongdoing. Motives often affect assessments of culpability. As the Court observed in *Solem v. Helm*, "A court . . . is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious

38 *See* Roth & Sundby, *supra* note 29, at 460. Some courts offer a third rationale that does not depend on culpability: that holding felons strictly liable for accidental death deters predicate felonies or deters their careless commission. However, this deterrence rationale is weak. Because certain punishment deters more effectively than severe punishment, punishment lotteries do not deter efficiently. Thus, punishing an occasional unexpected death severely is a poor way to deter conduct creating a risk of death, including felonies. *See* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003).

39 Kennedy v. Louisiana, 554 U.S. 407 (2008) (rape of a child); Enmund v. Florida, 458 U.S. 782, 798 (1982) (robbery); Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion) (rape of an adult woman).

40 *Kennedy*, 554 U.S. at 438 (emphasis added).

41 BINDER, *supra* note 33, at 38.

when committed pursuant to a contract."[42] Similarly, the Model Penal Code conditions negligence and recklessness on willingness to impose a risk that is not only "substantial," but also "unjustifiable."[43] Reckless homicide is aggravated from manslaughter to murder in many jurisdictions by a particularly cruel attitude or an antisocial purpose.[44] Finally, intentional murder can be aggravated to capital murder by a motive of financial gain, bigotry, or cruelty.[45]

Adding a felonious motive to the negligent imposition of a risk of death yields more culpability. "Thus felony murder liability rests on a simple and powerful idea: that the guilt incurred in attacking or endangering others depends on one's reasons for doing so."[46] Paul Robinson's and John Darley's empirical study of popular views of moral desert provided some evidence that the public views felony murder in this way. Their subjects were willing to sentence negligent killers to twenty-five-year terms if the killing was in the course of armed robbery.[47] The most persuasive account of felony murder is that, when properly imposed, it combines two dimensions of culpability: the negligent imposition of a substantial risk of death and the imposition of this risk for a felonious motive.

In sum, felony murder is not a crime of strict liability. Instead, it is a crime of careless violence in the pursuit of a felonious end. Indeed, this is precisely how the Supreme Court has described the culpability that, from the standpoint of the Eighth Amendment, justifies felony murder liability, but fails to justify capital liability. In *Tison v. Arizona*, Justice O'Connor explained:

> [T]he Arizona Supreme Court attempted to reformulate "intent to kill" as a species of foreseeability. The Arizona Supreme Court wrote:
>
> "Intend [*sic*] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."
>
> This definition of intent is broader than that described by the *Enmund* Court. Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . . might be used . . . in accomplishing the

42 Solem v. Helm, 463 U.S. 277, 293–94 (1983); *see also* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1 (2002); Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89 (2006).

43 MODEL PENAL CODE § 2.02(c)–(d) (AM. LAW INST. 1985).

44 *See, e.g.*, People v. Protopappas, 246 Cal. Rptr. 915 (Cal. Ct. App. 1988); Ramsey v. State, 154 So. 855 (Fla. 1934).

45 *See* SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 109–10 (1998) (discussing aggravated murder).

46 Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 968 (2008).

47 PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 169–81 (1995) (noting that subjects would impose terms of approximately twenty-five years for negligent homicide in the course of an armed robbery).

> underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself.[48]

While killing foreseeably in furtherance of a grave felonious purpose may establish enough culpability to justify a lengthy term of incarceration as proportionate, that does not mean it suffices to justify capital punishment as proportionate, because proportionality review of death is more demanding. We now turn to that more challenging problem.

II. Capital Punishment for Felony Murder

Justifying capital punishment as proportionate is more challenging than justifying prolonged incarceration as proportionate for four reasons. First, death can only be justified on the basis of desert and deterrence, not incapacitation or rehabilitation.[49] Accordingly, it must be conditioned on culpability. Second, among offenses against persons, the Court has reserved death for murder.[50] Third, capital punishment is limited to a narrower class of murders aggravated by facts—such as greater culpability—bearing on desert and deterrence.[51] Fourth, because execution is now very rare,[52] application of the death penalty to any class of offenders may seem "cruel and unusual" in the sense of violating "evolving standards of decency."[53] Together, these considerations make it hard to justify death for felony murder, absent greater culpability than negligence towards death in the pursuit of a serious felony.

If extended from accomplices in felony murder to actual killers, the holdings in *Enmund* and *Tison* offer a solution to this problem. These deci-

48 Tison v. Arizona, 481 U.S. 137, 150–51 (1987) (second, third, fourth, and fifth alterations in original) (citation omitted) (quoting State v. Tison, 690 P.2d 755, 757 (Ariz. 1984) (en banc)).

49 Roper v. Simmons, 543 U.S. 551, 571 (2005); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

50 Kennedy v. Louisiana, 554 U.S. 407 (2008); Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).

51 Zant v. Stephens, 462 U.S. 862, 877 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality opinion). To justify greater punishment on grounds of desert or deterrence, these aggravators must distinguish the offense on the basis of greater culpability or greater harm. *Kennedy*, 554 U.S. at 445–46 (punishing lesser harm more severely than greater harm creates perverse incentives to commit greater harm); Jeremy Bentham, The Theory of Legislation 322–23 (1931) (arguing that deterrence requires that greater harm be punished more severely); Crump & Crump, *supra* note 14, at 367–69 (discussing desert as a function of harm and culpability).

52 *Executions by Year*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/executions-year (last updated Oct. 19, 2016) (indicating 1439 executions from 1976 to 2016; 162 executions from 2012–2016).

53 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); *see* Enmund v. Florida, 458 U.S. 782, 798 (1982).

sions restrict capital punishment of accomplices in fatal felonies to those whose mental states would suffice for murder liability without the felony murder rule. Such accomplices have the culpability required for ordinary murder, plus an additional culpable mental state: a purpose to commit a very grave felony. Intentional killers are not death-eligible unless their murders are aggravated by some other circumstance, such as a felonious motive. By like reasoning, felony murderers should not be death-eligible unless their felony murders are aggravated by a culpable mental state of gross recklessness or intent to kill. Conditioning capital punishment of felony murder on recklessness accomplishes this because killing recklessly in the pursuit of an antisocial purpose is one common definition of gross recklessness.[54] A grave felony is a very, very antisocial purpose. It would follow that killing recklessly in the pursuit of such a felony includes and even exceeds one conception of gross recklessness. Confining capital punishment of felony murder to reckless killings therefore ensures that capital felony murders will be in at least one respect worse than other felony murders and other grossly reckless murders. Of course, confining capital punishment of felony murders to killers and accomplices who intended death would have the further benefit of ensuring that capital felony murders would be in one respect worse than other intentional murders. However, this would require overturning *Tison*.

A. *General Death Penalty Jurisprudence: Proportionality Through Rational Selection of the Most Culpable, So as to Advance Deterrence and Retribution*

Our examination of the proportionality of capital punishment of felony murder begins with the proposition that the Eighth Amendment requires culpability for capital punishment. The touchstone of the Cruel and Unusual Punishment Clause is proportionality, and this demands rational selection of those who most deserve death.

The Court bore witness to this principle in its 1976 decision in *Roberts v. Louisiana*, holding that the Constitution forbids the mandatory execution of all first-degree murderers.[55] Instead, capital punishment must be limited to

54 *See, e.g.*, People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (in bank) (explaining the felony murder doctrine is unnecessary where the defendant acted with a "base, antisocial motive and with wanton disregard for human life" (quoting People v. Thomas, 261 P.2d 1, 7 (Cal. 1953) (in bank) (Traynor, J., concurring))); *see also* People v. Protopappas, 246 Cal. Rptr. 915, 921 (Cal. Ct. App. 1988) (holding that a dentist's egregious overdose of an anesthetic drug on a manifestly frail patient can prove "implied malice" so as to establish "abandoned and malignant heart" murder (quoting CAL. PENAL CODE § 188 (1982))); Ramsey v. State, 154 So. 855, 856 (Fla. 1934) (en banc) (unintentional murder requires facts "evincing a depraved mind regardless of human life" (quoting COMP. GEN. LAWS § 7137 (1927) (internal quotation marks omitted))).

55 Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); *see also* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion).

those offenders who commit "a narrow category of the most serious crimes," and accordingly to those "most deserving of execution."[56]

Most death penalty jurisdictions satisfy these strictures by requiring the jury to find at least one aggravating circumstance at the sentencing phase.[57] Others permissibly use narrowing criteria at the guilt phase.[58] In all cases, though, states must give precise definition to the aggravating factors that can result in a capital sentence so that the death penalty is reserved for a narrow category of crimes and offenders.[59] These few may not be selected on an arbitrary basis[60]—they must be selected by criteria that not only "narrow the class of persons eligible for the death penalty" in numerical terms, but also "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[61]

Moreover, the only reasons that have been recognized by the Supreme Court as adequate to "justify" the extreme penalty of death are "retribution and deterrence of capital crimes by prospective offenders."[62] Unless the imposition of the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."[63] This requirement of reasonably justified narrowing—in service to the deterrent and retributive purposes of punishment—defines the constitutional right to proportionality. Each jurisdiction may assess desert and deterrence somewhat differently, but each must select defendants as death-eligible according to its own legislatively determined and consistently applied criteria of desert or deterrence.

To rationally select those whose deaths further retribution or advance deterrence, though, requires an assessment of *culpability*. The Court has denied that execution can serve either punitive purpose when the defendant lacks a culpable mental state: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness

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

57 *See, e.g.*, Proffitt v. Florida, 428 U.S. 242, 253 (1976) (plurality opinion) (reviewing Florida sentencing scheme); Gregg v. Georgia, 428 U.S. 153, 162–64 (1976) (plurality opinion) (reviewing Georgia sentencing scheme).

58 *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231 (1988). In *Lowenfield*, the sole aggravating circumstance was the fact that the defendant killed or endangered multiple victims. *Id.* at 235. This circumstance was established by the defendant's conviction on multiple murder counts. *Id.* The Court found that the underlying crime of murder was adequately narrowed by this finding, even though the finding took place at the guilt phase, because multiple murder is not a defining element of murder itself. *Id.* at 241; *see also* Jurek v. Texas, 428 U.S. 262, 269 (1976) (plurality opinion).

59 Zant v. Stephens, 462 U.S. 862 (1983); Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

60 Furman v. Georgia, 408 U.S. 238, 256 (1972) (Douglas, J., concurring).

61 *Zant*, 462 U.S. at 877.

62 Atkins v. Virginia, 536 U.S. 304, 319 (2002) (quoting *Gregg*, 428 U.S. at 183); *Gregg*, 428 U.S. at 183.

63 Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)).

is diminished . . . , [and] the same characteristics that render [certain defendants] less culpable . . . suggest as well that [certain defendants] will be less susceptible to deterrence."[64]

The connection between culpability and the *retributive* aim of punishment is obvious—one who intentionally does wrong ought to be punished more than one who does wrong negligently, and one who does wrong without fault usually deserves no punishment.[65] This follows from the widespread assumption that moral responsibility for wrongdoing depends on the exercise of choice.[66] As Justice Jackson wrote in *Morissette*,

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[67]

Similarly intuitive is the proposition that *deterrence* is best advanced by conditioning punishment on culpability. As Jeremy Bentham (a founder of deterrence theory) wrote, "Punishments are inefficacious when directed against individuals . . . who have acted without intention [or] who have done the evil innocently."[68] The less aware an actor is of violating the law, the less the actor can be influenced by the threat of a deterrent sanction.

In *Atkins v. Virginia*, the Court observed that subjecting the mentally retarded to the death penalty disserved both retribution and deterrence.[69] Stressing the relationship of culpability to the goal of retribution, the Court said:

> [T]he severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently

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64 Roper v. Simmons, 543 U.S. 551, 571 (2005).

65 "In principle, we blame more severely intended wrongdoing than unintended wrongdoing." LEO ZAIBERT, FIVE WAYS PATRICIA CAN KILL HER HUSBAND: A THEORY OF INTENTIONALITY AND BLAME 245 (2005). The drafters of the Model Penal Code explained their decision to limit strict liability to noncriminal violations in the following terms: "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable." MODEL PENAL CODE § 2.05, at 282–83 (AM. LAW INST. 1985).

66 MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 405–06 (1997) (explaining the choice principle).

67 Morissette v. United States, 342 U.S. 246, 250 (1952) (footnote omitted).

68 BENTHAM, *supra* note 51, at 322–23. H.L.A. Hart famously disagreed, reasoning that absolving the undeterrable might encourage the deterrable to offend and feign undeterrability. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968) [hereinafter HART, 1st ed.]; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 19 (2d ed. 2008). However, this sort of speculation ignores Bentham's premise that the social cost of punishment requires probable and substantial deterrent benefits to justify punishment. In any case, "the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty." Cass R. Sunstein & Justin Wolfers, *A Death Penalty Puzzle*, WASH. POST (June 30, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062901476.html.

69 Atkins v. Virginia, 536 U.S. 304, 318–19 (2002).

> confined the imposition of the death penalty to a narrow category of the most serious crimes. . . . If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.[70]

The Court also emphasized the connection between culpability and deterrence: "[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[71]

The Court similarly linked both retribution and deterrence to culpability in *Roper v. Simmons* when it banned the death penalty for juveniles who committed their crimes while under the age of eighteen:

> Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.
>
> . . . "[T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."[72]

The Court has not limited its application of the culpability requirement to cases of diminished mental capacity, though. In *Woodson v. North Carolina*, a mandatory death penalty statute was found to violate the Eighth Amendment by preventing individualized consideration of the offender.[73] Noting that Woodson was a non-triggerman accomplice who waited in the getaway car during a fatal robbery, the plurality stated that "the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed."[74] Part of the problem of mandatory execution of murderers, then, was blindness to their individual culpability, and particularly in the context of felony murder. However, the Court did not reach "the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate to the nature of his involvement in the capital offense."[75]

Individual culpability was also an important concern in the Court's decision in *Lockett v. Ohio*.[76] Like Woodson, Lockett was an accomplice who

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70 *Id.* at 319.

71 *Id.* at 320.

72 Roper v. Simmons, 543 U.S. 551, 571–72 (2005) (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (plurality opinion)).

73 Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion).

74 *Id.* at 298 (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

75 *Id.* at 305 n.40.

76 438 U.S. 586 (1978).

remained in a getaway car during a fatal robbery.[77] A state statute mandated the death penalty for aggravated murder (here, participation in a felony was one of the aggravators)[78] unless the defendant could show insanity, duress, provocation, or victim consent.[79] The Court overturned the death sentence "because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, *lack of specific intent to cause death*, and her relatively minor part in the crime."[80] However, the Court did not reach the question whether "the death penalty is constitutionally disproportionate for one who has not been proved to have taken life, to have attempted to take life, or to have intended to take life."[81]

In sum, the Eighth Amendment requires the rational selection of offenders worthiest of capital punishment, and this selection must be animated by considerations of retribution and deterrence. These penal purposes, in turn, can only be advanced when the central criterion of selection is mental culpability for the offense. As we will see, in considering the capital punishment of felony murder, *Enmund* and *Tison* would also emphasize the importance of culpability as the measure of desert and the target of deterrence.

B. *Felony Murder Eighth Amendment Jurisprudence*

We have seen that culpability guides Eighth Amendment jurisprudence more generally, and now we can turn to a discussion of how this guidance plays out in the context of felony murder more specifically. Because the fact patterns in felony murder cases can vary widely with respect to the perpetrator's involvement in the killing and also with respect to his mental state, the Supreme Court has paid special attention to this type of homicide.

1. *Enmund v. Florida*

In *Enmund v. Florida*,[82] an elderly couple was robbed and fatally shot by a younger couple who had stopped at their house asking for help with a disabled vehicle.[83] This younger couple "shot and killed both [members of the elderly couple], dragged them into the kitchen, and took their money and fled."[84] However, witnesses also identified a getaway driver who sat through these events in a car 200 yards from the house: Earl Enmund.[85] The case

77 *Id.* at 590.
78 *Id.* at 589.
79 *Id.* at 593–94.
80 *Id.* at 597 (plurality opinion) (emphasis added).
81 *Id.* at 609 n.16.
82 Enmund v. Florida, 458 U.S. 782 (1982).
83 *Id.* at 784.
84 *Id.*
85 *Id.* Enmund was accompanied by Ida Jean Shaw, his common law wife and the mother of one of the killers. *Id.* Shaw apparently drove the car, which belonged to her and Enmund, to the scene of the crime. *Id.*

thus presented the question of how substantial the offender's participation in and intent regarding the killing must be for capital punishment to be proportionate.

First, the Court surveyed the existing state laws on felony murder and capital punishment. It noted that in only twenty-one jurisdictions could felony murder be capitally punished without proof of intent or recklessness.[86] The Court added 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."[87] Thus, while "the current legislative judgment"[88] was not "wholly unanimous,"[89] it nevertheless weighed against the imposition of capital punishment for that crime.[90]

Next, the Court looked to the sentencing decisions of juries when faced with similar sets of facts and found that only six of 362 non-triggerman felony murder cases resulted in a death sentence.[91] These six executions all took place in 1955, with none since.[92] Moreover, the Court noted that of the 796 (and analyzing the 739 for whom sufficient data was available) inmates on death row at the time, only forty-one were nonparticipants in the assault of the victim, and only three were sentenced absent a finding of intent to kill.[93] Of forty-five felony murderers on death row in Florida, thirty-six were found to have intended to kill.[94] In eight other cases, no finding of intent was made, but the defendant was described as a "triggerman."[95] "In only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the triggerman."[96]

Finally, the Court employed its own conceptual analysis of the justifications for capital punishment when applied to these circumstances. Neither deterrence nor retribution—the hallmark justifications of punishment—warranted a death sentence in Enmund's case.

> "[C]apital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious

86 *Id.* at 789–90.

87 *Id.* at 792.

88 *Id.* at 792–93.

89 *Id.* at 793 (quoting Coker v. Georgia, 433 U.S. 584, 596 (1977)).

90 *Id.* at 793.

91 *Id.* at 794.

92 *Id.* at 794–95.

93 *Id.* at 795.

94 *Id.*

95 *Id.*

96 *Id.*

> felony murder will not "enter into the cold calculus that precedes the decision to act."[97]

Similarly, the demands of retribution "very much depend[ ] on the degree of [the defendant's] culpability":[98]

> The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims . . . . Enmund did not kill or intend to kill and thus 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]. This was impermissible under the Eighth Amendment.[99]

Thus, the Court regarded the actual killers as more deserving of death not merely because they killed, but because—under the facts of the case—their culpability was greater (both for the purposes of deterrence and retribution). All this led to the *Enmund* rule: Florida could not constitutionally impose a sentence of death "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken."[100] This confusing formulation may be read to imply that anyone who did kill is death-eligible regardless of culpability towards death. However, this reading is not compelled. It may also be read as requiring a mental state of at least "contemplating" the victim's death for all death-eligible defendants, including killers.

