

CASE COMMENTS

EIGHTH AMENDMENT PROHIBITS IMPOSITION OF DEATH PENALTY ON ACCOMPLICE TO A FELONY MURDER

Enmund v. Florida, 102 S. Ct. 3368 (1982)

In *Enmund v. Florida*,¹ the United States Supreme Court emphasized the eighth amendment's prohibition against disproportionate punishment² in holding that the imposition of the death penalty on a defendant convicted of felony murder,³ absent an independent finding of

1. 102 S. Ct. 3368 (1982).

2. The following cases recognize the eighth amendment prohibition of disproportionate penalties: *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (dictum); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Furman v. Georgia*, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring); *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (dictum); *Weems v. United States*, 217 U.S. 349, 367 (1910). See generally L. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* (1975); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 22, at 163 (1972); Baldus, Pluasky, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death, A Quantitative Approach*, 33 STAN. L. REV. 1, 1-8 (1980); Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 639-40 (1979); Turkington, *Unconstitutionally Excessive Punishment: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 147 (1967); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 841 (1972); Note, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356, 357-63 (1978); 59 WASH. U.L.Q. 546, 547-52 (1981).

3. Under the common-law felony murder rule a person is liable for murder if death occurs during the commission of a felony. 4 W. BLACKSTONE, COMMENTARIES * 201. At common law, an attempted felony was either punished as a misdemeanor or was not considered a crime at all. See Note, *supra* note 2, at 363-64. Thus, the felony murder rule was primarily instituted to broaden criminal responsibility for homicides committed during incomplete felonies. *Id.* Over time, as more crimes were categorized as felonies, many of which were not punished by death, the continued operation of the rule caused some startling results which generated demands for limitations on its use. MODEL PENAL CODE § 210.2 (Official Draft 1980). American legislatures responded by dividing felony homicides into two grades or lowering the degree of murder for all felony homicides. *Id.* at 32 n.78. The courts also imposed restrictions on the felony murder rule. For example, many courts now insist that the felony pose a foreseeable risk to life, *e.g.*, *People v. Washington*, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). Other courts require that the killing be in furtherance of the felony, *e.g.*, *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1965), or that the homicide resulted while the felony was in progress, *e.g.*, *Higgins v. State*, 149 Miss. 280, 115 So. 213 (1928). As a result of these piecemeal limitations on the scope of the felony murder rule, the current law of felony murder differs substantially throughout the country.

The felony murder rule remains the subject of criticism. Some commentators assert that inequities have resulted from the reform efforts. Moreover, because malice aforethought is presumed as

intent to kill,⁴ constitutes cruel and unusual punishment.

The trial court sentenced petitioner to death under Florida's capital felony sentencing statute⁵ following his conviction for robbery⁶ and

a matter of law where murder is committed in perpetration of a felony, *e.g.*, *Larry v. State*, 104 So.2d 352 (Fla. 1958), the felony murder rule is often attacked for being anomalous to the basic premise of criminal law: punishment for deeds done with a state of mind that makes them reprehensible. MODEL PENAL CODE § 210.2 (Official Draft 1980). *See also* *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980) (common-law felony murder rule abandoned in Michigan). In recognition of these problems, the American Law Institute has recommended elimination of the rule. Nevertheless, the felony murder rule persists. *See also* Note, *Felony Murder Rule—In Search of A Viable Doctrine*, 23 CATH. LAW 133 (1978). *See generally* W. LAFAYE & A. SCOTT, *supra* note 2, § 1, at 545 (discussion of felony murder).

4. In order to be held criminally liable under traditional principles of criminal law, a person must commit an act (*actus reus*) which causes harm, while harboring an evil state of mind (*mens rea*). W. LAFAYE & A. SCOTT, *supra* note 2, § 24, at 175. The defendant's *mens rea* is considered a reflection of his moral guilt and, thus, the degree of his criminal culpability. *See, e.g.*, *Mullany v. Wilbur*, 421 U.S. 684, 699 (1975).

At early common law, state of mind was not determinative of criminal responsibility. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 470 (rev. 2d ed. 1911). In the 12th century courts recognized the mental element of crime, R. MORELAND, *THE LAW OF HOMICIDE* 5 (1952), and in the 16th century the concept of malice aforethought became an essential element of murder. 4 W. BLACKSTONE, *supra* note 3, at * 178. Originally, malice aforethought meant deliberate intent to kill conceived prior to the act. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 545 (1934). Later, it was extended to include the accidental killing during the commission of a wrongful act. *Lord Docks's Case*, 72 Eng. Rep. 458 (K.B. 1535); E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 56 (6th ed. 1680). This extension has evolved into the present felony murder rule. *See supra* note 3. *See generally* Note, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony Murder Rule*, 46 MISS. L.J. 1021, 1021-22 (1975).

