

*LOCKETT SYMPOSIUM*

**JUSTICE WHITE'S *LOCKETT* CONCURRENCE AND THE  
EVOLVING STANDARDS FOR A CAPITAL DEFENDANT'S  
*MENS REA***

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In *Lockett v. Ohio*, Justice Byron White authored a separate concurring opinion specifically to assert that capital punishment violates the Eighth Amendment when imposed absent “a finding that the defendant possessed a purpose to cause the death of the victim.”<sup>1</sup> This view was largely vindicated when Justice White authored the opinions in *Enmund v. Florida*<sup>2</sup> and *Cabana v. Bullock*,<sup>3</sup> in which the Court held that the death sentence could not constitutionally be imposed on one who did not kill or attempt to kill or have any intention of participating in or facilitating a killing. Nonetheless, just one year after *Bullock*, White joined in the majority in *Tison v. Arizona* to hold that the Eighth Amendment does not prohibit the death penalty even where the defendant’s mental state is one of reckless indifference.<sup>4</sup> That standard exists to this day and is a marked departure from Justice White’s stand in *Lockett*. It suggests a pattern of increasing and sometimes case-specific compromises that the Court made in order to reach the death penalty as it now exists.

Part I of this paper analyzes Justice White’s death penalty jurisprudence leading up to *Lockett*, including his statement in *Furman v. Georgia*<sup>5</sup> that the capital punishment statute at issue “has for all practical purposes run its course.”<sup>6</sup> Part II reflects on the significance of Justice

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1. 438 U.S. 586, 624 (1978) (White, J., concurring).
2. 458 U.S. 782, 797 (1982).
3. 474 U.S. 376, 377 (1986).
4. 481 U.S. 137, 137-38 (1987).
5. 408 U.S. 238, 239-40 (1972).
6. *Id.* at 313 (White, J., concurring).

White's concurrence in *Lockett*, including paving the way for narrowing the death penalty in *Enmund* and *Bullock*. Finally, Part III analyzes *Tison* and the current state of the law regarding a defendant's mental state. The paper concludes that the principles Justice White articulated in *Lockett* better represent the Court's stated goals of deterrence and individualized consideration.

#### I. JUSTICE WHITE'S DEATH PENALTY JURISPRUDENCE PRIOR TO *LOCKETT V. OHIO*

Although Justice White concurred in *Furman v. Georgia* that the death penalty statutes at issue constituted cruel and unusual punishment in violation of Eighth and Fourteenth Amendments, he made clear that his was not a moral opposition to the existence of capital punishment overall.<sup>7</sup> Nevertheless, Justice White provided a crucial fifth vote, resulting in a moratorium on the death penalty in the United States. His concurrence did not focus on any excesses of the death penalty, but rather on the infrequency of its imposition. He noted that sentencing authority has been vested "primarily in juries," and those juries seem to have created a policy in which the death penalty is hardly ever imposed, and imposed without reasonable distinction.<sup>8</sup> For that reason, Justice White found that the policy of jury discretion "has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."<sup>9</sup>

By "run its course," Justice White's concern seemed to be that the states weren't imposing the death penalty often enough for it to be effective: in other words, "that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."<sup>10</sup> Accordingly, Justice White believed the death penalty was no

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7. *Id.* at 310-11 (White, J., concurring) ("I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment.").

8. In *Furman*, "White noted the good faith of Georgia in granting discretion to sentencing juries out of a 'desire to mitigate the harshness' of capital punishment laws." Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 *YALE L.J.* 19, 29 (1993) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)). Professor Stith was a law clerk for Justice White in the October Term of 1978.

9. *Furman*, 408 U.S. at 313 (White, J., concurring).

10. *Id.*

longer an effective deterrent if used so infrequently as to be “the pointless and needless extinction of life” without furthering any social end.<sup>11</sup>

Just four years later, however, he concurred with the majority in *Gregg v. Georgia* that Georgia’s updated death penalty statute was constitutional, effectively bringing the death penalty back to life.<sup>12</sup> Justice White held that with the more detailed guidance to juries in Georgia law, “if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside.”<sup>13</sup>