The majority opinion in *Enmund* was written by Justice White, who in *Lockett v. Ohio*[101] wrote that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a *purpose* to cause the death of the victim."[102] Moreover, in *Enmund*, Justice White several times used the term "nontriggerman" to describe the category of people who did not "kill," and so described Enmund himself.[103] It seems that he viewed the actual killer as someone who does more than perform an act necessary to the death. Indeed, if we view all necessary conditions for a result as causes, Enmund, by supplying the car used to transport the killers to the scene of the felony, could be said to have thereby caused the deaths. That Justice White distinguished "killing" from merely "causing death" is confirmed by his reference to "two killings that [Enmund] did not commit and had no intention of committing *or causing*."[104] Rather than embracing everyone whose conduct was necessary to the death, it seems that "one who killed"

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97 *Id.* at 799 (citations omitted) (first quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting); and then quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976) (plurality opinion)).

98 *Id.* at 800.

99 *Id.* at 798.

100 *Id.* at 801.

101 438 U.S. 586 (1978).

102 *Id.* at 624 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (emphasis added).

103 *Enmund*, 458 U.S. at 786 n.2, 792, 793–94 n.15, 794.

104 *Id.* at 801 (emphasis added).

refers only to a "triggerman" who employed a deadly weapon. Such a "triggerman" may not have intended death, but in attacking a person with a deadly weapon, he will likely have "contemplated that life would be taken."

2. *Cabana v. Bullock*

The 1986 decision in *Cabana v. Bullock*[105] held that *Enmund*'s requirement that the defendant sufficiently participate in or expect the killing is not an element of the crime of felony murder that must be proven to a jury. Rather, the *Enmund* rule is a "substantive limitation on sentencing" imposed by the Eighth Amendment.[106] Accordingly, even though satisfying *Enmund* requires a finding of fact, that finding may be made by a trial or appellate judge.[107]

> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.[108]

Cabana was, like *Enmund*, a 5-4 decision written by Justice White.[109] Yet the other Justices in the majority in *Cabana* were the four who had dissented in *Enmund*: O'Connor, Rehnquist, Powell, and Burger.[110] One of the major concerns expressed by Justice O'Connor, in writing for the *Enmund* dissenters, had been that the proportionality of death to the defendant's culpable mental state should be determined at the capital sentencing stage rather than in determining guilt for a death-eligible offense.[111] Thus, in *Cabana*, Justice White was conceding that whether the defendant had killed, attempted to kill, or intended to kill could be a sentencing question rather than a guilt question, yet he continued to insist that death was disproportionate for those outside this category.

Justice White's opinion contained some phrasing compatible with a mechanical reading of *Enmund*. First, White contrasted the finding of disproportionality in *Enmund* with the kind of "case-by-case, totality of the circumstances" finding made in *Solem v. Helm* (that a sentence of life without parole was disproportionate for passing a forged check):[112] "*Enmund*, by contrast, imposes a categorical rule: a person who has not in fact killed, attempted to

105 Cabana v. Bullock, 474 U.S. 376 (1986), *abrogated on other grounds by* Pope v. Illinois, 481 U.S. 497 (1987).

106 *Cabana*, 474 at 386.

107 *Id.*

108 *Id.* Note, *Cabana* was unaffected by *Ring v. Arizona*, which explicitly discussed the prior case and did not alter its holding. *See* Ring v. Arizona, 536 U.S. 584, 598 (2002).

109 *See Cabana*, 474 U.S. at 378.

110 *See id.*

111 Enmund v. Florida, 458 U.S. 782, 828 (O'Connor, J., dissenting).

112 Solem v. Helm, 463 U.S. 277 (1983). The majority in that case might not have agreed that its test, comparing the gravity of the crime, the severity of the sentence, the severity of sentences for similar crimes in other jurisdictions, and the gravity of crimes

kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."[113] Justice White added that "[i]f a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability."[114] It seems unlikely that Justice White meant that the Eighth Amendment has no requirements beyond the *Enmund* rule, or that it permits capital punishment for negligent homicide, but the sentence can be read that way. On the other hand, White's opinion reiterates his assumption that "killing, attempting to kill, or intending to kill" all permit execution insofar as they entail "the requisite culpability."

3. *Tison v. Arizona*

The Court returned to the substantive development of the rule in *Tison v. Arizona*.[115] In *Tison*, two brothers—Ricky and Raymond—involved themselves in a larger plot to break their father, Gary Tison, out of jail.[116] After the brothers successfully infiltrated the prison and all three had escaped it, the group flagged down a car with passing motorists.[117] After they transferred belongings to the new car, the problem of the still-living witnesses presented itself:

> Ricky Tison reported that [the father of the family of motorists] begged, in comments "more or less directed at everybody," "Jesus, don't kill me." . . . [He then] asked the Tisons . . . to "[g]ive us some water . . . just leave us out here, and you all go home." Gary Tison then told his sons to go back to the Mazda and get some water. Raymond later explained that his father "was like in conflict with himself . . . . What it was, I think it was the baby being there and all this, and he wasn't sure about what to do."
>
> The petitioners' statements diverge to some extent, but it appears that both of them went back towards the Mazda . . . while . . . Gary Tison stayed at the Lincoln guarding the victims. Raymond recalled being at the Mazda filling the water jug "when we started hearing the shots." Ricky said that the brothers gave the water jug to Gary Tison who then . . . went behind the Lincoln . . . [and] raised the shotgun[ ] and started firing. In any event, petitioners agree they saw . . . their father brutally murder their four captives with repeated blasts from [his] shotgun[ ]. Neither made an effort to help the victims, though both later stated they were surprised by the shooting.[118]

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punished with similar severity in the same jurisdiction, was a "totality of the circumstances" standard. *See id.* at 292.

113 *Cabana*, 474 U.S. at 386.

114 *Id.*

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

116 *Id.* at 139. A third brother was also involved in the plot, who was later shot by police. *Id.* at 141.

117 *Id.* at 139–40.

118 *Id.* at 140–41 (fifth, sixth, and seventh alterations in original) (citations omitted).

The brothers were sentenced to death, despite the absence of evidence that they intended to kill.[119] The Arizona Supreme Court offered the dubious theory that participation in a crime in which they knew someone could be killed constituted intent to kill.[120] In a 5-4 decision authored by Justice O'Connor—who had dissented in *Enmund*—the Court rejected this effort to reconcile the Tison brothers' death sentences with the rule in *Enmund*.[121] Nevertheless, the majority upheld the death sentences, revising the *Enmund* rule to permit execution of major participants in a fatal felony who acted with reckless indifference to human life.[122] The majority included *Enmund* dissenters, Justices Rehnquist and Powell, newcomer Justice Scalia, and the author of *Enmund*, Justice White.[123] The dissenters—Justices Brennan, Marshall, Blackmun, and Stevens—had all been in the majority in *Enmund*, and had all dissented in *Cabana*.[124]

The majority began its analysis with a discussion of *Enmund*. The Court noted that that case "explicitly dealt with two distinct subsets of all felony murders": the first subset involved "the minor actor [in a felony], not on the scene, who neither intended to kill nor was found to have had any culpable mental state . . . . The Court held that capital punishment was disproportional in those cases."[125] The second subset involved "the felony murderer who actually killed, attempted to kill, or intended to kill. The Court clearly held that . . . jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted."[126] The *Tison* defendants, the Court continued, fell in a gray area between the two, and thus *Enmund* did not dictate the outcome.[127]

Critical to the majority's perceived distinction were two categories: participation in the killing, and the mental state with respect to the killing: "[The Tison brothers'] degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life."[128] It was these two things that made *Tison* different from *Enmund*.

The concept of participation was capacious, including both participation in the *felony* and participation in the *killing*.[129] The decision identified as

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119 *Id.* at 143.

120 *Id.* at 144.

121 *Id.* at 138.

122 *Id.* at 158.

123 *See id.* at 138.

124 *See id.*

125 *Id.* at 149–50.

126 *Id.* at 150.

127 *Id.* The *Tison* opinion did not, as did *Enmund*, use the term triggerman in such a way as to narrow the meaning of the category of "actual killers."

128 *Id.* at 151.

129 *Id.* See various representations throughout the opinion: "minimal participation in a capital felony," *id.* at 147 (quoting Enmund v. Florida, 458 U.S. 782, 792 (1982)); "participation in the felony," *id.* at 147; "degree of participation in the murders," *id.* at 148

major participants offenders (such as the Tison brothers) who aided the killing by helping to capture victims or prevent their escape, remaining present when they were killed, and continuing their participation in the felony afterwards.[130] Just as the *Enmund* Court assumed that actual killers are highly culpable, the *Tison* Court assumed that "the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life."[131] Since the triggerman is obviously a "major participant" in a felony murder, *Tison* can be read to require that a triggerman must act with reckless indifference to human life to be capitally punishable for felony murder.

As in *Enmund*, the majority then surveyed state laws. It concluded that major participants in killing who were recklessly indifferent to death were, on the whole, subject to capital punishment. It found "substantial and recent legislative authorization of the death penalty . . . under [such] circumstances."[132] Legislative changes were echoed by state high court interpretations.[133]

Again, though, the majority's final determination rested on its own analysis of retribution and deterrence, and this in turn centered on culpability:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.[134]

But, Justice O'Connor reasoned, the *Enmund* formula assumed too distinct a dichotomy between intentional and unintentional killing, because not all intentional killers are sufficiently culpable to deserve death, while some unintentional killers are sufficiently culpable.

> A narrow focus on the question of whether or not a given defendant "intended to kill[ ]" . . . is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse. Other intentional homicides, though

(emphasis omitted); "participation in the felony murder," *id.* at 149; "degree of participation in the crimes," *id.* at 151; "participation in the crime," *id.* at 152; "participation in the felony murder," *id.* at 153; "major actor in a felony in which he knew death was highly likely to occur," *id.* at 154; "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life," *id.*, "participation in killing," *id.* at 155, "participant in . . . robbery . . . [with] no evidence that defendant himself shot the guard but he did fire a weapon," *id.*; "participation in these crimes," *id.* at 158; and "participation in the felony," *id.*

130 *Id.* at 151, 155.

131 *Id.* at 153.

132 *Id.* at 154.

133 *Id.* at 155.

134 *Id.* at 156.

> criminal, are often felt undeserving of the death penalty—those that are the result of provocation.[135]

Justice O'Connor saw the *Enmund* formula as both underinclusive and overinclusive. Moreover, she argued, "intent" did not capture the entire universe of death-eligible mental states:

> [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, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."[136]

Notably, the examples of defendants who were and were not sufficiently culpable to deserve death were all *actual killers.* The decision concluded that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[137] Yet it is important to remember that the opinion also refers to "participation in the felony murder" and sees such participation as evidence of "reckless indifference to human life."[138] Perhaps even more important is the qualification preceding the Court's conclusion: "We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here."[139] Even if *Enmund*'s holding can be read as a "categorical rule,"[140] *Tison*'s superseding test clearly cannot be.[141]

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135 *Id.* at 157.

136 *Id.*

137 *Id.* at 158. Recall earlier we noted the different possible levels or degrees of recklessness. *See supra* note 11. The *Tison* Court tended to use the term "reckless indifference," a term consistent with simple recklessness but, given the facts of the case, in a manner consistent with an implication of gross recklessness. We address this ambiguity in detail later in the Article. *See infra* subsection III.B.2.

138 *Id.* at 153.

139 *Id.* at 158.

140 Cabana v. Bullock, 474 U.S. 376, 386 (1986).

141 The Court's most recent characterization of the cases, in *Kennedy v. Louisiana*, describes the holdings as case-specific:

> [I]n *Enmund v. Florida*, the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison v. Arizona*, the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.

Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (citations omitted). Importantly, *Kennedy* identified only "intentional first-degree murder" as an offense for which the death penalty was not excessive. *Id.* at 438. This sheds light on the reference to *Enmund.*

4. *Hopkins v. Reeves*

In a 1996 habeas corpus decision, *Reeves v. Hopkins*, the Eighth Circuit ruled that a defendant sentenced to death for felony murder in Nebraska had been improperly denied jury instructions on the lesser included offenses of second-degree murder and voluntary manslaughter.[142] Because these offenses required intent to kill, neither was ordinarily considered a lesser included offense of felony murder, which did not require such intent. Yet the court reasoned that a finding of intent was required by *Enmund* and *Tison* for the defendant's death sentence, even though he had killed the victims himself by fatally stabbing them:

> [T]he death penalty cannot be imposed on a defendant without a showing of some culpability with respect to the killing itself. Before a state can impose the death penalty, there must be a showing of both major participation in the killing and reckless indifference to human life. *Enmund* and *Tison* are thus independent constitutional requirements of the mental culpability a state must prove if it is to impose a death sentence; if the death sentence is to be imposed, the state must necessarily produce some evidence of intent with respect to the killing. Nebraska's rationale for prohibiting lesser included offense instructions in felony murder cases thus disappears when the defendant is sentenced to death.[143]

In *Hopkins v. Reeves*, the Supreme Court reversed, reasoning that the culpability required by the Eighth Amendment for the imposition of death was not an offense element, under *Cabana v. Bullock*.[144] It followed that a capital sentence did not make felony murder a crime of intentional killing, and so a crime requiring intent to kill still could not be a lesser included offense of felony murder.[145] In dissent, Justice Stevens agreed with the Eighth Circuit that "under *Enmund v. Florida* [the state could not impose the death penalty] without proving that respondent intended to kill his victim, or under *Tison v. Arizona* that he had the moral equivalent of such an intent."[146] Significantly, Justice Thomas's majority opinion never challenged the assumptions of the Eighth Circuit and of Justice Stevens that *Enmund* and *Tison* required culpability on the part of actual killers.

III. The Problem: How to Understand "Actually Killed" in Light of the Culpability Requirement

So far, we have discussed how culpability justifies liability for the offense of felony murder, and also how the Eighth Amendment punishment analysis is similarly guided by culpability. We have explained that because culpability and participation can vary so widely, there are special rules for the capital punishment of felony murder. An offender cannot be death-eligible who has

142 Reeves v. Hopkins, 102 F.3d 977, 986 (8th Cir. 1996).

143 *Id.* at 984 (emphasis omitted) (citations omitted).

144 Hopkins v. Reeves, 524 U.S. 88, 100 (1998).

145 *Id.* at 99–100.

146 *Id.* at 101–02 (Stevens, J., dissenting) (citations omitted).

not "actually killed, attempted to kill, or intended to kill"[147] or acted with "major participation in the felony committed, combined with reckless indifference to human life."[148]

It is now time to ask whether this doctrinal test created by the Supreme Court actually does the work it is supposed to do—whether the *Enmund-Tison* rule adequately assesses culpability. What is immediately apparent is that one clause of the test seems to say nothing about culpability at all: "actually killed" (versus "intended to kill" or "attempted to kill").[149] We know that it is certainly possible to kill someone without intending it (say, in a car accident), and that this is also possible when committing a felony (say, in a car accident while a robber drives away from a bank robbery). Thus, a mechanical reading of the first clause of the test permits a result—capital punishment for the inadvertent actual killer—at odds with the rule's justification. Yet we shall see that a more reflective reading of the *Enmund* and *Tison* opinions is available, which precludes capital punishment of inadvertent accomplices in felony murder without necessarily permitting capital punishment of inadvertent perpetrators of felony murder.

A. *The Mechanical Reading*

1. Actual Killing as Independently Sufficient: The Problem of the Inadvertent Actual Killer

The mechanical reading takes "or" at face value and sees that word as creating a disjunctive test with four distinct and sufficient categories of cases. If an offender actually killed someone, the Eighth Amendment is satisfied; if he intended to kill, it is satisfied; if he attempted to kill, it is satisfied. Moreover, if these requirements cannot be met, the punishment is still constitutional if the conduct evidenced reckless indifference to human life and major participation in the felony. The mechanical reading does not create a sliding scale of cases descending in egregiousness—it creates four different categories that need not relate to each other at all.

Under this reading, the "actual killing" category neither explicitly nor implicitly requires culpability. This reading views this silence regarding mental state as an omission pregnant with meaning: it means that mental state is irrelevant.

A chart will help to demonstrate the features of this type of mechanical reading of the *Enmund-Tison* test, where an "X" denotes eligibility for capital punishment.

147 Tison v. Arizona, 481 U.S. 137, 150 (1987).

148 *Id.* at 158.

149 Recall that attempt implies intent. *See supra* Part I.

FIGURE 1

LOWER COURT OPINIONS

	Mens Rea (culpability)			
	None	Negligence	Recklessness	Intent (or attempt)
Minor				X
Major			X	X
Killer	X	X	X	X

The mechanical reading of *Enmund* and *Tison* permits execution of the actual killer irrespective of his intent to kill. It permits capital punishment for those who kill without culpability or with only a negligent mental state. The tension between this result and the emphasis on culpability expressed in these opinions and in Eighth Amendment jurisprudence more generally leads us to question the validity of such an interpretation.

2. The Problem of the Inadvertent Actual Killer Arises Because "Killing" Does Not Necessarily Imply Culpability

Before discussing another way of reading the test, though, it is valuable to take a historical detour to trace the changing meaning of the term "killing" as homicide law evolved. Execution of an inadvertent killer is possible under the mechanical reading of the *Enmund-Tison* rule because today, "killing" has no uniform definition.

In using phrases like "kill," "take life," and "actually killed" in *Enmund* and *Tison*, the Justices likely envisioned a fatal intentional shooting. After all, this is how the victims were killed in both of these cases. Moreover, the most common felony murder scenario is an intentional shooting during a robbery. FBI data reveal that of the 1923 felony-type murders in 2010, 603 were perpetrated with a firearm during a robbery.[150] The only other category that comes close is that of murders committed in the course of a narcotics offense, and of these 463, firearms were used for 391.[151] The vast majority of felony-type murders involved weapons: seventy-two percent were shootings, ten percent were stabbings, and four percent were bludgeonings.[152]

150 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2010 tbl.11 (2010), https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl11.xls (listing murder circumstances by weapon).

151 *Id.*

152 *Id.* Note that when the FBI Uniform Crime Report counted homicides, this included murder and non-negligent manslaughter, so what counted for the national homicide rate was anything a state happened to call "murder" under its own laws. *See* FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES: VIOLENT CRIME (2010), https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violentcrimemain.pdf .