5. FLA. STAT. § 921.141 (Supp. 1981).

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held that when infrequently and arbitrarily applied, the death penalty could not serve the social purposes that justify it. *Id.* at 249 (Douglas, J., concurring). The practical effect of this watershed decision was to strike down all state death penalty laws with the infirmities *Furman* identified. Within six months of *Furman*, the Florida legislature met in a special session and became the first state to reinstitute capital punishment. The new statute attempted to correct the deficiencies of the previous death penalty statute. *See* Boyd & Logue, *Developments in the Application of Florida's Capital Felony Sentencing Law*, 34 U. MIAMI L. REV. 441 (1980). *See also* Yetter, *Constitutionality of the Florida Death Penalty*, 52 FLA. BAR. J. 372 (1978); Note, *Florida Death Penalty: A Lack of Discretion?*, 28 U. MIAMI L. REV. 723 (1974).

Florida's section 921.141 requires bifurcated trials: guilt adjudication and sentencing. If found guilty, the defendant may present evidence at the sentencing hearing concerning any matter the court deems relevant to the nature of the crime and the character of the defendant, including factors relating to any of the following aggravating or mitigating circumstances:

first degree murder⁷ of an elderly couple.⁸ The Florida Supreme Court affirmed the conviction and sentence.⁹ In doing so, the the court noted that the record supported nothing more than an inference that petitioner was the person who waited in a parked car to help his codefendants escape.¹⁰ Nevertheless, under Florida law, his participation made

(5) Aggravating circumstances.— Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony 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 robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

FLA. STAT. § 921.141(5) (Supp. 1981).

(6) Mitigating Circumstances.—Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant at the time of the crime.

Id. § 921.141(6).

When testimony is concluded, the jury weighs the evidence and offers a sentencing recommendation arrived at through a majority vote. After receiving the recommendation, the trial judge weighs the aggravating and mitigating circumstances, and decides on the defendant's sentence. If the trial court imposes the death penalty, the judge must set forth the court's findings in writing and appellate review is mandatory.

Florida's capital felony sentencing statute was upheld as constitutional in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

6. The petitioner was convicted of robbery under FLA. STAT. § 812.13 (Supp. 1981).

7. The petitioner was convicted of first degree murder under FLA. STAT. § 782.02(1)(A) (Supp. 1981).

8. *Armstrong v. State*, No. 75-110 Crim. (Sept. 30, 1975).

9. *Enmund v. State*, 399 So. 2d 1362 (Fla. 1981).

10. *Id.* at 1363-67. Petitioner, Earl Enmund, decided to rob the victims Thomas and Eunice Kersey following an incident in which Mr. Kersey had revealed the contents of his wallet and bragged that he usually carried \$15,000-16,000 on his person.

Codefendants Sampson and Jeanette Armstrong approached the Kersey home on the pretext of needing water for an overheated car. Enmund remained in the car. When Mr. Kersey came out

him a constructive aider and abettor¹¹ and therefore a principal in first degree murder¹² subject to the death penalty.¹³ The United States Supreme Court reversed and *held*: Imposition of the death penalty on a defendant who did not kill, attempt to kill, or intend to kill constitutes cruel and unusual punishment under the eighth and fourteenth amendments.¹⁴

The Magna Carta¹⁵ and the cruel and unusual punishment clause of the English Bill of Rights¹⁶ prohibited the imposition of disproportionate punishments in England.¹⁷ The language of the eighth amendment¹⁸ is virtually identical to that of the cruel and unusual

of the house Sampson Armstrong threatened him at gun point. Kersey yelled for help. His wife emerged from the house firing a shotgun. In the shoot-out which followed, the Kersey's were killed. The Armstrongs took the victim's money, rejoined Enmund and fled.

11. FLA. STAT. § 777.011 (Supp. 1981).

12. *See, e.g.*, Adams v. State, 341 So. 2d 765, 768-69 (Fla. 1976) (a felon is generally responsible for the lethal acts of his co-felon), *cert. denied*, 434 U.S. 878 (1977).