In fact, Justice White would have upheld all of the death penalty statutes before the Court that day in 1976, including those states with mandatory death sentences for certain crimes. He reasoned that a mandatory death sentence is a consistently-imposed deterrent and accordingly dissented from the Court’s plurality opinion in *Woodson v. North Carolina* holding a mandatory death sentence for first-degree murder violated the Eighth and Fourteenth Amendments.<sup>14</sup> In *Roberts v. Louisiana*, Justice White similarly expressed support for Louisiana’s mandatory death penalty scheme for five categories of first-degree murder: “Even if the character of the accused *must* be considered under the Eighth Amendment, surely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal’s character is such that he deserves death.”<sup>15</sup> Justice White’s approval of the mandatory death penalty underlines his belief that there is nothing inherently cruel and unusual about the death penalty itself.<sup>16</sup> In particular, he noted the public support for the death penalty,

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11. *Id.* at 312.

12. 428 U.S. 153, 154-55 (1976).

13. *Id.* at 224 (White, J., concurring); *see also* *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) (Justice White joined the majority to again find that Georgia’s death penalty was not “wantonly or freakishly” imposed, despite statistical study purporting to show disparity in imposition of death sentence in Georgia based on race of murder victim and defendant).

14. 428 U.S. 280, 307 (1976) (White, J., dissenting) (noting that a mandatory death sentence does not implicate the constitutional concerns raised in *Furman* about “seldom and arbitrary” imposition of the death penalty). *See also* *Proffitt v. Florida*, 428 U.S. 242, 260-61 (1976) (White, J., concurring) (“There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in Florida as to those categories has ceased ‘to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.’”) (quoting *Furman*, 408 U.S. at 311 (White, J., concurring)).

15. 428 U.S. 325, 358 (1976) (White, J., dissenting) (emphasis in original).

16. *Id.* at 350 (White, J., dissenting) (“I also cannot agree with the petitioner’s other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment. . . . It is plain enough that the Constitution drafted by the Framers expressly made room

pointing to the large number of states that re-enacted the death penalty in the years after *Furman*.<sup>17</sup>

His approval of the death penalty stemmed in part from an abiding faith in and deference to the criminal justice system, which he repeatedly emphasized in his opinions.<sup>18</sup> For this reason, he declined to interfere with capital punishment proceedings and asserted that that prosecutors and appellate courts,<sup>19</sup> legislators,<sup>20</sup> and juries themselves,<sup>21</sup> for example, would uphold the system and correct any flaw.<sup>22</sup> The number of exonerations in the years since he was on the bench may call this conclusion into question,<sup>23</sup> or it may have furthered Justice White's belief in the power of the courts and advocates to find and correct mistakes.

Justice White recognized that the death penalty had limitations, however, including when capital punishment is "is grossly out of proportion to the severity of the crime."<sup>24</sup> Writing for the plurality in *Coker v. Georgia*, for example, Justice White held, "We have the abiding

for the death penalty.").

17. *Id.* at 352-54 (White, J., dissenting) ("The widespread re-enactment of the death penalty, it seems to me, answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution.").

18. *See, e.g., Gregg*, 428 U.S. at 226 (White, J., concurring) ("I decline to interfere with the manner in which Georgia has chosen to enforce [capital punishment] . . . laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.").

19. *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964) (White, J., dissenting) ("Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.").

20. *Roberts*, 428 U.S. at 355 (White, J., dissenting) ("It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere.").

21. *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring) ("[I]t should not be assumed that juries will disobey or nullify their instructions.").

22. For this reason as well, Justice White believed that capital punishment for minors was constitutional, for example when he joined the dissent in *Thompson v. Oklahoma*. 487 U.S. 815, 875-76 (1988) (Scalia, J., dissenting) (asserting that "what the laws of the Federal Government and 19 States clearly provide for represents a 'considered judgment,'" and that the Governor of Oklahoma "[w]ould certainly have used his pardon power if there was some mistake here.") (citations omitted).

23. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., dissenting) ("[T]he number of exonerations in capital cases has risen to 115.") (citations omitted); *Kansas v. Marsh*, 548 U.S. 163, 207-08 (2006) (Souter, J., dissenting) (DNA exonerations constitute "a new body of fact" when considering the constitutionality of capital punishment).

24. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life."<sup>25</sup> In that 1977 opinion, he also noted that a defendant may be eligible for the death penalty in Georgia "when in the commission of a felony he causes the death of another human being, irrespective of malice," so long as there are aggravating factors.<sup>26</sup> If he seemed concerned about the death penalty's application to those who did not intend to cause death, he did not reflect it in that opinion, though that was not the subject of *Coker*. His concern about a capital defendant's *mens rea*, even for murder cases, became clear in *Lockett* the following year.