Moreover, the term "killing" at one time connoted culpability on its own. In the seventeenth, eighteenth, and early nineteenth centuries, "killing" was generally understood to mean causing death by intentionally inflicting a wound or injury. "Malice," the mens rea of murder in that era, meant an intention or expectation of doing physical harm, unexcused by provocation or self-defense.[153] Indeed, "killing" was presumed malicious absent these excuses.[154] A study of a cross-section of London homicide cases between 1670 and 1830 found that fatal, unprovoked intentional stabbings, shootings, and bludgeonings almost always resulted in murder liability, without any further evidence of intent to kill.[155] Similar conduct resulted in manslaughter liability if the victim had provoked or invited combat.[156] Thus, when eighteenth-century jurists asserted that all "killing" in the course of a felony was "murder," they meant that a fatal intentional wounding was presumptively malicious, while a felonious motive would preclude a claim of provocation or self-defense, as the felony would justify resistance by the victim.[157] Convictions for deaths with more attenuated causation were unknown in the common law, "for the . . . death without the stroke or other violence makes not the homicide."[158]

Early nineteenth-century American lawyers still conceived the act of killing as necessarily entailing some measure of culpability by virtue of either violence or manifest danger. An 1804 treatise on Kentucky criminal law defined "killing" as follows:

> [N]ot only he, who by a wound or blow, or by poison, or by lying in wait, or by strangling, famishing or suffocation, &c. directly causes another's death, but also in many cases he who by wilfully and deliberately doing a thing which visibly and clearly endangers another's life, thereby occasions his death, shall be considered to kill him.[159]

By the end of the nineteenth century, however, scholars and judges reconceived the meanings of killing and malice and began to think of criminal offenses as culpably caused injuries more generally. Accordingly, they began to conceive killing as simply the causation of death and malice as comprising

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153 *See* 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 36–44 (London, E. & R. Nutt & R. Gosling 1736). Indeed, killing was presumed malicious absent provocation or self-defense. According to Edward Coke, express malice was an intention to "kill, wound or beat." 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 51 (London, M. Flesher 1794).

154 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS AND CUSTOMS OF ENGLAND *201 (1769).

155 Of forty-three murders, twenty-four were by swords or other blades, nine by shooting, six by bludgeoning, two by strangling, one by poison, and one a prolonged beating of a child. Guyora Binder, *The Meaning of Killing*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 88, 95–101 (Markus D. Dubber & Lindsay Farmer eds., 2007).

156 *Id.* at 101–02.

157 GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 280 (1978).

158 HALE, *supra* note 153, at 426.

159 HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY 4 (Frankfort, W. Hunter 1804).

a number of culpable mental states, including intent to kill, intent to grievously injure, depraved indifference to human life, and intent to commit certain dangerous felonies.[160]

Thus, while the earlier conception of killing guaranteed a measure of culpability, that is no longer true. When killing no longer implies intentional wounding, or intentional use of a deadly weapon, but instead encompasses any causation of death, the term becomes unmoored from considerations of culpability. Today there are four general approaches to defining the act element of homicide offenses, roughly equal in popularity: (1) defining homicide as causing death, and defining causal responsibility by statute;[161] (2) defining homicide or particular homicide offenses as causing death, but leaving the definition of causation to judicial elaboration;[162] (3) defining homicide offenses as killing;[163] and (4) leaving such offenses as "murder" and "manslaughter" undefined by statute.[164] Yet there is no association between particular definitions of the act and particular criteria of causal responsibility.

Among jurisdictions imposing felony murder liability, causal responsibility takes two forms: "an 'agency' test that restricts liability to deaths directly caused by felons, and a 'proximate cause' test that includes all deaths foreseeably resulting from the felons' acts."[165] An agency test might be thought to require the kind of culpability—intent to wound or injure—inherent in the concept of killing at common law. For example, in the case of *People v. Washington*, the California Supreme Court overturned a robber's conviction for the defensive killing of his co-felon by a robbery victim.[166] The court reasoned as follows:

> When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery. It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing. Section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony.[167]

This holding required that the act causing death have a felonious motive, but it also seemed to assume that the act causing death must be an intentional battery.

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160 *See* Binder, *supra* note 155, at 88; *see also* 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80–81 (London, Macmillan & Co. 1883).

161 N.J. STAT. ANN. §§ 2C:11-2(a), 2C:2-3 (West 2013); 18 PA. CONS. STAT. ANN. §§ 2501(a), 303 (West 2013); TEX. PENAL CODE ANN. §§ 19.01(a), 6.04 (West 2013).

162 GA. CODE ANN. § 16-5-1 (West 2013); N.Y. PENAL LAW § 125.00 (McKinney 2013); OHIO REV. CODE ANN. §§ 2903.01–09 (West 2013).

163 CAL PENAL CODE § 187(a) (West 2013); FLA. STAT. ANN. § 782.04(1)(a) (West 2013).

164 MICH. COMP. LAWS ANN. § 750.316 (West 2013); N.C. GEN. STAT. ANN. § 14-17 (West 2013); VA. CODE ANN. § 18.2-30 (West 2013).

165 Binder, *supra* note 16, at 484.

166 People v. Washington, 402 P.2d 130 (Cal. 1965).

167 *Id.* at 133.

If killing means causing death directly by intentionally striking a blow, it entails some culpability towards death. Yet if killing is conceived more broadly, as including any conduct necessary to death, without the intervention of another voluntary act, killing does not entail any culpability. Thus, four years after *Washington*, a California court upheld a conviction for felony murder when a frightened victim died of a heart attack after a robbery, without having been struck or injured by the robbers.[168] The court held that direct causation did not require foreseeability of death and simply assumed that causation satisfied the statutory requirement of killing, despite the absence of any intentionally inflicted blow or injury.[169]

A proximate cause standard requires that death be foreseeable, thereby requiring culpability towards death, but only at the level of negligence. This is not enough culpability to justify capital punishment as necessary for purposes of retribution or deterrence.[170] A classic example of a proximate cause rule was the decision in the Illinois case of *People v. Payne*, in which a robber who exchanged gunfire with a victim was held liable for the death of his co-felon, despite the absence of evidence to determine from whose gun the fatal shot emanated.[171] Here the defendant's recklessness made him responsible for the result despite the possible intervention of a victim.[172] Yet a proximate cause standard can require much less culpability. In the later Illinois case of *People v. Hickman*, an unarmed burglar was found liable for murder when a police officer shot an officer from another force investigating the same burglary, after the defendant had already fled the scene.[173] Because burglaries very rarely cause death,[174] the defendant was arguably not even negligent (and probably should not have been convicted).

Even this brief comparison shows that the act element of homicide varies from state to state, and even from case to case. It may entail a lot of culpability, or some, or none. Depending on how it is applied by courts, a direct causation or "agency" standard may require intent to injure, or it may not require any culpability. A proximate cause standard, properly applied, should require negligence towards death, but in practice sometimes it does not. Neither standard for causation of death consistently demands recklessness or intention with respect to death. Thus, given current definitions of homicide, conditioning capital murder on "actually killing" cannot substitute for these culpable mental states. It cannot escape the problem of the inadvertent actual killer.

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168 People v. Stamp, 82 Cal. Rptr. 598 (Cal. Ct. App. 1969).

169 *Id.* at 603.

170 *See supra* Section II.A.

171 People v. Payne, 194 N.E. 539 (Ill. 1935).

172 *Id.* at 543.

173 People v. Hickman, 319 N.E.2d 511 (Ill. 1974).

174 MODEL PENAL CODE § 210.2, at 38 n.96 (AM. LAW INST. 1980).

B. *The Reflective Reading*

We have argued that to read the *Enmund* test mechanically permits the execution of an inadvertent actual killer, and that this troubling result is enabled because state law provides no guarantee of an embedded culpability when the term "killing" is used. Yet we also argue that the mechanical reading is not compelled as a matter of constitutional doctrine (later, we will argue why it is wrong as a matter of constitutional theory).[175]

1. Rereading *Enmund*

A reflective reading of the *Enmund* opinion must begin with the identities of the signatories. It included Brennan and Marshall, who consistently viewed capital punishment as unconstitutional in all circumstances, and Blackmun and Stevens, who late in their long careers would come to the same conclusion.[176] All four of these Justices dissented in *Tison*, saying:

> Influential commentators and some States have approved the use of the death penalty for persons . . . *who kill* others in circumstances manifesting an extreme indifference to the value of human life. Thus an exception to the requirement that only intentional murders be punished with death might be made for persons who actually commit an act of homicide; *Enmund*, by distinguishing from the accomplice case "those who kill," clearly reserved that question.[177]

Yet they went on to insist that "[i]n *Enmund*, the Court explained at length the reasons a finding of intent is a necessary prerequisite to the imposition of the death penalty," without confining that prerequisite, or its supporting rationale, to accomplices.[178]

The author of the *Enmund* opinion was Justice Byron White.[179] Justice White's opinion in *Enmund* must be read against the background of his concurrence in *Lockett v. Ohio*, striking down a death sentence for an accomplice who drove a getaway car.[180] Justice White condemned the imposition of capital punishment on an accomplice without intent to kill in terms that strongly implied an across-the-board prohibition on executing anyone, including actual killers, without a finding of intent to kill:

175 *See infra* Part V.

176 *See* Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in* Baze v. Rees*: A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 791 n.28 (2010) (identifying the opinions in which Justices Brennan, Marshall, Blackmun, and Stevens first renounced the constitutionality of capital punishment).

177 Tison v. Arizona, 481 U.S. 137, 169 (1987) (Brennan, J., dissenting) (footnote omitted).

178 *Id.* at 172.

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

180 *See generally* Lockett v. Ohio, 438 U.S. 586, 621–28 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment).

> I agree with the contention of the petitioners . . . that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.
>
> . . . A punishment is disproportionate "if it (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. A punishment might fail the test on either ground." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (opinion of WHITE, J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the victim, the punishment of death violates both tests under the circumstances present here.
>
> . . . .
>
> . . . It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.
>
> The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders . . . its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful.
>
> . . . [T]he conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable or, indeed, any perceptible goals of punishment.
>
> . . . [S]ociety has made a judgment, which has deep roots in the history of the criminal law, distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy human life.[181]

These passages made no exception for actual killers, implying that execution should be conditioned on intent to kill for all defendants, even those whose actions caused death.

When we turn to Justice White's opinion in *Enmund*, we find that he identified two deficiencies in Florida's capital punishment process:

> [U]nder Florida law . . . [i]t was . . . irrelevant . . . that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape.[182]

At the time *Enmund* was decided, thirty-five states and the U.S. military authorized the death penalty, but fifteen states, the United States, and the District of Columbia did not.[183] Justice White noted that of those states

181 *Id.* at 624–26 (citation omitted) (citing United States v. U.S. Gypsum Co., 438 U.S. 422 (1978)).

182 *Enmund*, 458 U.S. at 788.

183 *Id.* at 789.

where the punishment was permitted, four did not punish felony murder capitally and an additional eleven required either intent to kill or "a culpable mental state . . . such as recklessness or extreme indifference to human life" as a prerequisite to capital liability.[184] Thus, thirty-two jurisdictions precluded capital punishment of inadvertent actual killers. Only one state required actual killing, while two more required major participation, and six more made minor participation a mitigating factor.[185] Justice White added that of Florida's forty-four other felony murder death row defendants (excluding Enmund), thirty-six had been found to have intended death, while no finding had been made with respect to intent in the other eight cases.[186] Thus Justice White's statistics supported a requirement of intent to kill much better than they supported a requirement of actual killing. However, in defending the statistics supporting Enmund's claim, White wrote,

> Nor can these figures be discounted by attributing to petitioner the argument that "death is an unconstitutional penalty absent an intent to kill" and observing that the statistics are incomplete with respect to intent. Petitioner's argument is that because he did not kill, attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within his category.[187]

This is consistent with the inference that Justice White considered execution of unintentional killers to be cruel and unusual, but reserved the question because it had not been sufficiently briefed and its resolution was not necessary to deciding the case. In discussing the disproportionality of the death penalty to Enmund's crime, however, Justice White emphasized Enmund's lack of culpability far more than his lack of participation in the killing:

> The focus must be on *his* culpability . . . . It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." Enmund did not kill or intend to kill and thus 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 . . . . This was impermissible under the Eighth Amendment.[188]

Justice White then argued that the justifying purposes of capital punishment required culpability.

> In *Gregg v. Georgia* the opinion announcing the judgment observed that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals, it "is nothing more than the purpose-

184 *Id.* at 789–90.
185 *Id.* at 791–92.
186 *Id.* at 795.
187 *Id.* at 796 (footnote omitted) (citations omitted).
188 *Id.* at 798 (citation omitted) (citing HART, 1st ed., *supra* note 68, at 162).

> less and needless imposition of pain and suffering," and hence an unconstitutional punishment. *Coker v. Georgia*, [433 U.S. 584, 592 (1977)]. We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," . . . .
>
> . . . .
>
> As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to "the degree of [his] criminal culpability," and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.[189]

Finally, contrary to the mechanical reading of *Enmund*, Justice White's conclusion was *not* that any felony murderer was death-eligible who killed, attempted to kill, or intended to kill. Instead, his conclusion suggested that Enmund's death sentence raised two constitutional concerns: "Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty."[190] The first concern was that Enmund had not shown the seriousness of his culpable intent by committing conduct directly endangering the victim. The second concern was the absence of any finding that Enmund had intended to kill or consciously adverted to a probability of death. By expressing this additional concern in a separate clause, Justice White suggested that the Eighth Amendment also would not permit execution of an actual killer who had not adverted to a probability of death.

These observations are strengthened when the petitioner's brief and oral argument are considered. The petitioner's brief emphasized, as its first of three main arguments, that Enmund had no more culpability with respect to death than any other participant in a serious felony.[191] The brief's third argument was that capital punishment of unintentional killing served neither deterrence nor desert.[192] At oral argument, the petitioner's attorney, James Liebman, implied that actual killing was inculpatory only in so far as indicating intent to kill, that fatal but unintentional shooting would not justify capi-

189 *Id.* at 798–800 (first and fifth alterations in original) (citations omitted) (first quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976); then quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting); and then quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).

190 *Id.* at 801.

191 *See* Brief for Petitioner at 14–15, 24–25, 29, 32–34, 40–41, 47–48, *Enmund*, 458 U.S. 782 (No. 81-5321).

192 *Id.* at 38.

tal punishment, and that at least recklessness should be required for actual killers.[193] One of the Justices suggested to Liebman that the jury could have inferred intent to kill from Enmund's participation in the robbery.[194] When Liebman denied this, the Justice interjected, "[Y]ou don't suggest that a person has to pull the trigger himself," to which Liebman responded, "Absolutely not, Your Honor. There can be an inference drawn from the fact that he pulled the trigger . . . that he intended, but there could be an inference drawn from many other factors even if he doesn't pull the trigger."[195] Another Justice broke in to ask, "[A]ssume in this case that Enmund was the only member of this group who entered the residence. He was armed, but he had no intention to shoot, so he testified. A struggle ensued in which . . . his gun went off accidentally."[196] Liebman responded, "[I]f the jury did determine that it was pure accident, that there was no intent, then the death penalty would be inappropriate because the jury would have thereby decided that this person was not at the intent level of culpability, but fell way below it."[197] Later, Liebman offered a fallback position: "Now, we think the intent line is best line, but there is also another line that would be a subjective state of culpability with regard to the homocide, [sic] be it recklessness, . . . some sort of awareness of it, and that was not found in this case. It would be enough under the model penal code. . . . But it was not found here."[198] Thus, the petitioner's position, at least, was that actual killing in the course of an enumerated felony was capitally punishable only if it was at least reckless.

2. Rereading *Tison*

How should we best read *Tison*'s revision of the *Enmund* standard? In approaching this question we should bear in mind that *Tison* was a 5-4 decision expanding the category of death-eligible accomplices recognized in *Enmund*. This expansion depended on the vote of Justice White, who authored the majority opinion in *Enmund* and then switched sides, joining the *Enmund* dissenters, Justices O'Connor, Rehnquist, and Powell. As we have seen, Justice White, in *Lockett v. Ohio*, expressed the view that death-eligibility should depend on intent to kill for all defendants. The majority in *Tison* also depended on the vote of a Justice who had joined the court subsequent to *Enmund*: Justice Scalia. As we will see in our discussion of the 1994 case of *Loving v. United States*, Justice Scalia likely believed that *Tison*'s minimum requirement of reckless indifference to human life applied to actual

193 Transcript of Oral Argument at 21, *Enmund*, 458 U.S. 782 (No. 81-5321).

194 *Id.* at 20. The transcript does not identify the Justices.

195 *Id.* at 21–22. Based on the recorded voices of the Justices, the authors believe the Justice who posed the question about inferring intent to kill from robbery was the same one interrupting Liebman's answer.

196 *Id.* at 22. Based on the recorded voices, the authors believe this was a different Justice.

197 *Id.* at 23.

198 *Id.* at 51.

killers.[199] Without these two votes, *Tison* comes out the other way. Moreover, the four dissenters in *Tison*—Justices Brennan, Marshall, Blackmun, and Stevens—conceded that, in a case where the defendant tortured a victim to death or intentionally shot a robbery victim, "an exception to the requirement that only intentional murders be punished with death might be made for persons who actually commit an act of homicide; *Enmund*, by distinguishing from the accomplice case 'those who kill,' clearly reserved that question."[200] Thus, we have at least six Justices in *Tison* who apparently thought that actual killers needed to act with at least reckless indifference to human life to be death-eligible.

Moreover, the approach of *Tison* indicates that the Court does not read *its own opinions* literally in this context. *Tison* represents a major revision of the *Enmund* test, a revision undertaken to reconnect that test with its underlying justifications. Recall that it was the Supreme Court in *Tison* that remarked that the *Enmund* test lacked the nuance to produce results in keeping with its underlying justifications:

> A narrow focus on the question of whether or not a given defendant "intended to kill" . . . is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty—those that are the result of provocation.[201]

To read its own case literally was, the Court wrote, to use a "narrow focus" and a "highly unsatisfactory means" of achieving its ultimate purpose—identification of "the most culpable and dangerous of murderers." *Tison* itself tells us that no rigid test ought to supplant a deeper consideration of the rationale for the rule in the first place; it therefore invites its own further development in light of new fact patterns. We might add that this kind of "common law" evolution of doctrine is especially appropriate in the context of the Eighth Amendment, where the touchstone of constitutionality is "*evolving* standards of decency."[202]

Moreover, upon close reading, *Tison*'s language resists the inference that killers are capitally punishable, regardless of culpability. As we have noted, the opinion treats the degree of participation as significant primarily in so far as it correlates with culpability towards death: "[T]he greater the defendant's participation in the felony murder, the more likely he acted with

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199 *See infra* subsection III.B.3. Apparently Justice Rehnquist also thought *Enmund* required culpability towards death for the actual killer, although, as a dissenter in *Enmund*, he may not have supported this requirement. *See infra* text accompanying note 221.

200 Tison v. Arizona, 481 U.S. 137, 169 (1987) (Brennan, J., dissenting).

201 *Id.* at 157 (majority opinion).