13. The trial court found that four statutory aggravating circumstances applied in this case: 1) the petitioner had a previous felony conviction; 2) the murders were committed during the course of a robbery; 3) the murders were committed for pecuniary gain; and 4) the murders were especially heinous, atrocious, or cruel because the Kersey's were shot in a prone position to eliminate them as witnesses. 399 So. 2d at 1371-72. The Florida Supreme Court rejected two of the four statutory aggravating circumstances found by the trial court. It held that the findings that the murders were committed in the course of a robbery and for pecuniary gain referred to the same aspect of the crime and therefore could only be considered as one aggravating circumstance. In addition, the state Supreme Court did not approve the finding that the murders were especially heinous, atrocious and cruel. It did, however, affirm the trial court finding that none of the statutory mitigating circumstances applied and thus, the aggravating circumstances outweighed the mitigating circumstances. Most importantly, the Florida courts decided that the petitioner's participation in the robbery was not "minor." *Id.* at 1371-72. *See supra* note 5.

14. Enmund v. Florida, 102 S. Ct. 3368 (1982). The eighth amendment is applicable to the states through incorporation of the due process clause of the fourteenth amendment. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667 (1962). In his concurring opinion in Furman v. Georgia, 408 U.S. 238, 241 (1972), Justice Douglas also argued that the privileges and immunities clause of the fourteenth amendment was specifically intended to apply the cruel and unusual punishments clause to the states.

15. J. HOLT, MAGNA CARTA 323 (1965). "A free man shall not be amerced [punished] for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be amerced according to its gravity." *Id.*

16. Bill of Rights, 1 W. & M. sess. 2, ch. 2, reprinted in R. PERRY & J. COOPER, SOURCES OF OUR LIBERTY 247 (1959).

17. "[T]he cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments which were unauthorized by statute . . . and second, a reiteration of the English policy against disproportionate penalties." Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969).

18. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

punishment clause of the English Bill of Rights.¹⁹

In 1791, the framers of the Constitution adopted the eighth amendment after cursory debate.²⁰ As a result, legislative history indicating the intended meaning of the cruel and unusual punishments clause is scarce. Courts initially limited the eighth amendment's application to barbaric and torturous forms of punishment.²¹ Subsequently, courts

19. *See supra* notes 16-18.

20. 1 ANNALS OF CONGRESS 754 (J. Gales ed. 1789).

In 1791, the states uniformly followed the common-law practice of imposing death as the mandatory sentence for specified offenses. *See* H. BEDAU, *THE DEATH PENALTY IN AMERICA* 307 (3d ed. 1982). The range of specified offenses typically included murder, treason, piracy, arson, rape, robbery, burglary, and sodomy. *Id.* at 7. Since that time, there has been considerable legal debate over the justifications and procedural requisites of capital punishment. *See, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Coker v. Georgia*, 433 U.S. 584 (1977); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *McGautha v. California*, 402 U.S. 183 (1971). This is especially true of the last decade, primarily because of the Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which required that courts use guided discretion when imposing a death sentence. *See also infra* notes 39-43 and accompanying text. *See generally* H. BEDAU, *THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT* (1977) (reflections on capital punishment controversy from 1967-1977).

Currently, thirty-five states authorize the death penalty for a variety of offenses.