## II. JUSTICE WHITE'S CONCURRENCE IN *LOCKETT* AND THE SUBSEQUENT NARROWING OF THE DEATH PENALTY BASED ON *MENS REA*

In *Lockett*, the Supreme Court struck down an Ohio death penalty statute that did not permit individualized consideration of certain mitigating factors in capital cases holding that such a restriction violated the Eighth and Fourteenth Amendments.<sup>27</sup> The petitioner in that case stayed in the car while her associates robbed a pawn shop.<sup>28</sup> Although there was no plan to kill, the pawnbroker grabbed the gun when one of the robbers announced the "stickup."<sup>29</sup> The pawnbroker was killed when the gun went off.<sup>30</sup> A plurality of the Court reversed the petitioner's death sentence because the Ohio statute "did not permit the sentencing judge to consider, as mitigating factors, [the petitioner's] character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime."<sup>31</sup> Other than listing the lack of specific intent as a mitigating factor, the Court did not delve into whether it was appropriate to execute someone without an intent to kill.

Justice White devoted his concurrence to requiring a *mens rea* of intent for capital punishment: in particular, to the principle, "ignored by the plurality, that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause

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25. *Id.* at 598 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)); *see also* *Solem v. Helm*, 463 U.S. 277, Syllabus ¶ 3 (1983) (Justice White joined the majority in finding "life imprisonment without possibility of parole is significantly disproportionate to" a minor crime, in violation of the Eighth Amendment).

26. *Id.* at 600.

27. *Lockett v. Ohio*, 438 U.S. 586 (1978).

28. *Id.* at 590.

29. *Id.*

30. *Id.*

31. *Id.* at 597.

the death of the victim.”<sup>32</sup> Although Justice White did not agree that limiting consideration of mitigating circumstances was unconstitutional, he found that the Ohio statute in that case violated his proportionality requirement in two ways: 1) the “extremely rare” imposition of the death penalty “upon those who were not found to have intended the death of the victim” makes no measurable contribution to the acceptable goals of punishment; and 2) the sentence is “grossly out of proportion to the severity of the crime.”<sup>33</sup>

Regarding the extreme rarity, Justice White found it “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.”<sup>34</sup> He noted that only eight executions since 1954 clearly involved individuals who did not commit the murder—far fewer than those executed for rape—though he seems to acknowledge that this is a separate measurement from those who intended to cause the death of the victim.<sup>35</sup> Justice White also found any “deterrent” value in executing those without a purpose to kill is “extremely attenuated,” as it is doubtful that people will be deterred from “becoming involved in ventures in which death may unintentionally result.”<sup>36</sup> This doubt was particularly strong in light of the “occasional and erratic basis” on which such executions occur.<sup>37</sup> Accordingly, Justice White stated that “society has made a judgment . . . 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.”<sup>38</sup>

Justice White found particularly problematic that Ohio seemed to be imposing the death penalty in cases with a *mens rea* of at most “recklessness: conduct undertaken with knowledge that death is likely to follow.”<sup>39</sup> Accordingly, he argued that such a punishment was unconstitutionally disproportionate, concluding, “Since I would hold that

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32. *Id.* at 624 (White, J., concurring in part and dissenting in part).

33. *Id.* (citing his own opinion in *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

34. *Id.* at 625.

35. *Id.* at 624-25.

36. *Id.* at 625.

37. *Id.*

38. *Id.* at 626. Justice White cited to *United States v. U.S. Gypsum Co.*, for the principle that such distinctions have deep roots in the history of criminal law. 438 U.S. 422, 436 (1978) (“We start with the familiar proposition that “[the] existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

39. *Id.* at 627-28.

death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death, these sentences must be set aside.”<sup>40</sup>

The Court soon adopted Justice White's view that the death penalty was disproportionate for a defendant who had not intended for death to occur, at least for those who had not themselves killed or attempted to kill. In particular, Justice White established his view as law as the author of *Enmund v. Florida* just four years after *Lockett*.<sup>41</sup> In that case, Florida authorized the death penalty against petitioner Enmund for aiding and abetting a robbery in the course of which murder was committed, even though Enmund was not physically present at the killing.<sup>42</sup> The Court first noted the rarity of executions for such circumstances, both legislatively,<sup>43</sup> and as sought by prosecutors and imposed by juries.<sup>44</sup> On this point, the Court concluded that the death penalty appeared disproportionate:

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.<sup>45</sup>

Relying on *Lockett*, the Court emphasized focusing on the petitioner's *own* culpability, “not on that of those who committed the robbery and shot the victims, for we insist on ‘individualized consideration as a constitutional requirement in imposing the death sentence . . . .’”<sup>46</sup> Accordingly, the Court found petitioner's death sentence invalid: “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

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40. *Id.* at 628; see also Ursula Bentele, *Multiple Defendant Cases: When the Death Penalty Is Imposed on the Less Culpable Offender*, 38 RUTGERS L. REC. 119, 123 n.33 (2010-2011) (collecting articles).

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

42. *Id.* at 784.

43. *Id.* at 792 (“Thus 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.”).

44. *Id.* at 795 (“That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population.”).

45. *Id.* at 796.

46. *Id.* at 798 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (footnote omitted)).

alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.<sup>47</sup> Similarly to his *Lockett* concurrence, Justice White again noted in *Enmund* that the death penalty for those who did not kill or intend to kill has limited retributive or deterrent value.<sup>48</sup>

While Justice White's *Lockett* concurrence proposed a categorical death penalty rule requiring a purpose to kill, his *Enmund* opinion "displayed on its surface a marked ambivalence" about making such a rule into law.<sup>49</sup> Rather, Justice White framed the question in *Enmund* as whether the Eighth and Fourteenth Amendments prohibit the death penalty "for one who neither took life, attempted to take life, nor intended to take life."<sup>50</sup> At the same time, he indicated that the death penalty might apply to those who "intended or contemplated that life would be taken,"<sup>51</sup> or "anticipated that lethal force would or might be used" to effectuate a robbery or escape, not merely those with a purpose to kill.<sup>52</sup> Unlike in *Lockett*, Justice White's *Enmund* analysis does not seem to apply at all to actual killers—rather than accomplices—who lacked an intent to kill, although such a scenario was not relevant to the facts of *Enmund*.<sup>53</sup> Rather, Justice White emphasized "Enmund's intentions, expectations, and actions" and the fact that he was not physically present for the killing.<sup>54</sup> Some have speculated that these departures were to gain Justice Blackmun's vote, who expressed some unease at Justice White's broad assertions in *Lockett*.<sup>55</sup>

47. *Id.*

48. *Id.* at 798-99 ("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."); *id.* at 801 ("Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."); see also *Lockett*, 438 U.S. at 625 (White, J., concurring in part and dissenting in part).

49. Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1147 (1990).

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

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

52. *Id.* at 788.

53. *Lockett*, 438 U.S. at 626 (White, J., concurring in part and dissenting in part) ("Under those circumstances the 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.").

54. *Enmund*, 458 U.S. at 786, 800 (emphasis added).

55. Rosen, *supra* note 50, at 1147 n.140 (citing *Lockett*, 438 U.S. at 614 n.2 (Blackmun, J., concurring) (finding a "requirement of actual intent to kill in order to inflict the death penalty" unworkable and an incomplete determination of culpability)).

Regardless of any ambiguity in *Enmund* itself, Justice White's decision four years later in *Cabana v. Bullock* seemed to make his position clear: *Enmund* "imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."<sup>56</sup> *Bullock* seems to make clear that contemplating or anticipating the taking of a life is not enough if that person "did not themselves kill, or attempt to kill, or intend to kill."<sup>57</sup> Accordingly, the Court directed the district court to issue a habeas corpus writ vacating the petitioner's death sentence but leaving to the State the choice of either imposing a sentence of life imprisonment or reimposing the death sentence after determining whether respondent in fact "killed, attempted to kill, intended to kill, or intended that lethal force would be used."<sup>58</sup>

After *Bullock*, the law had largely enshrined Justice White's *Lockett* concurrence requiring an intent to kill before capital punishment can be imposed. This restriction only applied to accomplices, and not those who committed or attempted to commit the murder. Nonetheless, it was a concrete manifestation of Justice White's philosophy that executions should be limited to those for whom there would be the greatest deterrent and retributive value and that any such value is tenuous at best for an accomplice without an intent to kill.