202 Brumfield v. Cain, 135 S. Ct. 2269, 2274 (2015) (emphasis added) (quoting Atkins v. Virginia, 536 U.S. 304, 321 (2002)).

reckless indifference to human life."[203] On this reasoning the killer's participation is significant as evidence—often conclusive—of reckless indifference.

Consistent with this concern for culpability with respect to death is Justice O'Connor's emphasis on the Tisons' presence throughout the killings and the fact that they enabled the killings by providing the arms, flagging down the victims, and holding them at gunpoint while their father decided whether to kill them.[204] Justice O'Connor added that "only eleven states authorizing capital punishment forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness."[205] It seems clear that the participation justifying a lower standard of culpability with respect to death was participation in the felony murder, not participation in the felony as such. To be sure, Justice O'Connor concluded that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* requirement."[206] Yet the argument of the opinion only justifies the conclusion that participation in the killing is probative. Participation in the felony is probative only in so far as the felony recklessly endangered the lives of the victims.

One of the foremost criticisms of felony murder liability is its imputation of complicity in the killing on the basis of aiding or encouraging the felony rather than aiding or encouraging the killing.[207] It seems likely that Justice O'Connor sought to insulate capital punishment of felony murder from this criticism by conditioning capital felony murder liability on aiding and foreseeing the killing. Underlying her dissatisfaction with the *Enmund* formula was its reliance on an unrealistically discrete category of killing. As a former state judge she no doubt recognized that in modern homicide law, actors can become responsible for death under a variety of different standards of causation and complicity that are not uniform across jurisdictions. Accordingly, she treated participation in homicide as a continuum, and viewed it as significant in so far as it supplied evidence of the culpability required for murder. Fatally shooting a victim would supply strong evidence of reckless indifference to human life, but aiding or encouraging such an act might be just as inculpatory. None of this reasoning implies that actual killers should be executed when the "circumstances" did not so "warrant"[208] by showing them to be "among the most culpable and dangerous of murderers."[209]

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203 *Tison*, 481 U.S. at 153.

204 *Id.* at 151–52.

205 *Id.* at 154.

206 *Id.* at 158.

207 BINDER, *supra* note 33, at 213–25.

208 "*Enmund* . . . dealt with . . . the felony murderer who killed, attempted to kill, or intended to kill. The Court clearly held that . . . jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted." *Tison*, 481 U.S. at 150.

209 *Id.* at 157.

In its concluding section, *Tison* argued that nonintentional murders "may be among the most dangerous and inhumane of all," and gave examples of torturers or robbers indifferent to the survival of their victims.[210] Significantly, the only examples offered of defendants culpable enough to merit capital punishment without intent to kill are *actual killers*. In arguing that such killers are culpable enough to deserve death, the opinion eschews any argument that a fatal result makes culpability irrelevant, or that a felonious motive obviates any culpability with respect to death. Instead, the Court limited its discussion to culpable mental states of sufficient gravity to warrant murder liability irrespective of felonious context. Thus:

> This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. See, *e.g.*, G. Fletcher, Rethinking Criminal Law § 6.5, pp. 447–448 (1978) ("[I]n the common law, intentional killing is not the only basis for establishing the most egregious form of criminal homicide . . . . For example, the Model Penal Code treats reckless killing, '*manifesting extreme indifference to the value of human life,' as equivalent to purposeful and knowing killing*").[211]

Moreover, the Court seemed to apply this requirement to those who actually cause death:

> [T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state . . . that may be taken into account in making a capital sentencing judgment *when that conduct causes its natural, though also not inevitable, lethal result*.[212]

Finally, we note that the majority opinion made no response to the claim by Justice Brennan in his dissent that the problem of the inadvertent actual killer was "clearly reserved" by *Enmund*.[213] Brennan pointed out that the *Tison* majority's discussion of unintentional killings was limited to that of reckless actual killers. While denying that *Enmund* permitted execution of non-triggermen without intent to kill, Justice Brennan conceded that *Enmund* might permit execution of those who actually kill recklessly, because the question of the culpability required of actual killers had been reserved. Were the mechanical reading of the test such an obvious one, it would be expected that the majority opinion would have responded to Justice Brennan's claims. Rather than insisting that actual killing alone sufficed to justify death-eligibility, Justice O'Connor sought to replace the rigid dichotomy of killing or intending to kill with a test better adapted to the disparate standards of homicide liability across the different states: death-eligibility required major participation in the conduct causing death, and reckless indifference to human life.

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210 *Id.*

211 *Id.* (alteration in original) (emphasis added).

212 *Id.* at 157–58 (emphasis added).

213 *Id.* at 169 (Brennan, J., dissenting).

3. The Significance of *Loving v. United States*

Finally, it is unlikely that the mechanical reading was contemplated because four members of the Court would later express skepticism at the prospect of the execution of the inadvertent actual killer. This skepticism was evident not in a published opinion but at the oral argument in a military capital case (to be discussed in depth later). This oral argument took place during the direct review of death sentence under the Uniform Code of Military Justice.[214] On this review, the defendant challenged the military's felony murder statute as failing to rationally narrow the death-eligible class of murderers, as the President lacked the authority to prescribe the aggravating factors that purported to cure the statute's defect.[215] The Court ultimately decided that the President did have such power, thus obviating the need to assess the constitutionality of the statute on its own.[216] What is important for our purposes, though, is that before reaching the separation of powers question, the Court had occasion at least to consider the Eighth Amendment question. Because the statute required no culpability with respect to the victim's death,[217] the Court was confronted with the problem of the inadvertent actual killer. At issue was whether or not a triggerman in a felony murder could be liable under the statute even when he possessed no intent to kill.

During oral argument, Justice Souter initially attempted to narrow the statute's meaning to intentional killing, presumably to avoid the difficult constitutional question that would otherwise result.[218] When petitioner's counsel pointed out that intent was not required, Chief Justice Rehnquist jumped in, highlighting the resultant problem: "*Enmund* I think supports your posi-

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214 Loving v. United States, 517 U.S. 748 (1996).

215 *Id.* at 759.

216 *Id.* at 770.

217 10 U.S.C. § 918 (1982). The statute provided:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape . . . , robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

Id.

218 Transcript of Oral Argument at 7–8, *Loving*, 517 U.S. 748 (No. 94-1966), https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/20586 ("[I]t doesn't dispense with a mens rea requirement, doesn't it [sic]?" he asked. "Because you still have the mens rea requirement necessary for murder." Petitioner's counsel corrected him that "murder" was not an element, and Justice Souter responded, "[O]h, it says . . . merely says kills." (alteration in original)).

tion there, that you can't automatically transpose the mens rea for a felony to a killing and still have capital punishment for it."[219]

While questioning the Deputy Solicitor General, Justices Scalia and Breyer also raised the problem. Justice Scalia asked if there was an intent requirement in the statute, since "[y]ou can perpetrate the killing without intending to kill."[220] The Deputy Solicitor General responded that there was none, to which Justice Scalia replied, "I guess that means [the statute] is . . . constitutionally invalid" for the purposes of "the death penalty."[221] Justice Breyer then said he was "with Justice Scalia, somewhat confused because . . . [the statute] does permit conviction of a person engaged in robbery who, let's say, negligently . . . kills someone else," and that therefore the death penalty could be imposed for merely negligent conduct.[222]

Later, Justice Scalia again returned to the issue. He asked the Deputy Solicitor General if "[a]ccidental killing would be enough to impose the death penalty under [the statute]."[223] He introduced a hypothetical: "Suppose I drop a gun during a holdup. The guns [sic] goes off and kills somebody. Is that enough to satisfy the requirements of [the statute]?"[224] Significantly, the Deputy Solicitor General then conceded that capital punishment for that conduct would violate the Eighth Amendment: "That . . . I believe that would be sufficient to satisfy [statutory liability]. It would not be sufficient to satisfy this Court's Eighth Amendment jurisprudence."[225] Justice Souter then interrupted, rejecting the Deputy Solicitor General's assertion that any constitutional problem was solved if the defendant were the "triggerman," since "[t]he triggerman can do it accidentally."[226] In such a case, the Deputy Solicitor General agreed that that scenario presented a "further" constitutional question.[227]

While all this language is nothing more than oral argument questioning, it cannot be ignored when attempting to assess whether the mechanical reading was the anticipated one. First, it is important to note that the government conceded that accidental killing was insufficient for capital punishment. Next, the Justices' questions show that multiple members of the Court do not (and some of those on the Court for *Tison* "did" not) see themselves as authorizing the rigid mechanical test. Dicta in the Court's opinion implied an understanding of *Enmund* and *Tison* as requiring culpability, even for killers:

> [W]e agree with Loving . . . that aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now

219 *Id.* at 8.
220 *Id.* at 43.
221 *Id.* at 44.
222 *Id.* at 45.
223 *Id.* at 28.
224 *Id.* at 29.
225 *Id.* (alteration in original).
226 *Id.* at 30.
227 *Id.*

> enacted. Article 118 authorizes the death penalty for but two of the four types of murder specified: premeditated and felony murder are punishable by death, whereas intentional murder without premeditation and murder resulting from wanton and dangerous conduct are not. The statute's selection of the two types of murder for the death penalty, however, does not narrow the death-eligible class in a way consistent with our cases. Article 118(4) by its terms permits death to be imposed for felony murder even if the accused had no intent to kill and even if he did not do the killing himself. The Eighth Amendment does not permit the death penalty to be imposed in those circumstances. *Enmund v. Florida*, 458 U.S. 782, 801 (1982). As a result, additional aggravating factors establishing a higher culpability are necessary to save Article 118.[228]

C. *The Best Conclusion: An Open Question*

We have discussed one tempting way of reading the *Enmund-Tison* test—the mechanical reading—and explained what such a reading means in terms of applied results. We showed that reading each clause of the test as an independently sufficent path to constitutionality yields the problem of capital punishment of the inadvertent "actual killer." We noted the theoretical problem with reading the test this way (it ignores culpability) and showed how this problem arose because over time legal conceptions of "killing" have changed so that the concept no longer entails the culpability it once did. We reviewed the leading contemporary tests for causation of death in the course of a felony—the agency and proximate cause tests—and showed that neither ensures a sufficient level of culpability to qualify felony murderers for capital punishment. Finally, we turned to an explication of why the mechanical reading is not compelled as a matter of standard doctrinal interpretation, as evidenced by close readings of *Enmund* and *Tison*, the latter case's unabashed modification of the former, and statements made at oral argument in *Loving*.

If our critique of the mechanical reading is sound, however, then it must be replaced with something else. What did the Court actually mean when it crafted its test? Our position is that—at least with respect to the "actual killer" category and the problem of the inadvertent actual killer—the Court did not resolve the issue. It was not directly before the Court in *Enmund* and *Tison*. It seems likely that when both *Enmund* and *Tison* were decided, a majority of the Justices thought that execution of inadvertent actual killers would not serve the required purposes of retribution and deterrence. Yet because Eighth Amendment proportionality had come to depend on evolving standards of decency, the Justices probably did not assume that their own views were controlling. Moreover, in an era when public support for capital punishment had fluctuated dramatically, the Justices probably thought it imprudent to decide this question in the abstract.

The Justices likely assumed that killings in the course of felonies would almost always be armed attacks manifesting recklessness. Inadvertent killings would be rare, and prosecutors would seldom seek—and juries rarely

228 Loving v. United States, 517 U.S. 748, 755–56 (1996) (citations omitted).

impose—capital sentences when they did occur. If a significant sector of the public believed that inadvertent killers merited capital punishment, such sentences would be imposed and challenged and come before the Court. If not, the resulting silence would testify more convincingly than any judicial rhetoric to the indecency of such a sentence, should one ever be imposed. In short, they left the question of the inadvertent killer open, in the expectation that the convergence of usage with principle would answer it in due course.

IV. The Prevailing Interpretation in the Lower Courts: The Mechanical Interpretation

We have argued that it is an open question whether a perpetrator of felony murder can be executed without a finding of at least reckless indifference to human life. Yet most state courts that have addressed the question have assumed that the Eighth Amendment permits such executions and, while the few federal circuit courts to consider the question are divided, the trend has been away from requiring culpability. Decisions denying that the Eighth Amendment conditions execution of killers on culpability have almost uniformly employed the mechanical reading of *Enmund.* A striking feature of these cases is that in almost all of them, the defendant is highly culpable. Thus, the courts could easily have affirmed most of these death sentences as satisfying the culpability requirements of *Enmund* and *Tison*, but instead they denied that the Eighth Amendment requires culpability at all.[229] At the same time, some recent cases have presented scenarios of weaponless killings of vulnerable victims that raise real questions about whether the defendant adverted to the risk of death. These cases illustrate that the prevailing mechanical reading of *Enmund* and *Tison* creates a risk of executing an inadvertent killer that the Supreme Court should not disregard.

In what follows, we will survey every case in the lower courts that has grappled with the inadvertent actual killer problem. We will begin by discussing the small number of courts that apply what we call the "reflective reading," which demands culpability even for an actual killer. However, we will then see that the weight of authority on this question skews heavily in favor of the mechanical reading. Opinions employing the mechanical reading break out into three broad categories: most courts say *Enmund* and *Tison* permit the actual killer's execution, some others say these cases do not apply to

229 The fact scenarios in these cases support what we believe to be Justice White's assumptions: that perpetrators of felony murder sentenced to death would be "triggermen," would be wielding deadly weapons, and would almost always be at least reckless. This pattern strongly suggests that, despite claims by courts that the Eighth Amendment permits execution of inadvertent killers, inadvertent killers are almost never being sentenced to death. If so, conditioning capital punishment on at least recklessness is not only consistent with Eighth Amendment principles requiring that execution serve retribution and deterrence. Requiring recklessness may also be consistent with evolving standards of decency as reflected in the discretionary decisions of prosecutors and sentencers.

actual killers, and a few say that we should rely on political process checks (and not legal rules) to prevent the execution of inadvertent killers.

In discussing the cases below, we should clarify up front the spirit in which we craft our critique. That the question of an inadvertent actual killer is not easily resolvable from a clear reading of Supreme Court cases shows that this is no simple question. Indeed, as our discussion of California's experience will show, conscientious judges can disagree sharply. What we find troubling is not that a court can arrive at the wrong judgment in a hard case, but that so many courts have avoided exercising judgment altogether, and on a question of life and death.

A. *Reflective Reading*

A small number of courts recognize the problem of the inadvertent actual killer, as well as the ambiguity of *Enmund* and *Tison* on that question, and take into consideration the underlying justifications of the Eighth Amendment. This interpretive approach leads these courts to demand that even an actual killer act with culpability with respect to the victim's death.

Shortly after the *Enmund* decision, the California Supreme Court was called upon to interpret its meaning in *Carlos v. Superior Court*.[230] In this case, the court construed a popular initiative imposing capital punishment for felony murder to require intent to kill for "all defendants—actual killers and accomplices alike."[231] The court in *Carlos* was uncommonly astute in recognizing the problem of the inadvertent actual killer, even though the defendant in the case was merely an accomplice.[232] "[The statute's] application to an actual killer who did not intend to kill would present a close and unsettled constitutional question."[233] The court considered at length the discussion in *Enmund* of culpability—both as a doctrinal requirement and as a theoretical justification for capital punishment. The court perceptively noted, "The reasoning of [*Enmund*] . . . raises the question whether the death penalty can be imposed on anyone who did not intend or contemplate a killing, even the actual killer," and stated that with respect to deterrence and retribution "there is no basis to distinguish the killer from his accomplice" if both lacked culpability.[234] It called the inadvertent actual killer problem a "substantial and yet unsettled constitutional issue,"[235] and it concluded that because any test that allowed for execution of an unintentional

230 Carlos v. Superior Court, 672 P.2d 862, 875 (Cal. 1983).

231 *Id.* at 877.

232 *Id.* at 875 ("Defendant did not kill, did not attempt to kill, and was not present at the time of the killing. Nothing in the record suggests that he intended the death of Jennifer Slagle or any other person. The most that could be said concerning defendant's culpability for Jennifer's death is that defendant knew his partner was armed, and may have contemplated that in an unexpected confrontation Perez would shoot and someone might be killed.").

233 *Id.* at 873.

234 *Id.* at 875.

235 *Id.*

killing did not advance the underlying justifications of punishment (and did not rationally narrow the class of death-eligible defendants), it would be unconstitutional.[236]

Also shortly after *Enmund*, the Eleventh Circuit decided *Adams v. Wainwright*,[237] which involved the following facts: "In the course of a robbery at the victim's home, Adams beat [the victim] senseless with a firepoker."[238] The victim languished for a day and then died.[239] In sentencing Adams to death, the judge found the aggravating circumstance that the killing was "especially heinous, atrocious, or cruel," because the defendant beat the victim "past the point of submission and until his body was grossly mangled."[240] Nevertheless, the defendant challenged his resultant death sentence for felony murder because there was no specific finding of intent to kill, as required by *Enmund*.[241] The court, however, distinguished *Enmund* not only on the ground that Adams actually killed, but also that he was more culpable:

> The Supreme Court held the death penalty disproportionate to Enmund's culpability, reasoning that he personally "did not kill or attempt to kill" or have "any intention of participating in or facilitating a murder." Here Adams personally killed his victim, savagely beating him to death. Adams acted alone. He is fully culpable for the murder.[242]

Thus, while the Florida courts had made no explicit finding of culpability, the Eleventh Circuit did test the sentence against the demands of *Enmund*.

Following *Wainwright* in 1983 was *Ross v. Hopper*, another Eleventh Circuit case.[243] During a home invasion, the defendant apparently shot and killed a police officer who answered a call from the house.[244] Ross was convicted of felony murder, without any specific finding that he had killed, attempted to kill, or intended to kill.[245] This was the basis of his *Enmund* challenge. The court rejected this, noting the culpability of the defendant:

> [T]he individual culpability of appellant Ross is significantly greater than the culpability of the defendant in *Enmund*. There is sufficient evidence in the record to support a finding that Ross not only contemplated that lethal force

236 *Id.* at 876 ("We doubt that a screening device which included those who killed accidentally, while excluding some intentional killers, would meet the United States Supreme Court's test.")

237 709 F.2d 1443 (11th Cir. 1983).

238 *Id.* at 1445.

239 *Id.*

240 *Id.* at 1447 (quoting Adams v. State, 341 So. 2d 765, 769 (Fla. 1977)).

241 *Id.* at 1446.

242 *Id.* at 1447 (citation omitted) (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

243 716 F.2d 1528 (11th Cir. 1983).

244 *Id.* at 1531.

245 *Id.* at 1532.