Thirty-two states statutorily impose the death penalty for felony murder. *See* ALA. CODE §§ 13A-2-23, -5-40(a)(2), -6-2(a)(1) (1975 & Cum. Supp. 1981); ARIZONA REV. STAT. ANN. § 13-703(G)(3) (Cum. Supp. 1981); ARK. STAT. ANN. § 41-1501 (Supp. 1981); CAL. PENAL CODE ANN. § 189, 190.2(a)(17) (West Supp. 1982); COLO. REV. STAT. § 16-11-103(5)(d) (1973); CONN. GEN. STAT. § 53a-54b (1981); DEL. CODE ANN., tit. 11, §§ 636(a)(2), 636(2) (6) (1979); FLA. STAT. §§ 782.04(1)(a), 775.082, 921.141(5)(d) (1976 & Cum. Supp. 1982); GA. CODE ANN. §§ 26-1101(b)(c), 27-2534.1(b)(2) (Cum. Supp. 1982); IDAHO CODE § 19-2515(f) (1979); ILL. REV. STAT. ch. 38, § 9-1(a)(3), (b)(6) (1979); IND. CODE ANN. § 35-50-2-9(c)(4) (West 1979); KY. REV. STAT. § 507.020(b) (Supp. 1981); LA. REV. STAT. ANN. § 14:30(1) (West Cum. Supp. 1982); MD. CRIM. LAW CODE ANN. art. 27, §§ 410, 411(b), 413(d)(10), 413(e)(1) (1982); MISS. CODE ANN. § 97-3-19(2)(e) (Cum. Supp. 1982); MONT. CODE ANN. § 46-18-304(6) (1981); NEB. REV. STAT. § 29-2523(2)(e) (1979); NEV. REV. STAT. §§ 200.030(1)(b), .030(4), .033(4) (1979); N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Cum. Supp. 1982); N.C. GEN. STAT. § 15(a)-2000(f)(4) (Supp. 1981); OHIO REV. CODE ANN. §§ 2903.01(B)(C)(D), 2929.02(A), 2929.04(A)(7) (Page 1982); OKLA. STAT. ANN. tit. 21 § 701.12 (West Cum. Supp. 1982); S.C. CODE ANN. §§ 16-3-10, -20(C)(a)(1) (Law Co-op Cum. Supp. 1982); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (1979 & Supp. 1982); TENN. CODE ANN. §§ 39-2-202, 2-203(i)(7) (1982); TEX. STAT. ANN., § 19.02(a), .03(a)(2) (Vernon 1974); UTAH CODE ANN. § 76-5-202(1) (1978); VT. STAT. ANN. tit. 13, §§ 2303(b), (c) (Cum. Supp. 1982); VA. CODE § 18.2-31(d) (1982); WASH. REV. CODE §§ 9A.32.030(1)(c)(1), .040(1) (1977 & Cum. Supp. 1982); WYO. STAT. §§ 6-4-101, -102(h)(iv) (1977). *See infra* notes 64 & 75 and accompanying text.

21. *See, e.g., In re Kemmler*, 136 U.S. 436, 447 (1890). Burning at the stake, crucifixion, and breaking at the wheel are examples of what was considered barbaric punishment. *Id.* at 446. It has been suggested that the cruel and unusual punishment clause in the English Bill of Rights of 1689 was not intended to outlaw barbarous methods of punishment, but instead, was intended to

have broadened the scope of the amendment to include the concept of disproportionality²² and to restrict the type of behavior that may be considered criminal.²³

A dissenting opinion in *O'Neil v. Vermont*²⁴ offered the first Supreme Court expression that the eighth amendment prohibited disproportionate sentences. The Court in *Weems v. United States*²⁵ later adopted that position as the majority view. In *Weems*, a United States Coast Guard officer was convicted of falsifying a public document²⁶ and sentenced to fifteen years of "hard and painful labor in chains."²⁷ In overturning the sentence as cruel and unusual, the Court explained that it is a "precept of justice that punishment for a crime . . . be graduated and proportioned to the offense."²⁸

The *Weems* Court engaged in a two-tiered analysis. First, the Court compared the defendant's punishment to sanctions imposed in other jurisdictions for the same crime.²⁹ It then compared the punishment under attack to sentences imposed in the same jurisdiction for more serious crimes.³⁰ The Court concluded that the nature of the punishment in question offended the eighth amendment in both "degree and kind."³¹

The *Weems* Court also emphasized the eighth amendment's evolving

outlaw punishments "which were unauthorized by statute and outside the jurisdiction of the sentencing court." Granucci, *supra* note 17, at 860.

22. See *supra* note 2.

23. See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977) (the cruel and unusual punishments clause does not apply to disciplinary corporal punishment in public schools); *Robinson v. California*, 370 U.S. 660 (1962) (imposition of ninety-day sentence for drug addiction is cruel and unusual punishment). See generally H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

24. 144 U.S. 323, 337 (1892) (Field, J., dissenting). Justice Field stated in his dissent: "The inhibition is directed, not only against punishments [which inflict torture], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339-40.

25. 217 U.S. 349 (1910).

26. *Id.* at 364.

27. *Id.* *Weems* was sentenced to fifteen years of hard labor, constant wearing of shackles, loss of civil liberties, and surveillance for life. *Id.*

28. *Id.* at 367.