### III. RE-EXPANSION OF THE DEATH PENALTY FOLLOWING *TISON*

#### A. *Justice White's Reversal in Tison*

Although *Enmund* and *Bullock* seemed to make clear that the law required intent to kill for accomplices, the Court reversed course just one year after *Bullock* in *Tison v. Arizona*.<sup>59</sup> Petitioners in that case sprung their father from prison, "armed their father and another convicted murderer, later helped to abduct, detain, and rob a family of four, and watched their father and the other convict murder the members of that family with shotguns."<sup>60</sup> Both petitioners stated that they were "surprised by the shooting," though they did not attempt to help the victims.<sup>61</sup> The Court accepted that neither petitioner intended to kill,<sup>62</sup> but held that

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56. 474 U.S. 376, 386 (1986).

57. *Id.* at 385.

58. *Id.* at 392.

59. 481 U.S. 137 (1987).

60. *Id.* at 137 (syllabus).

61. *Id.* at 141.

62. *Id.* at 151 ("Petitioners do not fall within the 'intent to kill' category of felony murderers

*Enmund* did not render unconstitutional the death penalty for defendants such as the Tisons, “whose participation is major and whose mental state is one of reckless indifference to the value of human life.”<sup>63</sup> The *Tison* court did not explicitly overrule *Enmund*, but instead more or less limited that decision to its facts: that the death penalty was unconstitutional for “the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state.”<sup>64</sup>

While departing from *Enmund*, *Tison* mirrored some of the earlier opinion’s reasoning to justify its shift. For example, the *Tison* court noted that sixteen states “authorize the death penalty in a felony-murder case where, though the defendant’s mental state fell short of intent to kill, the defendant was a major actor in a felony in which he knew death was highly likely to occur.”<sup>65</sup> The *Tison* court also relied on a number of state court decisions that imposed the death penalty after *Enmund*, even without a clear “intent to kill.”<sup>66</sup> The opinion went so far as to reverse the Arizona Supreme Court’s finding that the Tisons had an “intent to kill,” in order to explicitly hold that such a finding was not required by *Enmund*.<sup>67</sup> Rather, the *Tison* Court concluded that “intent to kill” is “a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers.”<sup>68</sup> Accordingly, the Court held that “the 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 support a capital sentence.<sup>69</sup> All of the examples the Court cited to support this standard, however, concerned the person actually doing the killing—a torturer or robber with reckless indifference—rather than an accomplice.<sup>70</sup>

Although Justice White had repeatedly advocated for limiting the death penalty to those who either “killed, attempted to kill, or intended that a killing take place or that lethal force be used,”<sup>71</sup> he joined the *Tison*

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for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.”).

63. *Id.* at 152.

64. *Id.* at 149.

65. *Id.* at 153-54. As the dissent pointed out, this reasoning did not account for the number of states that didn’t authorize *any* death penalty, nor did it consider how many states actually imposed the death penalty in such circumstances. *Id.* at 175-76 (Brennan, J., dissenting).

66. *Id.* at 154-55 (collecting cases).

67. *Id.* at 155 n.11.

68. *Id.* at 157.

69. *Id.* at 157-58.

70. *Id.* at 157.

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

majority to abrogate that standard.<sup>72</sup> The reasons for this change in thought are unclear, although the extreme facts of *Tison* “perhaps explain Justice White’s abrupt abandonment of this decade-long effort to require an intent to kill as a prerequisite for the death penalty.”<sup>73</sup> The *Tison* dissent certainly thought so, noting that the decision to execute the Tisons “appears responsive less to reason than to other, more visceral, demands.”<sup>74</sup> In fact, the dissent cited at length Justice White’s own decisions in *Enmund* and *Bullock* and his concurrence in *Lockett* about the importance of “[d]istinguishing intentional from reckless action in assessing culpability . . . in felony-murder cases” to argue against the standard *Tison* established.<sup>75</sup> Nonetheless, *Tison* has remained the law of the land for the decades since it was decided, essentially if not officially overruling Justice White’s earlier *mens rea* standards for capital defendants.

*B. The Legacy of Tison and Justice White’s Jurisprudence on Death Penalty Mens Rea Requirements*

If Justice White’s goal was to use *mens rea* to limit capital punishment to only the most culpable defendants, his joining the majority in *Tison* appears to have severely undermined that goal. As *Tison* allowed a recklessness standard even for accomplices, “the *Tison* standard rationally can be held to apply to every felony murder accomplice.”<sup>76</sup> After all, “such recklessness and indifference are presumed” when the actor is engaged in a dangerous felony.<sup>77</sup> Accordingly, Justice White’s

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72. See Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 *Hous. L. Rev.* 1493, 1515–16 (2009) (citing *Tison*, 481 U.S. at 138).