> might be employed during the robbery and hence possessed an intent to kill, but that he actually committed the murder himself.[246]

While the court noted that the defendant "actually killed" the victim, it still examined the "individual culpability of the defendant, as did the Supreme Court in *Enmund*."[247]

In the year following *Ross*, the Wyoming Supreme Court decided *Engberg v. State*—another example (albeit a complicated one) of the reflective reading.[248] In *Engberg*, the defendant intentionally shot a robbery victim and the victim died.[249] The defendant argued that a finding of intent to kill was required under *Enmund*. The court distinguished *Enmund* as inapplicable to actual killers and non-accomplices, thus initially staking out what might seem like a mechanical interpretation.[250] However, immediately after this, the court adverted to general Eighth Amendment principles and assessed the defendant's culpability anyway, even citing to *Enmund*:

> In giving individualized consideration to the culpability of Engberg, following the mandates in *Woodson v. North Carolina*, 428 U.S. 280 . . . (1976); *Lockett v. Ohio*, 438 U.S. 586 . . . (1978); and *Enmund v. Florida*, [458 U.S. 782 (1982)], Engberg's eligibility for capital punishment is sustained on the basis of his personal responsibility and moral guilt. His conduct satisfies the "two principal social purposes" of the death penalty "retribution and deterrence of capital crimes by prospective offenders." [*Enmund*, 458 U.S. at 798], quoting *Gregg v. Georgia*, 428 U.S. 153 . . . (1976).[251]

In *Engberg*, then, the court denied that *Enmund*'s requirement of intent to kill applied to a robber who intentionally and fatally shot a victim, but it nevertheless applied a requirement of culpability drawn from *Enmund* and other Eighth Amendment cases.

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246 *Id.* at 1532–33 ("Ross was seen standing in the dining room armed with Stanford's .32 caliber pistol seconds before the shooting. Witnesses testified that two rounds from Meredith's shotgun were fired, followed immediately by a pistol shot. Meredith's body was found in the adjoining kitchen shot through the chest with a single bullet at close range. Ballistics tests later revealed that the bullet was fired from the same .32 caliber pistol seen in Ross' possession seconds before the shooting. Shortly thereafter Ross told his brother Theodore that he had shot a policeman and that the gun of his accomplice had misfired. He also told another witness that he thought he had killed a policeman." (citing Ross v. State, 211 S.E.2d 356, 358 (Ga. 1974))).

247 *Id.* at 1533.

248 686 P.2d 541 (Wyo. 1984).

249 *Id.* at 544.

250 *Id.* at 551 ("The Supreme Court of the United States there held that a capital sentence could not be imposed upon an accomplice convicted under a felony murder theory if the accomplice 'does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.' Engberg in this instance did kill himself, and he would qualify for capital punishment under the holding in *Enmund v. Florida*. Furthermore, *Enmund v. Florida* is an accomplice case, not a case involving a principal. In our view it has no application to a case in which the defendant is the principal who accomplished the fatal act." (citations omitted) (first citing Enmund v. Florida, 458 U.S. 782, 795–99, (1982); and then citing Osborn v. State, 672 P.2d 777 (Wyo. 1983))).

251 *Id.*

In 1985, another jurisdiction approached the actual killer question reflectively: Delaware. In *Whalen v. State*, the defendant raped a very elderly victim and strangled her to death.[252] He argued that the Eighth Amendment required proof of intent to kill (recklessness had already been found, as this was required for guilt).[253] The court distinguished *Enmund* because it did not involve an actual killer; however, this was not because of some mechanical interpretation given to the words "actually killed"— instead the court assumed that actual killers almost always have culpability, and therefore their execution serves the purposes of punishment.[254] In discussing retribution, the court said: "From Whalen's actions there can be little doubt of his intentions and expectations. His culpability for the death that resulted here is far different from Enmund's."[255] Since the facts here clearly evidenced intent to kill, there was no problem under *Enmund*:

> [T]he death penalty is not a grossly disproportionate and excessive punishment for a defendant found guilty of felony murder, who actually killed his victim *under the circumstances present here*. We note that such a conclusion comports with the requirement that a defendant's punishment "be tailored to his personal responsibility and moral guilt."[256]

The court's position was not that actual killing obviates inquiry into culpability—instead, it was that the facts of an actual killing often provide evidence of culpability.

Another 1985 case, this one from the Fifth Circuit, employed a similarly reflective reading of *Enmund*.[257] In *Kirkpatrick v. Blackburn*, the defendant stabbed a robbery victim, inflicting a mortal wound, but before the victim could bleed to death he was shot fatally in the head (by a co-felon).[258] The defendant argued that a finding of intent was required but that the jury in his case was charged to find either specific intent to kill *or* intent to "inflict great bodily harm."[259] Essentially, he claimed that his knife attack was only committed with intent to "inflict great bodily harm," while the co-felon's gunshot was the actual cause of death. Tellingly, the court rejected any distinction between killers and those who culpably aid in the killing: both were principals under Louisiana law.[260] The mental element of murder in Louisiana was intent to inflict great bodily harm, which both assailants exhibited. As for causal responsibility, it is true that where one assailant inflicts a mortal wound and a second independent assailant inflicts an immediately lethal wound, the subsequent independent act breaks the chain of causal responsi-

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252 492 A.2d 552 (Del. 1985).

253 *Id.* at 563.

254 *Id.* at 564–65.

255 *Id.* at 564.

256 *Id.* at 565 (emphasis added) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

257 Kirkpatrick v. Blackburn, 777 F.2d 272 (5th Cir. 1985).

258 *Id.* at 275.

259 *Id.* at 287.

260 *Id.* at 287–88.

bility.[261] But where two assailants collaborate in an attack with deadly weapons, each owns the other's actions and both are causally responsible. Thus, because Kirkpatrick was a participant in the fatal assault, he *was* causally responsible for the death:

> When a defendant personally intends to inflict great bodily harm and succeeds in producing death, his personal involvement and individual culpability is sufficiently established that the capital sentence is not cruel and unusual.
>
> . . . The knife used in the assault was buried to the hilt in the victim's chest and the victim had severe abdominal wounds. Both wounds were potentially lethal. The gunshot was but the coup de grace and Kirkpatrick cannot be exonerated even if he did not pull the pistol trigger.[262]

Anticipating *Tison*, this case illustrates that when an accomplice in a felony (robbery, in this case) is also an accomplice in the killing, the distinction between accomplice and actual killer is unhelpful. The only question that should matter for Eighth Amendment purposes is whether the defendant is sufficiently culpable. The court concluded that Kirkpatrick's capital sentence satisfied *Enmund*—not because he was causally responsible, but because he was sufficiently culpable. He did "intend . . . that lethal force would be employed,"[263] indeed he intentionally used it[264] and he "contemplated that life would be taken."[265] In saying that an intent to inflict great bodily harm was a sufficient level of culpability for a felony murderer who killed or was a principal in the killing,[266] the court implied that *Enmund* was satisfied by a mental state of recklessness with respect to death for defendants causally responsible for the death, since great bodily harm poses an obvious danger of death.

A 1992 Illinois case, *People v. Ramey*, also represents a reflective reading of *Enmund*.[267] In *Ramey* the defendant was convicted of felony murder and sentenced to death when he fatally stabbed a victim during a home invasion robbery.[268] His death sentence was overturned by the Illinois Supreme Court, though, for the court's failure to instruct the jury to find intent to kill.[269] Although the defendant was himself the killer, the court cited *Enmund*, reasoning that:

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261 BINDER, *supra* note 27, at 208.

262 *Kirkpatrick*, 777 F.2d at 288.

263 *Enmund*, 458 U.S. at 797.

264 *Kirkpatrick*, 777 F.2d at 288.

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

266 *Id.* The Court's complicated formulation was: "When the defendant himself acts with the intention of inflicting great bodily harm *and* either killed the victim or was a principal in his killing *and* was engaged in or was a principal in the commission of robbery, he has acted with personal culpability." *Id.* at 287–88.

267 603 N.E.2d 519 (Ill. 1992).

268 *Id.* at 522.

269 *Id.* at 540.

"A certain degree of culpable conduct is necessary, under the Federal Constitution, to warrant imposition of the death penalty . . . ." An essential element which the State was required to prove in order to establish the existence of the sixth aggravating factor—a culpable mental state—was not included in the instruction to the jury.[270]

Here, the court interpreted *Enmund* to mean that culpability with respect to death is required—even for an actual killer.[271]

The 1996 Eighth Circuit case, *Reeves v. Hopkins*,[272] discussed above as the precursor to the Supreme Court case of *Hopkins v. Reeves*,[273] also employed a reflective reading of *Enmund* and *Tison*. In *Reeves*, the defendant—in an alcohol- and peyote-induced haze—stabbed one victim seven times with a kitchen knife, and also stabbed a second victim.[274] The defendant argued that intent to kill was required, and the court agreed:

> [T]he *death penalty* cannot be imposed on a defendant without a showing of some culpability *with respect to the killing itself*. *Enmund v. Florida*, 458 U.S. 782, 801 . . . (1982). Before a state can impose the death penalty, there must be a showing of both major participation in the killing and reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158 . . . (1987). *Enmund* and *Tison* are thus independent constitutional requirements of the mental culpability a state must prove if it is to impose a *death sentence*.[275]

Thus, the court concluded that the combination of *Enmund* and *Tison* implied that a killer must act with at least reckless indifference to the victim's death to be capitally punished. The court seemed attuned to the underlying purposes of the Eighth Amendment in promulgating this interpretation, and noted that "the facts of this case . . . indicate the need for particular care that Reeves's 'punishment . . . be tailored to his personal responsibility and moral guilt.'"[276]

Perhaps most emblematic of the reflective approach to the inadvertent killer problem is a 1998 decision of the U.S. Court of Appeals for the Armed Forces. The case at issue, *Loving v. Hart*,[277] was a collateral attack on the death sentence upheld by the Supreme Court in the previously discussed *Loving v. United States*.[278] It concerned the military's felony murder offense:

> Any person . . . who . . . unlawfully kills a human being [while] . . . engaged in the perpetration or attempted perpetration of [a predicate fel-

270 *Id.* at 539 (citation omitted) (quoting People v. Jimerson, 535 N.E.2d 889, 905 (Ill. 1989)).

271 *Id.*

272 Reeves v. Hopkins, 102 F.3d 977, 978 (8th Cir. 1996).

273 *See supra* subection II.B.4; *see also* Hopkins v. Reeves, 524 U.S. 88, 99–100 (1998) (overturning the lower court decision because it read *Enmund* and *Tison* as affecting guilt-stage liability for felony murder).

274 *Reeves*, 102 F.3d at 978.

275 *Id.* at 984.

276 *Id.* at 985 (second alteration in original) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

277 47 M.J. 438 (C.A.A.F. 1998).

278 517 U.S. 748 (1996); *see supra* subsection III.B.3.

> ony] . . . is guilty of murder, and . . . shall suffer death or imprisonment for life as a court-martial may direct.[279]

This provision appears to permit the death penalty for felony murder even without culpability with respect to the death. The claim in *Loving v. Hart* was that one of the aggravating factors—that the offender be the "actual perpetrator of the killing"—was unconstitutional, as it required no finding of intent to kill or recklessness.[280] The facts of Loving's crime clearly evidenced an intent to kill—he entered a taxi, placed a pistol to the driver's head, and shot the driver fatally after he was unable to produce money—but Loving contended that the lack of an intent requirement made the aggravator facially unconstitutional.[281]

In considering this argument, the court of appeals directly addressed the constitutional problem of the inadvertent actual killer, and recognized that the Supreme Court had not clearly resolved the question: "Neither *Enmund* nor *Tison* involved an actual killer. Thus, left unanswered after *Enmund* and *Tison* is the question whether a person who 'actually killed' may be sentenced to death absent a finding that the person intended to kill."[282] The court took seriously the Justices' questions at the oral argument in *Loving v. United States*, especially Justice Scalia's skepticism,[283] and also noted Justice White's earlier conclusion that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim."[284] These data points indicated to the court of appeals that "when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life."[285] The court concluded that "the phrase, 'actually killed,' as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life."[286]

The court found anomalous the fact that the military's murder statute made felony murder death-eligible, but not unpremeditated intentional murder:[287]

> This . . . would allow the death penalty for the person who unintentionally kills by firing through the ceiling during a robbery in an effort to scare the victim or someone whose intended victim dies of a heart attack during a

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279 *Loving*, 517 U.S. at 753–54 (quoting 10 U.S.C. § 918 (1982)).

280 *Loving*, 47 M.J. at 441.

281 *Id.*

282 *Id.* at 443 (citation omitted).

283 *Id.*; *see supra* notes 208–13 and accompanying text.

284 *Loving*, 47 M.J. at 443 (quoting Lockett v. Ohio, 438 U.S. 586, 624 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment)).

285 *Id.*

286 *Id.* (citation omitted).

287 *See id.* at 444.

> robbery, but it would not permit the death penalty for a person who, without premeditation, intentionally kills.[288]

And as so interpreted, the statute would violate the constitutional requirement that the class of death-eligible offenders be narrowed in the right way, since "there [must be] a rational connection between the level of culpability and the narrowing process. In short, only the most culpable should be death eligible."[289]

Loving v. Hart represents the best effort by a lower court to address the conundrum of the inadvertent actual killer—not only to grapple with the plain language of the *Enmund*-*Tison* line of cases, but also to square the application of their test with its underlying justifications. For in felony murder cases, the court wrote, "the culpability requirement is part and parcel of the narrowing process."[290]

B. *Mechanical Reading: Actual Killing as Independently Sufficient Under* Enmund *and* Tison

While the few courts discussed above interpreted the *Enmund*-*Tison* test in a reflective way, every other court has done so mechanically. The first category of these mechanical readings involves cases holding that the test is satisfied by even an inadvertent actual killer. Courts employing this interpretation simply take the "or" in the test at face value, setting up the independently sufficient category of "actual killer," the plain meaning of which calls for no assessment of culpability. This approach presumes that *Enmund* and *Tison* ruled that the Eighth Amendment permits execution of all killers as proportionate, and thereby places those cases in contradiction to other decisions like *Gregg*, *Lockett*, *Zant*, and *Roper* that condition proportionality on careful consideration of culpability. It reduces *Enmund* and *Tison* to formulaic rules, rather than considering the Eighth Amendment principles that inform their reasoning.

The first court to employ such a mechanical reading was the high court in South Carolina in 1982 (the same year *Enmund* was decided).[291] In *State v. Koon*, the defendant kidnapped and strangled the victim to death.[292] The defendant argued to the state supreme court that *Enmund* required intent to kill, but this was quickly dismissed by the court:

> *Enmund* held that the Eighth and Fourteenth Amendments prohibit imposing the death penalty upon one who aids and abets in a felony murder but who does not himself kill, attempt to kill, or intend to kill the victim. Because appellant admitted he killed the victim, *Enmund* is not dispositive here.[293]

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288 *Id.*

289 *Id.*

290 *Id.*

291 *See* State v. Koon, 298 S.E.2d 769 (S.C. 1982).

292 State v. Koon, 328 S.E.2d 625 (S.C. 1985).

293 *Koon*, 298 S.E.2d at 774.

While there was ample evidence of intent to kill, and of recklessness and depraved indifference, the court chose instead to find that *Enmund* was satisfied simply because the defendant "killed the victim."[294]

The next representation of this version of the mechanical reading came the year after *Enmund* in 1983, with the Alabama case *Ex parte Dobard*.[295] In *Dobard*, the defendant shot a police officer at close range during a traffic stop while fleeing a robbery.[296] He raised an *Enmund* claim, which the court construed to mean that the death sentence was prohibited where "no evidence was offered to show that the defendant actually killed or intended to kill anyone."[297] The court dismissed this in only two sentences: "Overwhelming evidence of record shows that Dobard pulled the trigger, firing the shots that killed Officer Sudduth. Consequently, we find no merit to petitioner's contention that *Enmund* . . . precludes imposition of the death penalty in this case."[298] Pulling the trigger and firing the shots—actually killing—is alone enough, and consideration of the triggerman's culpability becomes irrelevant. The "or" between "actually killed" and "intended to kill" is determinative.

California, too, has adopted such a reading of *Enmund* and *Tison*. California earlier employed a reflective reading (in dicta) in *Carlos v. Superior Court*,[299] but this was abandoned for a mechanical reading only four years later (shortly after *Tison*). The California Supreme Court overruled *Carlos* in *People v. Anderson*,[300] where Justice Mosk wrote that "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved."[301] The court noted that its *Carlos* opinion was in accord with academic commentaries interpreting *Enmund*, as well as with Justice White's statement in *Lockett* that capital punishment requires "conscious purpose."[302] Yet Justice Mosk concluded that the decisions in *Cabana* and *Tison* showed these interpretations to have been mistaken.[303]

First, the following pronouncement in *Cabana* seemed to hold special weight for Justice Mosk: "If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment is not violated by his or her execution."[304] Justice Mosk wrote, "In these words the court

294 *Id.*

295 *Ex parte* Dobard, 435 So. 2d 1351 (Ala. 1983).

296 *Id.* at 1353.

297 *Id.* at 1357 (citation omitted).

298 *Id.* (citation omitted).

299 672 P.2d 862 (Cal. 1983). This was in dicta (which has been discussed above), since *Carlos* involved an accomplice, and not an actual killer.

300 742 P.2d 1306 (Cal. 1987).

301 *Id.* at 1331.

302 *Id.* at 1326.

303 *See id.* at 1326–27.

304 *Id.* at 1326 (alteration in original) (emphasis omitted) (quoting Cabana v. Bullock, 474 U.S. 376, 386 (1986), *abrogated by* Pope v. Illinois, 481 U.S. 497 (1987)).

declared that the Eighth Amendment did not require intent to kill."[305] It is true that this reformulation makes explicit the negative pregnant implicit in *Enmund*'s holding that the Eighth Amendment forbids execution of one who has not killed, attempted to kill, nor intended to kill. Yet it does not reveal whether in this context, "killed" should be read as excluding "attempted to kill" and "intended to kill," or as including them.

Justice Mosk also read *Tison* as "impliedly declar[ing] its disagreement with our reading of *Enmund*."[306] Why? Because the *Tison* Court wrote that "the California Supreme Court in [*Carlos*] construed its capital murder statute to require a finding of intent to kill," but "only did so in light of perceived federal constitutional limitations stemming from our then recent decision in *Enmund*."[307] For the California court in *Anderson*, the word "perceived" must have been pejorative—if "perceived," then not "real." Even accepting that "perceived" means "misperceived," the incorrect perception the Supreme Court was alluding to was that *Enmund* required intent to kill as a constitutional floor—the whole point of *Tison* was to lower that floor to a baseline of recklessness. *Anderson* reads *Tison*'s implication that intent is not necessary to mean that *no* culpability is necessary, but it does so only by ignoring that case's larger holding.