29. *Id.* at 380-81. In *Badders v. United States*, 240 U.S. 391 (1916), Justice Holmes ignored *Weems* and relied on *Howard v. Flemming*, 191 U.S. 126, 135-36 (1903), which rejected the comparative approach. Recently, however, the Court has compared punishments and statutes when evaluating sentences under the eighth amendment. See *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

30. 217 U.S. at 380-81.

31. *Id.* at 377.

nature. The Court observed that many commentators viewed the amendment as "progressive," and thus sensitive to changes in public standards of decency and justice.³²

More recent Supreme Court decisions reiterate the *Weems* interpretation of the eighth amendment as an evolving standard.³³ In *Trop v. Dulles*,³⁴ the Court announced that the definition of the eighth amendment is not static.³⁵ Rather, it incorporates "evolving standards of decency that mark the progress of a maturing society."³⁶ When applied, this construction of the eighth amendment has functioned to overturn various sentences,³⁷ including the assignment of the death penalty.³⁸

32. *Id.* at 378.

33. *See* *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); *Coker v. Georgia*, 433 U.S. 584, 593-94 (1977); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *id.* at 463-64 (Brennan, J., concurring); *id.* at 409 (Blackmun, J., dissenting); *Robinson v. California*, 370 U.S. 660-66 (1962); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

34. 356 U.S. 86 (1958) (army serviceman denationalized for wartime desertion after escaping from stockade where he was confined for disciplinary breach).

35. *Id.* at 100-01.

36. *Id.*

37. *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962) (imposition of a 90-day sentence for drug addiction is cruel and unusual punishment); *Trop v. Dulles*, 356 U.S. 86 (1958) (denationalization of wartime deserter is cruel and unusual punishment). *But see* *Rummel v. Estelle*, 445 U.S. 263 (1980) (mandatory life sentence under recidivist statute is not cruel and unusual punishment).

38. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape reversed); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (death penalty for murder reversed); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (same); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty for murder and rape reversed).

In other cases, however, the Supreme Court has upheld the death penalty. *See* *Jurek v. Texas*, 428 U.S. 262 (1976) (death sentence for choking a ten year old girl upheld); *Proffitt v. Florida*, 428 U.S. 242 (1976) (death sentence for stabbing burglary victim upheld); *Gregg v. Georgia*, 428 U.S. 153 (1976) (death sentence for robbery and murder upheld). The Court, however, has only affirmed death sentences where the killing was clearly the deliberate and premeditated act of the defendant.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the jury was instructed on both intentional and felony murder theories. The facts of that case, however, leave little doubt as to the intentional nature of the offense. The Court confirmed this characterization of Gregg's crime in stating: "But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." *Id.* at 187. The Court was presented with an accomplice, felony murder scenario in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *Woodson*, however, was decided on the broader issue of the constitutionality of mandatory death penalty statutes. As a result, the Court never reached the question of whether the imposition of the death penalty on the petitioner would have been "so disproportionate to the nature of his involvement . . . as independently to violate the Eighth [Amendment]. . . ." *Id.* at 305 n.4. The Court similarly avoided making such a determination in *Lockett v. Ohio*, 438 U.S. 586 (1978). *See infra* notes 55-59 and accompanying text.

The Supreme Court first directly addressed the constitutionality of capital punishment under the cruel and unusual punishments clause of the eighth amendment in *Furman v. Georgia*.³⁹ In *Furman*, one petitioner was convicted of murder and two other petitioners were convicted of rape.⁴⁰ A jury sentenced each defendant to death.⁴¹ The Supreme Court, however, invalidated the capital sentences.⁴² The Court determined that allowing a jury to impose the death penalty through a process that lacked objective standards of guidance constitutes cruel and unusual punishment in violation of the eighth amendment.⁴³

Since *Furman*, mandatory death penalty statutes have likewise been declared unconstitutional.⁴⁴ Capital punishment per se, however, has

39. 408 U.S. 238 (1972). Challenges to the death penalty shifted to the eighth amendment after an attempt based on due process doctrine failed in *McGautha v. California*, 402 U.S. 183 (1971). For a discussion of the constitutionality of capital punishment under traditional due process and equal protection analysis, see Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1001-17 (1978).