73. Rosen, *supra* note 50, at 1151. See also Batey, *supra* note 73, at 1515–16 n.131 (citing Christopher E. Smith, *Bright-Line Rules and the Supreme Court: The Tension Between Clarity in Legal Doctrine and Justices’ Policy Preferences*, 16 *Ohio N.U. L. Rev.* 119, 133-37 (1989) (hypothesizing that the majority opinion was a judicial compromise designed to condemn the Tisons without overruling *Enmund*)).

74. *Tison*, 481 U.S. at 184-85 (Brennan, J., dissenting) (“The urge to employ the felony-murder doctrine against accomplices is undoubtedly strong when the killings stir public passion and the actual murderer is beyond human grasp.”). Eventually, the Tison brothers were resentenced to life in state court. See Richard Ruelas, *The Story of Gary Tison’s Fateful Final Escape—From Those Who Were There*, ARIZONA REP. (Sept. 19, 2017, 05:55 AM), <https://www.azcentral.com/story/news/local/arizona-best-reads/2017/09/19/arizona-tison-gang-spree-prison-escape-1978/660262001/> [<https://perma.cc/68KZ-92Y2>].

75. *Id.* at 171 (Brennan, J., dissenting).

76. Rosen, *supra* note 50, at 1162 (“In every felony murder case, the defendant has agreed to commit a dangerous felony and, as a result, someone has ended up dead.”).

77. MODEL PENAL CODE § 210.2(1)(b) (“Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of

statement in *Lockett* “that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death,” has since been eviscerated by *Tison*.<sup>78</sup>

Some of the problems with *Tison* were visible from the moment it was decided. As Justice Brennan noted in his dissent, citing Justice White’s *Lockett* concurrence, a person who acts recklessly is “qualitatively different” from a person who acted with intent: “[B]ecause that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill.”<sup>79</sup> Moreover, identifying recklessness is significantly more complicated than identifying intent: “[A] court looking at reckless indifference to human life is essentially expressing a moral judgment, a judgment of the culpability of, and not merely the purpose underlying, a defendant’s acts.”<sup>80</sup> Justice White himself has repeatedly recognized the difficulty in defining “reckless disregard” in other context such as libel suits.<sup>81</sup> Accordingly, the Court went from an identifiable and narrow *mens rea* standard to one that was both qualitatively broader and more difficult to define.

A key consequence of *Tison* is the decline of an individual’s personal culpability as the key measure of who should or should not be sentenced to death. Justice Brennan noted that *Tison*, for example, “left open the issue whether a court may constitutionally attribute to a defendant as an aggravating factor the manner in which other individuals carried out the killings” or “whether the purposes for which other individuals committed a crime can be constitutionally attributed to a defendant as an aggravating

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force, arson, burglary, kidnapping or felonious escape.”)

78. *Lockett v. Ohio*, 438 U.S. 586, 627–28 (1978) (White, J., concurring in part and dissenting in part).

79. *Tison*, 481 U.S. at 170–72 (Brennan, J., dissenting) (“[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 life.”) (quoting *Lockett*, 438 U.S. at 626–28 (White, J., concurring in part and dissenting in part)).

80. *Rosen*, *supra* note 50, at 1154 (“As the Court has acknowledged elsewhere, this process reflects that the concept of reckless indifference is not a fact but a highly subjective evaluative judgment with no common core of meaning.”).

81. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (Justice White, writing for the Court, stating that “‘reckless disregard’ . . . cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication.”); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 515 (1984) (White, J., dissenting) (noting that, unlike “actual knowledge,” he does “not believe that the ‘reckless disregard’ component of the New York Times malice standard is a question of historical fact.”).

circumstance.”<sup>82</sup> Citing to *Lockett*, he noted that “such vicarious attribution ’would seem to violate the core Eighth Amendment requirement that capital punishment be based upon an “individualized consideration” of the defendant’s culpability.”<sup>83</sup>