The *Anderson* rule remains law, but the California Supreme Court did discuss the rule in light of new Supreme Court caselaw in 2013. In *People v. Contreras*, the defendant killed a convenience store clerk with a shotgun during a robbery. Under the *Anderson* rule no finding of intent to kill was required.[308] The defendant raised the same challenge made years before in *Anderson*, and the court rejected it by retreating to the standard form of the mechanical reading:

> *Enmund*'s limits on death eligibility and sentencing are "categorical." When such rules are stated in terms of the circumstances under which capital punishment is allowed, no constitutional violation occurs where the defendant "*in fact killed*, attempted to kill, or intended to kill."
>
> Accordingly, in the context of first degree felony murder, we have not conditioned capital punishment upon an intent to kill for actual killers.[309]

It may be true that the Court in *Cabana* viewed the *Enmund* rule as establishing a category of defendants who "may not be sentenced to death."[310] It does not follow that it thereby established three independent categories of defendants—including nonculpable killers—who may be sentenced to death with "no constitutional violation."

The mechanical interpretation evident in the *Anderson* case is also present in various Oklahoma decisions. Oklahoma has had several cases that

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305 *Id.* at 1327.

306 *Id.*

307 Tison v. Arizona, 481 U.S. 137, 153 n.8 (1987).

308 People v. Contreras, 314 P.3d 450, 457 (Cal. 2013).

309 *Id.* at 480 (citations omitted) (quoting *Cabana*, 474 U.S. at 386, *abrogated by Pope*, 481 U.S. 497).

310 *Cabana*, 474 U.S. at 386.

stemmed from a child abuse murder statute that functions similarly to a felony murder rule.[311] The offense reads as follows: "A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person."[312]

In *Fairchild v. State*,[313] the court employed the mechanical reading to hold that this statute requires no intent for an actual killer. The Oklahoma Court of Criminal Appeals described the facts succinctly: "Three-year-old Adam Broomhall, who weighed 24 pounds, died as a result of brain damage caused when he was thrown against the vertical surface of the folded-down wing of a drop-leaf table by his mother's live-in boyfriend, Richard Stephen Fairchild."[314] The autopsy revealed evidence of twenty-six separate blows.[315] Fairchild challenged his death sentence in part by arguing that the child abuse murder statute was unconstitutional—that "*Tison* . . . establishes the least culpable mental state sufficient for death eligibility as [recklessness]."[316] The court, however, quickly distinguished *Tison*. "*Tison* is a felony-murder case in which the defendant himself did not kill. This Court has found *Tison* does not apply to a defendant who, by his own hand, does kill."[317] Moreover, the case that does "apply" to an actual killer, *Enmund*, finds that category of cases to be constitutional: "This holding is consistent with the Supreme Court's holding in *Enmund* that the Eighth Amendment 'requires that he himself [a death-sentenced defendant] have actually killed, attempted to kill, or intended that lethal force be used.'"[318] Again, the "or" does all the work, and "actually killed" is read to mean simply causing death.[319]

Next, consider the Tennessee case *State v. Godsey*.[320] In *Godsey*, the defendant was convicted of felony murder with a predicate felony of aggravated child abuse, after he threw a seven-month old infant onto a tile floor, causing a brain injury that eventually led to death.[321] The defendant was charged with felony murder predicated on aggravated child abuse.[322] He

311 *See, e.g.*, Abshier v. State, 28 P.3d 579 (Okla. Crim. App. 2001), *overruled on other grounds by* Jones v. State, 134 P.3d 150 (Okla. Crim. App. 2006); Fairchild v. State, 998 P.2d 611 (Okla. Crim. App. 1999), *as corrected on denial of reh'g* (May 11, 2000).

312 OKLA. STAT. tit. 21, § 701.7(C) (2016).

313 *Fairchild*, 998 P.2d at 611.

314 *Id.* at 615.

315 *Id.* at 616.

316 *Id.* at 630 (citation omitted).

317 *Id.* (citing Wisdom v. State, 918 P.2d 384, 395 (Okla. Crim. App. 1996)).

318 *Id.* (alteration in original) (quoting Cabana v. Bullock, 474 U.S. 376, 390 (1986), *abrogated by* Pope v. Illinois, 481 U.S. 497 (1987)).

319 However, the acts and causal process leading to death were clearly established, and the prolonged, escalating violence clearly shows recklessness and depraved indifference to human life. *See id.* at 616. Had the court accepted the applicability of *Tison* to actual killers, its requirement of reckless indifference could easily have been satisfied.

320 60 S.W.3d 759 (Tenn. 2001).

321 *Id.* at 767.

322 *See id.* at 764.

argued that the intent required for the predicate felony—knowing infliction of serious bodily injury—did not entail recklessness with respect to death as required under *Tison*.[323] The court dismissed this argument on the now familiar ground that *Tison* applied only to accomplices: "*Tison* involved defendants who themselves did not kill the victims. Here the defendant's own actions killed the victim. In [*Enmund*], the United States Supreme Court approved the imposition of the death penalty on the actual killer in a felony murder."[324] It is certainly not true that Enmund himself was the actual killer, so the court must have been referring to the formulaic three-part test, and it must have employed the mechanical reading. Most troubling about *Godsey*, though, is the court's clearly mistaken view that the *Tison* threshold of recklessness with respect to death can somehow be met by the culpability with respect to the conduct of the predicate felony: "[T]he culpable mental state for aggravated child abuse, 'knowing,' is a higher standard than 'reckless indifference.' Therefore, the Court of Criminal Appeals correctly concluded that both the statutory elements and the facts of this case establish reckless indifference."[325] But *Tison* demands recklessness with respect to *death*, not recklessness with respect to serious injury.[326] Still, the court might reasonably have argued that knowing infliction of serious bodily injury to a child implies reckless indifference to human life, and the court, to its credit, did observe that given the grievous nature of the head injury, "the facts of this case establish reckless indifference."[327]

Turning to federal courts, a 2003 Tenth Circuit case typifies the now prevailing mechanical reading: *Workman v. Mullin*.[328] In *Workman*, the evidence showed that the defendant caused three blunt head injuries to a two-year-old child, equivalent in force to the fall from a two- or three-story building.[329] The defendant was convicted under Oklahoma's child abuse murder statute, on a theory of willful or malicious use of unreasonable force, and was sentenced to death on the basis of the aggravating circumstance that the killing was "especially heinous, atrocious, or cruel."[330]

Workman challenged the constitutionality of his death sentence by citing *Enmund* and *Tison*.[331] The court could have easily answered this objection by finding recklessness based on the above facts. Instead, however, the court concluded that "Workman's crime falls into the category of cases under *Enmund* in which a felony murderer has 'actually killed' his victim."[332] This conclusion meant that the inquiry was over. "The significance of falling into

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323 *Id.* at 773–74.

324 *Id.* at 773 (citation omitted).

325 *Id.* at 773–74 (citation omitted).

326 *See supra* notes 147–48 and accompanying text.

327 *Id.* at 774.

328 342 F.3d 1100 (10th Cir. 2003).

329 *Id.* at 1104.

330 *Id.* at 1105 (quoting OKLA. STAT. tit. 21, § 701.12(4) (2016)).

331 *Id.* (first citing Tison v. Arizona, 481 U.S. 137, 157 (1987); and then citing Enmund v. Florida, 458 U.S. 782, 798 (1982)).

332 *Id.* at 1111 (citing *Tison*, 481 U.S. at 150).

Enmund's category of when a felony murderer has 'actually killed' his victim is that the Eighth Amendment's culpability determination for imposition of the death penalty has then been satisfied."[333] The circuit court took this view because it saw the test as "carefully formulated," given its frequent repetition: "The phrase 'actually killed, attempted to kill, or intended to kill' or variations thereof is repeated at least nine times in *Enmund*, is repeated at least three times in *Tison*, and is repeated at least twenty times in *Cabana v. Bullock*."[334] The circuit court also included a citation to *Cabana* for its proposition, with a telling use of an ellipsis: "*Cabana*, 474 U.S. at 386, 106 S.Ct. 689 ('If a person sentenced to death in fact killed . . . the Eighth Amendment itself is not violated by his or her execution.')."[335] The full sentence in *Cabana* reads, "If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution."[336] Thus, nothing mattered for the Tenth Circuit after the comma; the court read the plain language of "actually killed" to say nothing about culpability.

An opinion from the Eighth Circuit agreed with this version of the mechanical reading: *Palmer v. Clarke*, from 2005.[337] This was a later proceeding of the Nebraska case of *State v. Palmer*, in which the defendant bound and then strangled a coin dealer to death during a robbery of the dealer's house.[338] While the facts seemed to show that this was an intentional killing, under state law the conviction and death sentence did not require any finding of culpability. The court denied that such a finding was necessary, because the "accurate statement of the Supreme Court's test" in *Enmund* and *Tison* was that execution was unconstitutional "only when a defendant does not himself kill, attempt to kill, or intend that a killing take place."[339] And, in keeping with the mechanical reading, the court viewed the first clause as an independently sufficient category: "Because the Nebraska Supreme Court, as well as the jury . . . determined that the record in this case showed that Palmer alone killed Zimmerman . . . , the death penalty may constitutionally be imposed upon Palmer."[340] To this court, conduct matters, not culpability.

Most recently, Arizona has also adopted this version of the mechanical reading. In the 2012 case of *State v. Joseph*, a killing took place during a domestic dispute in which the defendant broke into his estranged wife's home and repeatedly shot her, her boyfriend, and her fourteen-year-old nephew, killing the nephew.[341] The evidence clearly showed at least reckless

333 *Id.* (citing Cabana v. Bullock, 474 U.S. 376, 386 (1986), *abrogated by* Pope v. Illinois, 481 U.S. 497 (1987)).

334 *Id.* (citations omitted).

335 *Id.* at 1111–12 (alteration in original).

336 *Cabana*, 474 U.S. at 386.

337 408 F.3d 423 (8th Cir. 2005).

338 399 N.W.2d 706, 712–13 (Neb. 1986) (per curiam).

339 *Palmer*, 408 F.3d at 441.

340 *Id.*

341 283 P.3d 27, 29 (Ariz. 2012) (en banc).

indifference to human life—indeed, all but one juror who found felony murder also found premeditation and intent to kill.[342] However, Arizona provides an *Enmund-Tison* jury instruction during capital sentencing in cases only where the defendant is an accomplice in a felony murder, and the court denied that such an instruction was required for actual killers:

> The Eighth Amendment does not allow the death penalty to be imposed for felony murder unless the defendant "himself kill[s], attempt[s] to kill, or intend[s] that a killing take place or that lethal force will be employed," *Enmund v. Florida*, 458 U.S. 782, 797 . . . (1982), or is a major participant in the crime and acts with reckless indifference, *Tison v. Arizona*, 481 U.S. 137, 157–58 . . . (1987). Joseph does not dispute that he acted alone in killing Tommar. Because *Enmund* allows imposition of capital punishment on a defendant who actually kills a victim in the course of committing another felony, the Eighth Amendment did not require that an *Enmund/Tison* instruction be given.[343]

The court takes the "actually killed" category as independently sufficient to meet the constitutional requirements, without any consideration of mens rea, and it fails to mention or recognize the Eighth Amendment's underlying justifications.

C. Mechanical Reading: Enmund *and* Tison *Are Inapplicable to Actual Killers*

While the above courts held that *Enmund* and *Tison* were not violated in cases of inadvertent actual killers, another group treats *Enmund* and *Tison* as entirely inapplicable in actual killing scenarios. In one sense, this reading is better: it acknowledges that *Enmund* and *Tison* left the question of inadvertent killers open. Yet in another sense it is even worse: it presumes that if *Enmund* and *Tison* do not forbid the execution of actual killers, the Eighth Amendment has nothing to say about such executions.

The first court employing this version of the mechanical reading was the Court of Criminal Appeals of Texas in 1984 (two years after *Enmund*). In *Stewart v. State*, the defendant shot the victim in the head twice during a burglary.[344] The defendant argued on appeal that *Enmund* required proof of intent to kill, but this argument was rejected because *Enmund* did not involve the actual killer: "We are not faced with the *Enmund* situation in the instant case . . . . Because there is evidence which shows appellant was the triggerman, we hold that *Enmund v. Florida* does not apply to the instant case."[345] Only in cases "where the defendant was clearly not the triggerman" must a court take into account "the defendant's culpability."[346] Instead of finding that the fact of a gunshot to the head clearly showed intent to kill and premeditation, the court instead distinguished *Enmund* entirely.

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342 *Id.* at 30–31.

343 *Id.* at 30 (first, second, and third alterations in original) (citation omitted) (citing Enmund v. Florida, 458 U.S. 782, 797–98 (1982)).

344 686 S.W.2d 118 (Tex. Crim. App. 1984) (en banc).

345 *Id.* at 123.

346 *Id.*

The next court to adopt such a reading was the Supreme Court of Nebraska. In *State v. Rust*, the defendant shot several police officers and a civilian who came to their aid while in flight from a robbery.[347] Rust appealed his death sentence, arguing that capital felony murder required intent to kill or premeditation, and cited *Enmund* for support.[348] The court rejected this argument with the following reasoning:

> *Enmund* held only that the death penalty cannot be imposed on one who aids and abets a felony in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed. . . . [T]he trial evidence is that such is not the situation before us.[349]

While the evidence warranted the conclusion that Rust both killed and intended to kill, the verdict of felony murder did not require a finding of intent to kill. The court apparently found *Enmund* inapplicable because Rust killed, irrespective of intent. In any case, the *Rust* decision was so read in the later decision of *State v. Palmer*.[350]

The Eighth Circuit has at times interpreted the *Enmund-Tison* test in a similarly mechancial way. In the court's first encounter with the question—a 1994 case entitled *Murray v. Delo*—the defendant participated in a robbery involving the deaths of victims, but he claimed that he did not kill or intend to kill any of them.[351] Other evidence indicated that he shot the victims in the back.[352] He raised an *Enmund-Tison* claim based on his version of the facts, but this was quickly rejected by the court: "We believe that his reliance on these cases is misplaced. *Enmund* and *Tison* are felony-murder cases which apply in situations in which the defendant was not the shooter. As stated above, the evidence at trial indicated that the petitioner actually committed at least one murder, and perhaps both."[353] What is important for our purposes is not that the defendant's legal challenge was based on an entirely different version of the facts, but that the court immediately assumed that neither an *Enmund* nor a *Tison* analysis was required in the case of the actual killer.

Such reasoning was also employed by the Oklahoma Court of Criminal Appeals in interpreting the state's child abuse murder statute (discussed earlier) in *Wisdom v. State*.[354] The victim, a three-year-old child, died of a subdural hematoma, with medical evidence indicating that the fatal wound could have resulted from an open-handed blow or from shaking.[355] The defendant challenged the child abuse law as unconstitutional because it

347 388 N.W.2d 483, 492 (Neb. 1986).
348 *Id.* at 492–93.
349 *Id.* at 493.
350 600 N.W.2d 756, 769 (Neb. 1999).
351 34 F.3d 1367, 1376 (8th Cir. 1994).
352 *Id.*
353 *Id.*
354 918 P.2d 384 (Okla. Crim. App. 1996).
355 *Id.* at 388.

required no intent with respect to the death of the child/victim.[356] In a very brief discussion, the Court of Criminal Appeals distinguished *Enmund* and *Tison* entirely because they did not involve an actual killer:

> Both *Tison* and *Enmund* concerned situations where . . . a person who had not actually caused the injuries resulting in the victim's death, was sentenced to the death penalty. Appellant is the person who actually killed another, not the person who participated in a felony but who did not actually cause or intend to cause the death of another.[357]

For this reason, the "death qualifying language" of *Enmund* and *Tison* ought not be "applied" to anyone who had actually killed.[358]

A second Oklahoma case to consider here is *Abshier v. State*.[359] *Abshier* involved the same child abuse murder statute as in *Wisdom*. Unlike in *Wisdom* though, the facts of *Abshier* more obviously bespeak depraved indifference to human life. The victim was a toddler, and medical evidence indicated nine separate head wounds with most of the skin on the victim's face gone.[360] One medical expert believed the victim's head had been stomped.[361] The court reiterated its position that "the requirements of *Enmund*, [*Cabana*], and *Tison* do not apply [to an actual killer], and we need not determine whether Appellant was a 'major participant in a felony and exhibited reckless indifference to human life'—he was the only participant."[362]

Like Oklahoma, Mississippi has also concluded that *Enmund* and *Tison* are inapplicable to actual killers.[363] In *Evans v. State*,[364] there was no question that the defendant was an actual killer who possessed an intent to kill (he kidnapped, sexually assaulted, and strangled a ten-year-old girl),[365] but

356 *Id.* at 395 ("Appellant argues that the language in *Enmund* and *Tison* strongly indicates that one who kills without an intent to do so or to cause major bodily injury, and who does not knowingly act with reckless indifference to human life, is not constitutionally eligible to receive the death penalty.").

357 *Id.*

358 *Id.*

359 28 P.3d 579 (Okla. Crim. App. 2001), *overruled on other grounds by* Jones v. State, 134 P.3d 150 (Okla. Crim. App. 2006).

360 *Id.* at 587, 591.

361 *Id.* at 591.

362 *Id.* at 608 (citing *Wisdom*, 918 P.2d at 395). The court also cited (and completely misread) *Hopkins v. Reeves* as if it supported its reading of *Enmund* and *Tison*. *Hopkins* held, consistently with *Cabana*, that the *Enmund-Tison* rule, stemming from the Eighth Amendment requirements for punishment, did not alter the substantive criminal law of felony murder in the states. Hopkins v. Reeves, 524 U.S. 88, 99–100 (1998). The *Abshier* court, though, took *Hopkins* to mean that, because *Enmund* created no culpability requirement for guilt, it created no culpability requirement for the Eighth Amendment. *Abshier*, 28 P.3d at 609. This reading is completely backwards. *Hopkins* said only that the culpability required by proportionality did not affect the elements of liability, not that there was no longer any culpability required by proportionality.

363 *See* Evans v. State, 725 So. 2d 613 (Miss. 1997).

364 *Id.*

365 *Id.* at 633.

he challenged the felony murder aggravator[366] as unconstitutional because it required no finding of intent.[367] The Mississippi Supreme Court saw no need to apply *Enmund* and *Tison* because, "unlike the defendants in [those cases], Evans was a major participant in a felony-murder and actually killed his victim."[368]

One final case should be considered in this category—the Tennessee case *State v. Pruitt*.[369] The predicate felony was a robbery, specifically a carjacking.[370] The court summarized the facts as follows:

> Mr. Pruitt ran up behind the older man and pushed him into the car. Although she could not see clearly into the car, it appeared to [the witness] that the two men were "tussling." . . . After about fifteen seconds, she saw Mr. Pruitt throw the older man to the ground, slam the car door, and drive away. When Ms. Pruitt checked on the victim, he was shaking and having trouble breathing and he was bleeding from his nose and both ears.[371]

The victim was a seventy-nine-year-old who later died from his injuries—injuries, perhaps, that would not foreseeably cause death to an average person.[372] The prosecution sought—and the jury found—the aggravating circumstance of a "knowing" killing by one having a "substantial role" in a predicate felony.[373] Thus it may seem that this procedure satisfied the requirements of *Tison* or even *Enmund*, although the presence of "knowledge" on these facts seems dubious. However, the defendant argued that evolving standards of decency precluded execution of an inadvertent actual killer, which he claimed to be.[374] This alternative manner of addressing the inadvertent actual killer problem was rejected, though, in the same way that the other challenges were rejected—because "*Enmund* and *Tison* addressed defendants who were accomplices to, but not perpetrators of, felony murder."[375] This is the mechanical reading, applied in a different way.