Prior to *Furman*, the Court heard arguments on the death penalty as cruel and unusual punishment in *Boykin v. Alabama*, 395 U.S. 238, 249 n.3 (1969) (Harlan, J., dissenting), but the case was decided on other grounds. The Court has often given implicit constitutional approval to capital punishment by holding that particular methods of execution do not violate the eighth amendment. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (second attempt at electrocution after first attempt failed not cruel and unusual punishment); *In re Kemmler*, 136 U.S. 436 (1890) (electrocution approved as method of execution); *Wilkerson v. Utah*, 99 U.S. 130 (1878) (death by shooting approved as method of execution). In addition, there are a number of instances where the Court, in dictum, or a particular Justice, in a separate opinion, has expressed the opinion that capital punishment does not offend the eighth amendment. *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (Warren, C.J.); *In re Kemmler*, 136 U.S. 436, 447 (1890) (Fuller, C.J.) (dictum).

40. 408 U.S. 238 (1972).

41. *Id.*

42. *Id.*

43. *Id.* at 240-57 (Douglas, J., concurring) (discretionary sentencing procedures permit discriminatory sentences); *id.* at 291-300 (Brennan, J., concurring) (statutes permit capricious sentencing); *id.* at 309-10 (Stewart, J., concurring) (statutes permit random and capricious imposition of death penalty); *id.* at 311-14 (White, J., concurring) (infrequent imposition of death penalty makes it unusual and pointless punishment); *id.* at 364-66 (Marshall, J., concurring) (death penalty discriminates against minority group defendants). Justices Brennan and Marshall also concluded that the death penalty was unconstitutional per se. *Id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring). For a full analysis of *Furman*, see England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg*, 52 NOTRE DAME LAW. 596, 596-600 (1977); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 76-85 (1972). See *supra* note 5.

44. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory death penalty statute for murder unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (same).

never been disqualified as contrary to the eighth amendment.⁴⁵

In *Coker v. Georgia*,⁴⁶ the Supreme Court overturned the imposition of a capital sentence for the crime of rape.⁴⁷ The Court ruled that a punishment is excessive and therefore unconstitutional if it “makes no measurable contribution to acceptable goals of punishment,⁴⁸ or is grossly out of proportion to the severity of the crime.”⁴⁹ Moreover, the Court stressed that a constitutional judgment of proportionality should be based upon objective evidence of contemporary public attitudes.⁵⁰ Accordingly, the Court reviewed legislative judgments⁵¹ and jury sentencing tendencies⁵² regarding the punishment of rape. The *Coker* Court, however, viewed an evaluation of public opinion as only one factor to be considered in making a proportionality decision.⁵³ The Court observed that a court’s subjective judgment should also affect a decision regarding the acceptability of a punishment under the eighth amendment.⁵⁴

45. See *Gregg v. Georgia*, 428 U.S. 153, 168-87 (1976) (the punishment of death does not, under all circumstances, violate the eighth amendment if not imposed arbitrarily or capriciously and if the sentencing authority is given adequate information and guidance).

46. 433 U.S. 584 (1977) (petitioner escaped from correctional facility and committed rape, robbery, assault, and kidnap).

47. *Id.* at 592.

48. There has been much controversy over which goals of punishment are acceptable and whether the present penal system adequately serves those goals. Retribution and deterrence are the two theories of punishment usually advanced in support of the death penalty. Under the theory of deterrence, the sufferings of the criminal for the crime he has committed are intended to deter others from committing future crimes, for fear they will suffer the same unfortunate fate. W. LAFAVE & A. SCOTT, *supra* note 2, § 5, at 23. Under the theory of retribution, punishment is imposed on a criminal by society in order to obtain revenge or because he inflicted harm and therefore deserves his “just deserts.” *Id.* at 24. The appropriateness of these theories with respect to capital punishment has been the subject of considerable scrutiny. See generally Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981); Comment, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirement for its Justification*, 34 OKLA. L. REV. 567 (1981).

49. 433 U.S. at 592.

50. *Id.* at 593.

51. *Id.* at 594-97. Legislative actions are presumed to measure public opinion because political representatives are elected and subject to reelection. See *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1975).

52. 433 U.S. at 594-97. Jury recommendations are presumed to reflect public attitudes because they are composed of a cross section of the community. See Kalven & Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 769 (1966).

53. 433 U.S. at 598.

54. *Id.*

In *Lockett v. Ohio*,⁵⁵ the Supreme Court implicitly affirmed the notion that subjective judgment plays a role when evaluating the propriety of a death sentence.⁵⁶ In *Lockett*, the Court maintained that individualized consideration is a constitutional imperative in capital cases because of the unique and final character of the death penalty.⁵⁷ Consequently, the *Lockett* Court struck down the Ohio death penalty statute because it impinged upon the defendant's right to sentence consideration of mitigating circumstances concerning his character, record and offense.⁵⁸ Thus, in evaluating the proportionality of a death sentence, courts must consider not only the objective standards of decency set forth in *Coker*,⁵⁹ but also any mitigating circumstances concerning the defendant.