For example, the individualized consideration for capital defendants became further attenuated after *Tison* due to the consideration of victim impact evidence. The Court in *Payne v. Tennessee*<sup>84</sup> relied on *Tison* to hold that the Eighth Amendment did not prohibit victim impact evidence at sentencing, even if the defendant was unaware of the impact discussed. The Court held that “the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law. . . in determining the appropriate punishment.”<sup>85</sup> In fact, *Tison* was the sole case the majority cited—joined by Justice White—to justify looking at harm when considering a death sentence: “[I]f the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed.”<sup>86</sup> Justice White himself expressed support for this position after *Tison*, irrespective of the defendant’s intention to cause such harm: “There is nothing aberrant in a juror’s inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused. . . .”<sup>87</sup> In other words, Justice White no longer treated a

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82. *White v. Dugger*, 483 U.S. 1045, 1049 (1987) (Brennan, J., dissenting from denial of certiorari and stay) (citation omitted).

83. *Id.* (quoting *Lockett*, 438 U.S. at 605); see also Lynn D. Wittenbrink, *Overstepping Precedent? Tison v. Arizona Imposes the Death Penalty on Felony Murder Accomplices*, 66 N.C. L. REV. 817, 837 (1988) (“Rather than admit that the Court focused on the harm committed by Gary Tison, the father of the defendants, the Court invoked a contrived distinction between *Enmund* and *Tison*.”) (emphasis in original).

84. 501 U.S. 808, 819 (1991).

85. *Id.* (“Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.”).

86. *Id.* (quoting *Tison v. Arizona*, 481 U.S. 137, 148 (1987)).

87. *Booth v. Maryland*, 482 U.S. 496, 516-17 (1987) (White, J., dissenting), *overruled by Payne*, 501 U.S. at 830. Justice White encouraged juries to consider harm due in part to his faith in the system, in particular that the Court should not presume that the jury will consider impermissible factors such as the race of the victim. *Id.* at 517 (citations omitted).

I fail to see why the State cannot, if it chooses, include as a sentencing consideration the particularized harm that an individual’s murder causes to the rest of society and in particular to his family. To the extent that the Court is concerned that sentencing juries might be moved by victim impact statements to rely on impermissible factors such as the race of the victim, there is no showing that the statements in this case encouraged this, nor should we lightly presume such misconduct on the jury’s part.

defendant's culpability as a clear line demarcating who can and cannot face capital punishment.

Despite his support for victim impact evidence, Justice White continued to be troubled by expanding the penalties for those without the sufficiently culpable intent. In his final years on the Court, Justice White dissented from a non-capital opinion upholding a statutorily mandated penalty of life without possibility of parole for narcotics possession by citing to his opinion in *Enmund*: "To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt."<sup>88</sup> He seemed particularly troubled by an opinion upholding a death penalty delivered under instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony murder. That case, *Schad v. Arizona*, relied on *Tison* to note that anyone convicted of felony murder could be presumed to have the requisite intent, and could be viewed as equivalent to one who committed premeditated murder:

Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.<sup>89</sup>

Justice White, in his dissent, found such equivalence "unbelievable," and asserted felony murder does not automatically qualify for the death penalty without further findings such as *mens rea*:

Thus, this Court has required that in order for the death penalty to be imposed for felony murder, there must be a finding that the defendant in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used or that the defendant was a major participant in the felony and exhibited reckless indifference to human life.<sup>90</sup>

Although this statement accurately sums up the conclusions of *Tison*, Justice White neglected to see that the expansive view in *Schad*—allowing the death penalty for any felony murder—was a direct result of that earlier decision. Once the Court declared that recklessness and major

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88. *Harmelin v. Michigan*, 501 U.S. 957, 1023 (1991) (White, J., dissenting) (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

89. 501 U.S. 624, 644 (1991).

90. *Id.* at 658-59 (White, J., dissenting) (citations omitted) (citing *Enmund*, 458 U.S. at 797; *Tison*, 481 U.S. at 158).

participation are sufficient to impose the death penalty on an accomplice, it is difficult to conceive of a murder in which a factfinder could not be satisfied that such expansive and generalized concepts are met.<sup>91</sup> Justice White's assertion in *Lockett*, 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," accordingly has long since failed to be the rule of the Court.<sup>92</sup>

#### IV. CONCLUSION

Justice White's majority opinions in *Enmund* and *Bullock* were the fruition of the principles espoused in his *Lockett* concurrence: that the Court "insist[s] on 'individualized consideration as a constitutional requirement in imposing the death sentence,'"<sup>93</sup> and that the death penalty for those who did not kill or intend to kill has limited retributive or deterrent value.<sup>94</sup> Thus, Justice White for a time succeeded in establishing a "categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."<sup>95</sup> Even though this standard imposed a higher *mens rea* requirement only on those who did not themselves kill or attempt to kill, it nonetheless represented a significant red line demarcating the acceptable outer limits of eligibility for capital punishment.