D. Mechanical Reading—Reliance on Process Checks

Other courts employing the mechanical reading recognize the inadvertent actual killer problem, yet tolerate it because of their faith in process checks (prosecutorial and jury discretion, mitigation, appellate review, etc.) to prevent execution of inadvertent killers.

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366 MISS. CODE ANN. § 99-19-101(5)(d) (West 2013) ("The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any [enumerated felony].").

367 *Evans*, 725 So. 2d at 682–84.

368 *Id.* at 684.

369 415 S.W.3d 180 (Tenn. 2013).

370 *Id.* at 188.

371 *Id.* at 187.

372 *Id.* at 188, 218.

373 *Id.* at 205.

374 *Id.* at 210.

375 *Id.* at 211–12.

A 1992 case from Tennessee, *State v. Middlebrooks*,[376] is representative. In *Middlebrooks*, the state's high court held that the felony murder statute was constitutional under the Eighth Amendment and the state constitution (which mirrored the federal) even absent a requirement of intent.[377] Like Nebraska, Tennessee took the extreme approach of completely distinguishing *Enmund* and *Tison* when the circumstances involved an actual killer.[378] Although the court recognized that this position was at odds with the Eighth Amendment's underlying concern for culpability, the court put its faith in the appellate review process to prevent unjustified results.[379] "Accordingly, rather than an absolute rule of *per se* disproportionality, this Court has in the past relied on its statutory duty of review . . . to assure that the sentence *in each case* is not disproportionate or excessive."[380] Any irrational selection of felony murderers for execution could be corrected on review, and the risk of such error was not substantial enough to change the rule itself.

Similar reasoning was employed in the 1995 Maryland case of *Brooks v. State*.[381] There, the female defendant, a recovering drug addict who had previously been a victim of sexual abuse, became enraged at a female housemate who she thought had groped her sexually.[382] She bludgeoned her repeatedly with a metal tool until she died, and also wrapped an electrical cord around her neck.[383] The jury convicted her of robbery and felony murder.[384] Brooks challenged her designation as death-eligible without a finding of intent to kill.[385] Specifically, she questioned whether the scheme sufficiently narrowed the class of death-eligible defendants in felony murder cases.[386]

In determining death eligibilty, the court was faced with the question of culpability, given that felony murder requires no "proof of any particular *mens rea* [with respect to death]."[387] The felony murder law made a homi-

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376 840 S.W.2d 317 (Tenn. 1992), *superseded by statute as recognized in Pruitt*, 415 S.W.3d at 180.

377 *Id.*

378 *See id.* at 337 ("[*Enmund* and *Tison*] dealt with the problem of imposing the death penalty in cases of vicarious liability for felony murder, i.e., where an accomplice in the felony, one who did not actually kill the victim, is convicted of murder under the felony murder doctrine and receives the death penalty.").

379 *See id.* at 349 (Drowota, J., concurring in part and dissenting in part).

380 *Id.* at 340 (majority opinion).

381 655 A.2d 1311 (Md. Ct. Spec. App. 1995), *abrogated by* Winters v. State, 76 A.3d 986 (Md. 2013).

382 *Id.* at 1313.

383 *Id.*

384 *Id.* at 1314.

385 *Id.* at 1316 ("[A]ppellant contends that her entire sentencing proceeding was tainted because the judge improperly concluded that she was death-eligible," and that therefore the court needed to "consider the constitutional validity of Maryland's capital sentencing scheme."). Brooks was not sentenced to death, but challenged her designation as death-eligible. *Id.* at 1323.

386 *See id.* at 1321.

387 *Id.*

cide murder even if "the killing may have been . . . merely accidental," and the trial judge seemed attuned to this problem.[388] The Court of Special Appeals was able to avoid all these thorny problems of "personal conscience," though, by taking note that "the Supreme Court has suggested that death may be imposed on the principal in a felony murder case without regard to *mens rea*," and cited to *Tison* and *Enmund*.[389] The court found it acceptable "that the felony murder rule creates a risk of imposing the death penalty for a killing that was truly accidental,"[390] and cited to the facts of *Stewart v. Maryland*[391]—a case where the shock of a robbery caused a sixty-year-old motel desk clerk to die of an adrenaline-induced heart attack.[392] The court conceded that the defendant in *Stewart* could be sentenced to death under this regime it was approving, but that capitally punishing such an accidental death was permissible.[393] This was because, although such an arbitrary death sentence was indeed a risk, it was not a "substantial" risk.[394] The risk was insubstantial because (1) the statute allowed for a catchall mitigator ("any other facts that the jury . . . finds as mitigating"), and (2) the statute offered post-sentence review to determine if the evidence of aggravating circumstances outweighed the evidence of mitigating circumstances and if the sentence resulted from passion, prejudice, or arbitrariness.[395] *Brooks*, while recognizing the inadvertent actual killer problem and the attendant risk of an execution disproportionate to the offender's culpability, opted to rely on process checks instead of an alteration of the rule itself.[396]

Is this confidence justified? It is probably true that few inadvertent killers are sentenced to death. We will conclude below that very few capitally sentenced killers invoking *Enmund* and *Tison* on appeal or habeas corpus review, in fact killed inadvertently.[397] It is also very likely that few of those inadvertent killers sentenced to death have been executed since only a small minority of death sentences—about one in six since 1976—have been carried

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388 *Id.* at 1317 (footnote omitted). The trial judge had observed:

> This is one of the most troublesome areas of Maryland's death penalty law to me because I can walk over to Mr. Dixon and I can say to him, Mr. Dixon, I hate you[, then] . . . I can kill him . . . . And under Maryland law I cannot be prosecuted and receive the death penalty. . . . But if in fact I say to him that I want his sixty-nine dollar watch and [I] . . . steal his watch and murder him, I can be prosecuted for the death penalty . . . .

Id. at 1321–22 (quoting the lower court).

389 *Id.* at 1322 (citation omitted).

390 *Id.*

391 500 A.2d 676 (Md. Ct. Spec. App. 1985).

392 *Id.* at 683; *Brooks*, 655 A.2d at 1322.

393 *Brooks*, 655 A.2d at 1322.

394 *See id.*

395 *Id.* at 1322–23 (quoting MD. CODE ANN., CRIM. LAW § 413(g)(8) (West 1996) (repealed 2002)).

396 *See id.* at 1323.

397 *Infra* Section IV.E.

out.[398] Yet defining inadvertent killing as capital murder does harm even when such killers are not executed. It invites prosecutors to charge suspected inadvertent killers with capital murder to induce favorable pleas, and diverts scarce capital defense resources. If the rarity of executing a class of offenders justifies making those offenders death-eligible, then the *Enmund* Court should have declared nonculpable accomplices to felony murder death-eligible. Instead, the Court viewed the rarity of capital punishment for this class of offenders as evidence that it violated evolving standards of decency.

E. Summary

Our survey of the lower court decisions interpreting *Enmund* and *Tison* in cases of actual killers revealed a dichotomy between a reflective reading, which saw culpability as required by the justifying purposes of capital punishment, and a mechanical reading, which required only killing (irrespective of culpability). The latter group divided into decisions that the *Enmund-Tison* rule (1) authorized execution of all killers, (2) did not apply to actual killers, or (3) was unnecessary for preventing execution of inadvertent killers.

Overall, the weight of authority hews in favor of the mechanical reading. Twelve jurisdictions read *Enmund* and *Tison* mechanically; only six jurisdictions read the cases reflectively. Interestingly, there are some chronological patterns in the opinions discussed above. While the reflective interpretation somewhat prevailed in the period between *Enmund* and *Tison* (seven opinions versus three), after *Tison* the balance tipped heavily in favor of the mechanical interpretation (fifteen opinions versus two).

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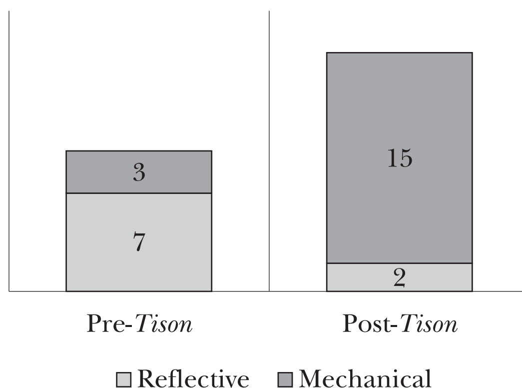
398 From 1976 through 2015, there were 8087 death sentences in the United States. *Death Sentences by Year Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-year-1977-present (last visited Dec. 15, 2016). There were 1422 executions, resulting in an execution rate of 17.6%. *Searchable Execution Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/views-executions (last visited Dec. 15, 2016).

FIGURE 2

LOWER COURT OPINIONS



It appears that, after *Tison*, lower courts became more reluctant to look to the underlying purposes of the Eighth Amendment when interpreting the felony murder test. Instead, these courts often confined the *Enmund* rule to accomplices, finding that actual killers satisfied the test's requirements automatically.

This survey also reveals how few of the cases present facts that raise a genuine doubt as to whether the killer adverted to the danger of death. Most of the cases involved intentional shootings (nine), strangulations (five), stabbings (four), or severe battering either of an infant or with a weapon, producing a brain injury (six).[399]

FIGURE 3

MECHANISMS OF DEATH IN ACTUAL KILLER CASES

399 Note that this is one case fewer than above, as *Carlos* was an accomplice case. *See* Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983).

In such cases, recklessness with respect to death is easy to establish, and could have been established by appellate review of the record. Nevertheless, the courts ignored this option in the mechanical reading cases, opting either to find *Enmund-Tison* was satisfied by actual killers irrespective of culpability, or to find it entirely inapplicable to actual killers.

The only two cases (classified as "other" in the chart above) that had even colorable claims of inadvertent killing were *Pruitt* and *Wisdom*.[400] *Pruitt*, recall, presents what may be a common scenario for inadvertent killing in furtherance of a felony: a weaponless battery that unexpectedly leads to death due to the vulnerability of the victim (an elderly man suffering from coagulopathy, a condition similar to hemophilia).[401] The victim suffered three distinct blows to the head, although it is unclear whether these came from punches or from being thrown against the car and ground.[402] Similarly, in *Wisdom*, the precise conduct leading to the death of the child was not established, and even the alleged conduct—either an open-handed blow or shaking—did not clearly evidence the conscious creation of a substantial risk of death.[403]

V. Correcting the Mechanical Reading

A. *The Mechanical Reading Is Flawed: It Fails to Assess Culpability, and Is Therefore Irrational*

Although the Court held that Enmund could not be executed "absent proof that [he] killed or attempted to kill, *and* regardless of whether [he] intended or contemplated that life would be taken,"[404] most lower courts have read the *Enmund* decision to allow execution of killers regardless of whether they intended or contemplated death. However consistent the mechanical reading of *Enmund* and *Tison* may be with some language in those cases, it is inconstent with the Eighth Amendment principles on which *Enmund*, *Tison*, and other major cases rest. Thus, the mechanical reading does not require that a defendant who caused death have done so culpably, but permits capital punishment in cases where a culpable mental state is entirely absent or where it falls below that level of culpability required for other murders. Because the Constitution requires the rational selection of

400 *See* Wisdom v. State, 918 P.2d 384 (Okla. Crim. App. 1996); State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013).

401 *Pruitt*, 415 S.W.3d at 187, 192.

402 *Id.* at 205. Arguably this case should have been overturned for insufficiency of evidence. Recall that Pruitt was convicted for "knowingly" killing, even though he had no knowledge of the victim's medical condition. *Id.* Even a *Tison* instruction conditioning a death sentence on a finding of reckless killing cannot prevent this kind of pro-prosecution jury nullification. Appellate courts must also be willing to review such sentences for sufficient evidence of recklessness.

403 *Wisdom*, 918 P.2d at 384. On the controversy over the reliability of evidence of lethal shaking, see generally Deborah Tuerkheimer, Flawed Convictions: "Shaken Baby Syndrome" and the Inertia of Justice (2014).

404 Enmund v. Florida, 458 U.S. 782, 801 (1982) (emphasis added).

the most culpable offenders for capital punishment,[405] the mechanical reading of the *Enmund-Tison* test violates the theoretical underpinnings of these cases.

That the mechanical reading permits the execution of nonculpable killers is easily demonstrated by actual and hypothetical cases. Most of the lower court cases interpreting *Enmund* and *Tison* in the mechanical way dealt with intentional or reckless killers whose legal challenges argued merely that a *finding* of intentionality or recklessness should have been made. The facts are not always so clear-cut in felony murder scenarios, however.[406] We could start with the list of hypotheticals (some drawn from actual cases) noted by Justice Broussard, dissenting in *People v. Anderson*:

> Among the cases now subject to the death penalty are the following:
>
> (a) A burglar startles a resident, who dies of a heart attack. (*Cf. People v. Stamp* (1969) 2 Cal.App.3d 203, 82 Cal.Rptr. 598.)[407]
>
> (b) A robber inflicts only a minor injury, but the victim dies weeks later of unexpected medical complications.
>
> (c) While defendant is on the way to committing an armed robbery, his gun fires accidentally, killing his accomplice. (*Cf. People v. Johnson* (1972) 28 Cal.App.3d 653, 104 Cal.Rptr. 807.)
>
> (d) While defendant is driving the get-away car, he causes an accident, killing a bystander. (*Cf. People v. Fuller* (1978) 86 Cal.App.3d 618, 150 Cal.Rptr. 515.) Indeed the defendant would be subject to the death penalty even if he were driving carefully, so long as he could be said to be "the actual killer," and even if his victim was the robber.[408]

We can add other well-known felony murder cases drawn from criminal law textbooks. In *People v. Jenkins*,[409] a suspect was convicted of felony murder when he shook free from a pursuing officer who was brandishing his gun, with the result that the officer fatally shot his partner.[410] In *People v.*

405 *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002).

406 Again, we emphasize that the vast majority of felony murders are intentional shootings, and recognize that these are outlier cases.

407 *Stamp*—where the victim of the robbery was already in ill health (i.e., he happened to be an "eggshell" victim) and dropped dead of fright when the robbers entered his store—is arguably no longer good law in California, because the revised CALCRIM 540A would require proof that death was foreseeable. *See* People v. Stamp, 2 Cal. App. 3d 203 (Cal. Ct. App. 1969); Advisory Comm. on Criminal Jury Instructions, Judicial Council of Cal., Criminal Jury Instructions 2016, CALCRIM § 540A. In addition, there remains a serious question—never litigated—as to whether Stamp could "kill" in the sense required by the holding in *People v. Washington*, 402 P.2d 130 (Cal. 1965), without a battery. But the outcome of the case illustrates the possibility of a strict liability felony murder case that could constitutionally warrant the death penalty under the mechanical reading we critique here. Felony murder convictions for spontaneous heart attacks are rare, but the *Stamp* case is hardly unique. *See, e.g.*, People v. Ingram, 492 N.E.2d 1220 (N.Y. 1986).

408 People v. Anderson, 742 P.2d 1306, 1334–35 n.3 (Cal. 1987) (Broussard, J., concurring in part and dissenting in part).

409 545 N.E.2d 986 (Ill. App. Ct. 1989).

410 *Id.* at 989.

Matos,[411] a fleeing robber was convicted of felony murder when a pursuing police officer fell down an airshaft.[412] In *Hickman v. Commonwealth*,[413] the defendant was convicted of felony murder because he was present while a companion took a moderate dose of cocaine, from which he unexpectedly overdosed.[414]

These cases illustrate that permitting the execution of inadvertent felony murderers poses two risks. One is that those executed will have less culpability than the Eighth Amendment demands. But, in addition, where culpability is minimal, causal responsibility can also become highly attenuated. If felons can be executed for causing death without any inquiry into their culpability, there is a greater danger that they will be executed without having caused death at all. Where a death results from excessive force or reckless pursuit by law enforcement, prosecutors may be especially tempted to deflect causal responsibility onto an arrestee for the death.[415] The threat of a capital felony murder charge in such cases can force a guilty plea to a noncapital charge, concluding a travesty no reviewing court need ever see. Thus, the mechanical reading can do real harm, even if few inadvertent killers are actually executed.

The illogic of the mechanical reading is also apparent when we compare the inadvertent killings it condemns to the intentional killings Eighth Amendment law exempts from death. Compare, for example, a robber or burglar whose intrusion triggers a heart attack in a homeowner[416] to an abusive husband who commits manslaughter by strangling his wife on learning that she plans to leave him.[417] The former can be executed, but the latter cannot. In California, a frenzied killer who stabs a child repeatedly is exempt from execution if he kills without the deliberation that would elevate a murder to first degree.[418] Yet, a robber or burglar who kills inadvertently is death-eligible in California without any further aggravation.[419]

Once we disengage capital sentencing from considerations of culpability with respect to death, we find ourselves at war with our deeply held intuitions as well as with Eighth Amendment principles. The point here is simple: if we must assess culpability in order to rationally select who should be executed, then any test that disregards culpability is bound to produce absurd results.

411 568 N.Y.S.2d 683 (N.Y. Sup. Ct. 1991).

412 *Id.* at 684.

413 398 S.E.2d 698 (Va. Ct. App. 1990).

414 *Id.* at 699.

415 *See* Alison Flowers, *Charged with Murder, But They Didn't Kill Anyone—Police Did*, CHI. READER (Aug. 18, 2016), http://www.chicagoreader.com/chicago/felony-murder-police-shooting-investigation/Content?oid=23200575.

416 People v. Ingram, 492 N.E.2d 1220 (N.Y. 1986).

417 People v. Berry, 556 P.2d 777 (Cal. 1976). *See generally* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997) (noting frequent use of subjective provocation standards like the Model Penal Code's to mitigate domestic violence homicides).

418 *See* People v. Anderson, 742 P.2d 1306 (Cal. 1987).

419 *See* People v. Watkins, 290 P.3d 364, 390 (Cal. 2012).

B. The Solution: At Least Recklessness for All Cases

We have thus far argued that the most prevalent interpretation of the *Enmund-Tison* rule in the lower courts—the mechanical reading—disconnects death sentencing from culpability for a category of offenders (those who "kill") that it cannot define with precision. It thereby violates Eighth Amendment principles requiring rational narrowing on the basis of culpability in every case.