In *Enmund v. Florida*,⁶⁰ a plurality of the Supreme Court⁶¹ applied the eighth amendment to invalidate a death sentence imposed on an accomplice to a felony murder. Justice White articulated the proportionality principle⁶² and evaluated the facts in accordance with the ob-

55. 438 U.S. 586 (1978) (defendant sentenced to die for aiding and abetting a felony murder).

56. *Id.*

57. *Id.* at 605. See also *Eddings v. Oklahoma*, 102 S. Ct. 869 (1982) (adopting the *Lockett* rule in finding defendant's age to be a mitigating circumstance); *Green v. Georgia*, 442 U.S. 95 (1979) (adopting the *Lockett* rule by allowing testimony of third party at sentencing hearing, to effect that codefendant actually committed killings).

Justices White and Rehnquist expressed concern that the discretion which the *Lockett* decision affords the sentencer in considering mitigating circumstances is too great. They viewed it as resulting in a return to the unguided discretion impermissible under *Furman*. *Lockett v. Ohio*, 438 U.S. at 622-23 (White, J., concurring in part and dissenting in part); *id.* at 629, 631 (Rehnquist, J., concurring in part and dissenting in part). The Texas Court of Criminal Appeals raised the same concern in *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979), *rev'd on other grounds*, 448 U.S. 38 (1980).

58. 438 U.S. at 605. See also Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendants Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981).

In *State v. Cooper*, 336 So. 2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977), the Florida Supreme Court expressly declared that the former Florida death penalty statute restricted consideration of mitigating factors to those set forth in the statute. Two years later, the court reversed the *Cooper* decision in *Songer v. State*, 365 So. 2d 696, 700 (Fla. 1978) (on rehearing), *cert. denied*, 441 U.S. 956 (1979), holding that the Florida capital sentencing statute created a nonexclusive set of mitigating circumstances and was thus constitutional despite *Lockett*.

59. 433 U.S. at 592. See *supra* notes 46-52 and accompanying text.

60. 102 S. Ct. 3368 (1982).

61. Justice White delivered the opinion of the Court, in which Justices Marshall, Blackmun and Stevens joined.

62. *Id.*

jective test established in *Coker*.⁶³

Justice White considered the nationwide status of the death penalty and concluded that only nine of the thirty-six jurisdictions authorizing the death penalty would execute a defendant solely because he participated in a robbery during which a murder occurred.⁶⁴ In addition, Justice White examined the nation's death row population as of October 1,

63. 102 S. Ct. at 3372-76. See *Coker v. Georgia*, 433 U.S. 584 (1977). See also *supra* notes 46-52 and accompanying text.