When Justice White joined the majority in *Tison*, however, any such limitation disappeared. Now, the death penalty is available even for those who did not kill, attempt to kill, or even intend for a killing to take place, so long as they were a major participant in the felony and exhibited reckless indifference to human life.<sup>96</sup> The expansion of the death penalty decimated the categorical limit on eligibility, at least as far as *mens rea* is concerned. This expansive practice exists to this day.<sup>97</sup>

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91. *Id.* at 645 ("There we held that 'the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents [such] a highly culpable mental state . . . that [it] may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result.'") (alterations in original) (quoting *Tison*, 481 U.S. at 157-58).

92. *Lockett*, 438 U.S. at 624 (White, J., concurring in part and dissenting in part).

93. *Enmund*, 458 U.S. at 798 (citing *Lockett*, 438 U.S. at 605 (footnote omitted)).

94. *Id.* at 798-99, 801; *see also Lockett*, 438 U.S. at 625 (White, J., concurring in part and dissenting in part).

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

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

97. *See, e.g., Jordan v. Mississippi*, 138 S. Ct. 2567, 2570 (2018) (Breyer, J., dissenting from the denial of certiorari) ("Mississippi is one of a small number of States in which defendants may be (and, in Mississippi's Second Circuit Court District, routinely are) sentenced to death for, among other things, felony robbery murder without any finding or proof of intent to kill.").

As noted above, this expanded understanding of the death penalty undermines the Court's stated goals of deterrence and individualized consideration. As a result of *Tison*, a defendant may be sentenced to death for the fatal conduct of someone else involved in the felony, even if the defendant did not intend or even know that a killing would occur.<sup>98</sup> This results in a lack of individualized consideration—being punished for something the defendant perhaps did not do or even know about—as well as a lack of deterrence effect. As Justice White explained in *Lockett*, after all, if one is unaware that a killing will occur, the death penalty is unlikely to enter the calculus of whether to proceed with a felony.<sup>99</sup> While there continues to be a requirement that a defendant display reckless indifference to qualify for capital punishment, any individual engaged in a dangerous felony can potentially satisfy that requirement.<sup>100</sup> Accordingly, any deterrent value for the death penalty in such cases—on the chance that a fatality may occur, even if one is not planned or foreseen—is minimal at best.

In fact, the Court continues to note with approval the standards espoused by *Enmund* and *Bullock*, to the extent they survive beyond *Tison*. In *Graham v. Florida*, for example, the Court relied on *Enmund* to hold that the Eighth Amendment prohibits life without parole sentences for juvenile offenders who did not commit homicide:

The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . . It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.<sup>101</sup>

The Court also relied on *Enmund* to prohibit the death penalty for “mentally retarded criminals” due in part to lack of deterrent value: “[I]t seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.’”<sup>102</sup>

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98. See *supra* Part IV.

99. *Lockett*, 438 U.S. at 625 (White, J., concurring in part and dissenting in part) (“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 — and that debate rages on — its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful.”).

100. See *supra* Part III.

101. *Graham v. Florida*, 560 U.S. 48, 69 (2010), *as modified* (July 6, 2010) (citations omitted).

102. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (“The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.”) (citing *Enmund*, 458 U.S. at 799)).

If the Court continues to uphold the death penalty, the Court's oft-cited principles of individualized consideration and deterrence would be better served by adopting Justice White's *Lockett* requirement in capital cases of "a finding that the defendant engaged in conduct with the conscious purpose of producing death . . . ." <sup>103</sup> An "intent" standard for capital defendants at the very least should apply to those who themselves did not kill or attempt to kill, if not for all capital defendants. To hold otherwise allows the death penalty to proceed regardless of individual culpability or deterrent value in violation of the Eighth Amendment. <sup>104</sup>

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103. *Lockett*, 438 U.S. at 628 (White, J., concurring in part and dissenting in part).

104. *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) ("A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.").