If Eighth Amendment principles require some degree of culpability towards death for actual killers to become death-eligible, it is natural to ask, What degree of culpability? We propose that the interpretation of the *Enmund-Tison* test that best reconciles both decisions with Eighth Amendment principles would require at least reckless indifference to human life for every defendant sentenced to death for felony murder. This reading of *Enmund* and *Tison* reconnects their test to an assessment of culpability, and so to the underlying justifications of the Eighth Amendment (deterrence and retribution). A requirement of recklessness dispels the problem of the inadvertent actual killer, and also imposes a baseline mens rea across the somewhat disparate state law definitions of "killing." Moreover, it provides a principled way of narrowing the category of felony murders (which can be committed negligently) to those deserving greater punishment—those committed recklessly.

In proposing this solution we do not oppose a more ambitious solution: requiring intent to kill for all capital murder. This solution would have one distinct advantage, in that it would ensure that every death-eligible murder was in one respect more culpable than every murder that was not death-eligible. By requiring that capital felony murders must also be intentional murders, this solution would ensure that capital felony murders would be no less culpable than noncapital intentional murders.

Yet while a uniform requirement of intent would better fulfill the Eighth Amendment principles requiring rational narrowing on the basis of culpability, and would accord with both the holding and the reasoning of *Enmund*, it would abrogate the holding of *Tison*. While the Supreme Court may choose to overturn precedent by establishing a uniform requirement of intent to kill, lower courts are constrained from doing so. By contrast, the solution we propose is an *interpretation* of *Enmund* and *Tison* that preserves their authority and extends their reasoning to an open question. Indeed, it is a better interpretation than the one that now prevails. Accordingly, our proposal is one that state and lower federal courts can and should implement now even absent Supreme Court intervention.

In offering this proposal, we recall the measured position offered by Enmund's attorney in oral argument:

> Now we think the intent line is the best line, but there is also another line that would be a subjective state of culpability with regard to the homocide,

> [sic] be it recklessness . . . some sort of awareness of it, and that was not found in this case. It would be enough under the model penal code.[420]

Similarly, we recall the concession of the four dissenters in *Tison*, that:

> [i]nfluential commentators and some States have approved the use of the death penalty for persons, like those given in the Court's examples, *who kill* others in circumstances manifesting an extreme indifference to the value of human life. Thus an exception to the requirement that only intentional murders be punished with death might be made for persons who actually commit an act of homicide.[421]

If a requirement of recklessness is the most demanding standard the Court's precedent will allow, it is also the least demanding standard the Court's avowed principles can tolerate.

1. Not a New Standard of Decency, Not a Necessary Interpretation of Existing Cases

In advocating for our new solution, it is important that we explain what such a requirement would mean doctrinally. As should be evident from our discussion of *Enmund* and *Tison* above, we do *not* argue that this is a necessary or obvious reading of those cases. Instead, we argue only that the application of the Eighth Amendment to this class of cases was left open—that "*Enmund*, by distinguishing from the accomplice case 'those who kill,' clearly reserved" the question of an actual killer with a mental state less than that of intent.[422]

Moreover, we do not argue (although we do not deny) that this proposed requirement of recklessness even for the actual killer is a *new* Eighth Amendment principle that should now be imposed because of the emergence, since *Enmund* and *Tison*, of an "evolving standard[ ] of decency."[423] We believe that there is substantial support for this claim: our survey of cases found few instances of even arguably inadvertent killers who had been sentenced to death. Validating such a claim, however, requires searching analysis of trends in executions, sentencing, and in state law that we do not undertake here. The Court has given priority to demonstrations of comparative disproportionality in declaring the application of the death penalty to particular classes of cases disproportionate.[424] Thus it seems prudent for any litigant seeking to persuade the Supreme Court—or a lower court—to adopt a minimum requirement of recklessness for execution of felony murderers to

420 Transcript of Oral Argument at 51, Enmund v. Florida, 458 U.S. 782 (1982) (No. 81-5321).

421 Tison v. Arizona, 481 U.S. 137, 169 (1987) (Brennan, J., dissenting) (footnote omitted).

422 *Id.*

423 *See* Brumfield v. Cain, 135 S. Ct. 2269, 2274 (2015) (quoting Atkins v. Virginia, 536 U.S. 304, 321 (2002)).

424 See *Kennedy v. Louisiana*, 554 U.S. 407 (2008), and *Enmund v. Florida*, 458 U.S. 782, for the methodology of reaching a new rule concerning the proportionality of applying capital punishment in a category of cases.

offer evidence that condemnations and executions of inadvertent killers are rare. We believe such evidence is there to be found, but that is a topic for further research.

In this Article, however, we advocate a uniform requirement of recklessness (even for an actual killer) as a matter of doctrinal development that is necessitated by the Eighth Amendment's underlying theoretical justifications. Just as *Tison* refined the common law of the Eighth Amendment by providing a solution to cover a class of cases not considered by the *Enmund* court (non-triggermen who were nevertheless recklessly indifferent major participants), so do we call for a further refinement to exempt another class not yet addressed: the perpetrator of felony murder who causes death inadvertently. Our proposed solution is simple: require recklessness in all cases, even for the actual killer.

2. The Need for a Culpability Threshold

First, we point out the need for at least *some* culpability threshold. If capital punishment is justified by desert and deterrence, it ceases to be justified once culpability dips below a certain level. Below we display a hierarchy of increasingly culpable mental states accompanying killing during a felony. Each is illustrated with both a hypothetical example and a real case. These examples show that not all actual killings are equally culpable, so that a line needs to be drawn somewhere on the chart, above which killings should not be capitally punishable.

FIGURE 4

Actual Killing	**Hypothetical**	**Real Case**
Negligent	Young man throws down elderly woman during purse snatching; bound robbery victim dies of asphyxiation.	*State v. Pruitt*, 415 S.W.3d 180 (Tenn. 2013) (79-year-old dies from relatively short weaponless beating during carjacking).
Reckless	Arsonist lights fire to vacation home even though car in driveway.	*Adams v. Wainwright*, 709 F.2d 1443, 1446–47 (11th Cir. 1983) (per curiam) (during burglary and robbery, prolonged beating of homeowner with iron poker, leaving body grossly mangled).
Extreme Indifference Type 1 (endangering multiple victims)	Defendant drives car into a crowded lawn party he has been excluded from.	*State v. Joseph*, 283 P.3d 27 (Ariz. 2012) (en banc) (fires multiple shots at each of three victims).

Extreme Indifference Type 2 (recklessness + antisocial purpose or cruelty)	Burglary victim dies while being tortured to force him to reveal combination of safe.	*Fairchild v. State*, 998 P.2d 611 (Okla. Crim. App. 1999) (escalating abuse of crying three-year-old: repeated blows, burning, and finally throwing against table).
Knowing	Abusive parent refuses to feed baby for a week because it is crying.	*State v. Rust*, 388 N.W.2d 483, 492–93 (Neb. 1986) (fleeing robber shoots a pursuing civilian four times, including after he has fallen).
Purposeful	Convenience store robber shoots witness in the head.	*Loving v. Hart*, 47 M.J. 438, 441 (C.A.A.F. 1998) (shooting taxi driver in head when he had no money).

As should be clear, the "actual killer" category is too broad to account for our more nuanced intuitions about desert; only by introducing culpability can we do this.

But beyond these intuitions, a culpability threshold is also compelled by a combination of the same two principles announced at the outset of this Article: (1) felony murder *liability* is justifiable only when the defendant kills at least negligently with a felonious motive; and (2) the Eighth Amendment requires that death-sentencing involve a narrowing of the class of murderers according to a rational selection of the most culpable. Properly defined and applied, felony murder liability guarantees us a baseline culpability of negligence, but the Eighth Amendment requires that we "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[425] Assuming felony murder liability is only justified for the (at least) negligent causation of death during the commission of a grave felony, the Eighth Amendment requires culpability greater than negligence for capital punishment of felony murder.

3. Recklessness Reconciles Precedent and Principle

In light of these arguments, we must demand a threshold higher than negligence if we aim to satisfy the demands of *Zant* in a way that accounts for the underlying justification of felony murder liability. This approach leaves a number of possibilities. The Model Penal Code recognizes four mental states higher than negligence: recklessness, recklessness with extreme indifference (gross recklessness), knowledge, and purpose.[426] Among these, the Supreme

425 Zant v. Stephens, 462 U.S. 862, 877 (1983).

426 Model Penal Code § 2.02 (Am. Law Inst. 1985); Model Penal Code § 210.2 (Am. Law Inst. 1980).

Court has already made the choice for us—if recklessness is sufficient for execution of a major participant in felony murder (*Tison*), then it follows that recklessness is enough for the actual killer (who is certainly a major participant).

Recklessness is usually defined as "consciously disregard[ing] a substantial and unjustifiable risk," (here, a risk of death).[427] Thus, it goes beyond mere negligence, which requires only that the actor "*should be* aware of a substantial and unjustifiable risk."[428] Negligence blames an actor for unreasonable ignorance of a risk, whereas recklessness requires conscious disregard of that risk. Thus, where the reckless actor adverts to danger and proceeds in the face of that knowledge, the negligent actor fails to advert to the danger at all. Precisely because of this, criminal law has traditionally disfavored negligence for serious crimes, and made recklessness the usual baseline level of culpability required to warrant severe criminal punishment.[429] When danger is knowingly imposed on others, however, unease at the prospect of punishment drops away. Thus, recklessness is made a default mental state in the Model Penal Code (to be employed when an offense definition is silent as to the required mental state corresponding to an objective element).[430] Infliction of our most severe penalty is far more acceptable for harm consciously risked than for harm risked inadvertently.

We stop short of arguing for *gross* recklessness as a requirement. The Model Penal Code conditions murder liability on this higher level of culpability, which it defines as recklessness combined with "extreme indifference to the value of human life."[431] As noted above, examples of this might include spitefully driving a car into a crowd of guests at a party, or causing a victim's death during torture. The *Tison* Court alluded to this mental state with the torture example, but then reverted back to regular recklessness when it promulgated its holding.[432] This equivocation between simple recklessness and gross recklessness probably can be explained by two related drawbacks of requiring gross recklessness in the context of felony murder.

First, because gross recklessness is ambiguous, it is not a very administrable standard to use for constitutional review of the proportionality of death sentences in different jurisdictions. Gross recklessness has many synonyms: "extreme indifference," "depraved indifference," "wanton disregard," and even "abandoned and malignant heart." These various phrases also have at least three meanings. Recklessness or indifference can be gross, or extreme, or depraved because of (1) the scale of the known risk (more than

427 MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

428 *Id.* § 2.02(2)(d) (emphasis added).

429 *Id.* § 2.02 cmt. at 229–44. The Model Penal Code accepts negligence as a culpable mental state, but notes that this should be rare: "[N]egligence, as here defined, should not be wholly rejected as a ground of culpability that may suffice for purposes of penal law, though it should not generally be deemed sufficient." *Id.* at 243–44.

430 *Id.* § 2.02(3); KAPLAN, WEISBERG & BINDER, *supra* note 25, at 224–25.

431 MODEL PENAL CODE § 210.2 (AM. LAW INST. 1980) (murder).

432 Tison v. Arizona, 481 U.S. 137, 157 (1987).

the substantial and unjustifiable probability required for recklessness, but less than the certainty required for knowledge); or (2) the number of people exposed to risk (such as the guests at a lawn party); or (3) the bad motive or purpose for which the risk is imposed (spite, sadism, coercion). Thus a minimum culpability of gross recklessness might be understood and applied differently by different courts and legislatures, or different Supreme Court Justices. A requirement of gross recklessness would therefore be ambiguous unless the Court arbitrarily chose one of these three meanings, to the detriment of jurisdictions that had chosen to define it differently.

Second, one of the meanings of gross recklessness—recklessly imposing a risk for an evil or antisocial purpose—would normally be satisfied whenever someone kills recklessly in furtherance of an enumerated felony. Accordingly, by choosing recklessness as the minimum required culpability towards death for death-eligible felony murder, the Court can impose a clear and easily administrable requirement that achieves the same effect as requiring one variant of gross recklessness. Consider the most common predicate felonies for first-degree felony murder: robbery, arson, rape, kidnapping, escape, and burglary. All of these involve a felonious purpose independent of physical harm to the victim. Robbery aims at theft, arson at destruction of a building, rape at violation of sexual autonomy, kidnapping at violation of personal liberty, and escape at obstruction of law enforcement. Burglary involves a trespass to property and usually aims at theft.[433] One class of predicate felonies likely to involve claims of unintended and even inadvertent killing is aggravated child abuse felonies. While these felonies lack the kind of independent felonious purpose that typifies robbery or rape, they often involve an antisocial purpose, such as sadistic cruelty. Thus, by conditioning capital punishment of felony murder on recklessness towards death (along with a felonious purpose), the Supreme Court would be ensuring a finding of one form of gross recklessness in almost every case.

Imposing a requirement of recklessness and felonious purpose for the execution of perpetrators would satisfy Eighth Amendment principles by serving the goals of deterrence and retribution.

While there is little evidence that the death penalty deters, conditioning execution on reckless rather than inadvertent killing is at least rationally related to the goal of deterrence. Any potential deterrent effect of a penalty for murder is undermined where the offender acts without any knowledge of the risk of causing death. Deterrence theory presupposes that "[p]unishments are inefficacious when directed against individuals . . . who have acted without intention, [or] who have done the evil innocently, under an erroneous supposition."[434] It might be argued that the threat of execu-

433 Although it can be committed by unlawful entry for the purpose of aggravated assault, and it has been criticized as a predicate for felony murder under these circumstances. *Compare* Parker v. State, 731 S.W.2d 756 (Ark. 1987), *with* People v. Wilson, 462 P.2d 22 (Cal. 1969), *overruled by* People v. Farley, 210 P.3d 361 (Cal. 2009), *and* People v. Farley, 53 Cal. Rptr. 2d 702 (Cal. Ct. App. 1996).

434 Bentham, *supra* note 14, at 322–24.

tion for inadvertent killing discourages predicate felonies, but for the inadvertent killer, the consequences of causing death cannot influence decisionmaking. Even for serious crimes like robbery and arson, the chance of any one commission of the crime producing a death is very small. Probably for that reason, felony murder liability has little proven deterrent effect.[435] Yet for the felony murderer who knowingly imposes a risk of death, for example by intentionally shooting a resisting victim, the prospect of death is known, and the penalty for doing so should be salient.

Requiring recklessness also serves retribution by requiring more culpability than is required for simple felony murder liability. One study of popular views of desert found that experimental subjects supported a sentence of twenty-two to twenty-seven years for negligent killing in the commission of a robbery.[436] These same subjects, though, supported a life term or a death sentence for intentional murder.[437] Another study found that mock jurors were five times more likely to impose a death penalty for premeditated murder in the context of a robbery than for an inadvertent shooting in the context of a robbery.[438] Presuming then that intentional felony murder is much worse than negligent felony murder, it seems that reckless murder is intermediate between the two. In this sense, it meaningfully narrows felony murder.

While requiring recklessness towards death for capital punishment of felony murder would serve deterrence and desert and meaningfully narrow felony murder, it seems that a requirement of intent to kill would advance these goals even more effectively. By requiring intent to kill for all capital murders, the Court could ensure that every capital felony murder would be more culpable than every noncapital intentional murder, because it would combine intentional killing with the purpose of committing an independent serious felony. Killings that recklessly endangered multiple victims or endangered the victim for an antisocial purpose would not be death-eligible unless the victim was also killed intentionally. In this way, capital gross recklessness murder would always be more culpable than noncapital intentional murder. Limiting capital punishment to intentional killers would therefore narrow capital punishment most effectively.

To be sure, in *Tison*, Justice O'Connor reasoned that some grossly reckless murders—such as the unintended killing of a victim during torture—are more culpable than some intentional killings.[439] She offered examples of justified, excused, and mitigated intentional killings, but even a premedi-

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435 As for the somewhat fanciful theory that felony murder liability encourages committed felons to commit their crime more carefully, the only empirical study of the deterrent effect of felony murder rules on killing found none. *See* Anup Malani, Does the Felony Murder Rule Deter? Evidence from FBI Crime Data (2002) (unpublished manuscript), https://www.researchgate.net/publication/265435387_Does_the_Felony-Murder_Rule_Deter_Evidence_from_FBI_Crime_Data.

436 ROBINSON & DARLEY, *supra* note 47, at 169–81.

437 *Id.*

438 *See* Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court's Assertions*, 15 LAW & HUM. BEHAV. 405 (1991).

439 Tison v. Arizona, 481 U.S. 137, 157 (1987).

tated murder may be diminished in culpability by an altruistic motive of alleviating suffering.[440] Nevertheless, even if some grossly reckless murders are more reprehensible than some intentional murders, intentional murders are generally more reprehensible than reckless killings. As Justice White reasoned in *Enmund*, desert is generally thought to require that "causing harm intentionally must be punished more severely than causing the same harm unintentionally."[441] Setting the minimum culpability requirement for capital murder at recklessness runs a greater risk that defendants will be executed for killings that are not the most culpable. If we are only executing a fraction of a percent of the perpetrators of homicide, it seems reasonable to exclude anyone who killed unintentionally.

The countervailing consideration is simply that the Supreme Court has already decided, in *Tison*, that reckless killing in furtherance of a predicate felony suffices for death-eligibility. What the Court did *not* decide in *Tison*, is that "major participants" who kill can be executed without reckless indifference to human life. That question was not before the Court and has not yet been decided. The many lower courts that have convinced themselves that the Court has authorized the execution of inadvertent killers are mistaken.

In sum, Eighth Amendment principle demands that a culpability threshold be imposed above that of negligence. Recklessness and intent both satisfy the demands of principle, but recklessness best reconciles principle with precedent. It is the solution available to lower courts now, it is the solution more easily supported as an evolving standard of decency, and it is the solution that the Court can adopt without disturbing precedent.

Conclusion

We have shown that under the prevailing interpretation of the Eighth Amendment in the lower courts, a defendant who participates in a felony and causes the death of a victim is eligible for the death penalty—even when the defendant acted without any culpable mental state with respect to the victim's death. This "mechanical reading" of *Enmund* and *Tison* is mistaken, as the underlying justifications of the Eighth Amendment require a rational selection of the most deserving offenders, and this in turn requires an assessment of culpability. The Supreme Court should address this open question in Eighth Amendment law by imposing a uniform requirement of at least recklessness with respect to death.

440 *See* Kaplan, Weisberg & Binder, *supra* note 25, at 339; *71-Year-Old Woman Gets Probation in the Mercy Killing of Her Husband*, Gainesville Sun, June 20, 1984, at 1B (covering the Dorothy Healy case).

441 Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Hart, 1st ed., *supra* note 68, at 162).