64. 102 S. Ct. at 3372-75. More specifically, the Court found that only nine states authorize imposition of the death penalty for mere participation in a robbery in which a cofelon takes a life. See CAL. PENAL CODE ANN. §§ 189, 190.2(a)(17) (West Supp. 1981); FLA. STAT. ANN. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (West 1976 & Cum. Supp. 1982); GA. CODE ANN. §§ 28-1101(b), -1101(c), 27-2534.1(b)(2) (Cum. Supp. 1982); MISS. CODE ANN. §§ 97-3-19(2)(e), 99-19-101(5)(d) (Cum. Supp. 1982); NEV. REV. STAT. §§ 200.030(1)(b), .030(4), .033(4) (1979); S.C. CODE ANN. §§ 16-3-10, -20(C)(a)(1) (Law Co-op 1976 & Cum. Supp. 1981); TENN. CODE ANN. §§ 39-2-202, -203(i)(7) (1982); WASH. REV. CODE §§ 9A.32.030(1)(c)(1), .040(1) (1977 & Cum. Supp. 1982); WYO. STAT. §§ 6-4-101, -102(h)(iv) (1977). Nine other states allow execution for unintended felony murder only if aggravating circumstances outweigh mitigating circumstances. Of these, six make minor accomplice participation a statutory mitigating circumstance. See ARIZ. REV. STAT. ANN. § 13-703G(3) (Cum. Supp. 1981) ("relatively minor" participation); CONN. GEN. STAT. § 53a-46a(f)(4) (1981) (same); IND. CODE ANN. § 35-50-2-9(c)(4) (West 1979) (same); MONT. CODE ANN. § 46-18-304(6) (1981) (same); NEB. REV. STAT. § 29-2523(2)(e) (1979) (same); N.C. GEN. STAT. § 15(a)-2000(f)(4) (Supp. 1981) (same). The other three exclude felony murder from their lists of aggravating circumstances. See IDAHO CODE § 19-2515(f) (1979); OKLA. STAT. ANN. tit. 21, § 701.12 (West Cum. Supp. 1982); S.D. CODIFIED LAWS § 23A-27A-1 (1979 & Supp. 1982). The remaining jurisdictions that authorize capital punishment either flatly prohibit such a sentence for felony murder, see MO. REV. STAT. §§ 565.001, .003, .008(2) (1979) (death penalty may be imposed only for capital murder; felony murder is first-degree murder); N.H. REV. STAT. ANN. §§ 630:1, :1(III), :1-a(I)(b)(2) (1974) (capital murder includes only killing a law enforcement officer, killing during a kidnapping, and murder for hire); PA. STAT. ANN., tit. 18, §§ 1102, 2502(a), 2502 (b) (Purden 1980) (death penalty may be imposed only for first-degree murder; felony murder is second-degree murder), or require some culpable mental state with respect to the homicide, see ALA. CODE §§ 13A-2-23, -5-40(a)(2), -6-2(a)(1) (1975 & Supp. 1981) (to be found guilty of capital murder, accomplice must have had "intent to assist or promote commission of the murder" and murder must be intentional); ARK. STAT. ANN. § 41-5101(1)(a) (Supp. 1981) (defendant must demonstrate "extreme indifference to . . . life"); DEL. CODE ANN., tit. 11, § 636(a)(2), 636(a) (6) (1979) (if defendant "recklessly" or "with criminal negligence" causes death during the commission of a felony); ILL. REV. STAT., ch. 38 §§ 9-1(a)(3), -1(b)(6) (1979) (capital crime only if defendant killed intentionally or with knowledge that his actions "create[d] a strong probability of death or great bodily harm"); KY. REV. STAT. § 507.020(b) (Supp. 1981) (defendant must manifest "extreme indifference to human life" and "wantonly engage in conduct which creates a grave risk of death . . . and thereby causes . . . death"); LA. REV. STAT. ANN. § 14:30(1) (West Cum. Supp. 1982) ("specific intent to kill"); N.M. STAT. ANN. §§ 30-2-1(a)(2), 31-18-14(A), 31-20A-5 (Supp. 1981) (felony murder is a capital crime but death penalty may not be imposed absent intent to kill unless victim was a peace officer); OHIO REV. CODE ANN. §§ 2903.01(B)-.01(D), 2929.02(a), 2929.04(A)(7) (Page 1982) (accomplice not guilty of capital murder unless he intended to kill); TEX. STAT. ANN. §§ 19.02(a), .03(a)(2) (Vernon 1974) ("intentionally commits the murder in the course of [a felony]"); UTAH CODE ANN. § 76-5-202(1) (1978) ("intentionally or knowingly causes

1981.⁶⁵ He observed that, at that time, 796 inmates had been sentenced to death, but only three, including the petitioner, had been sentenced without proof of malice aforethought.⁶⁶ Thus, the Court concluded that legislative judgments and jury sentences indicated society's rejection of the death penalty for crimes such as the petitioner's.⁶⁷

The plurality also viewed the defendant's lack of culpability as a significant factor that made the punishment disproportionate and therefore unconstitutional.⁶⁸ Since the petitioner lacked criminal intent to murder, the death penalty failed to serve its two principal social purposes: retribution and deterrence of capital crime by potential offenders.⁶⁹ Justice White asserted that "[i]t is fundamental" that harm caused intentionally must be punished more severely than unintentional infliction of the same harm.⁷⁰ Yet the petitioner and the actual triggerman each received the death sentence.⁷¹

Justice Brennan, in a concurring opinion, restated his position that imposition of the death penalty is always cruel and unusual punishment.⁷²

Justice O'Connor wrote on behalf of the dissent.⁷³ Although she employed the proportionality test used by the plurality, she did not reach the same conclusion.⁷⁴ According to Justice O'Connor's survey of the state statutes, a defendant who neither killed nor intended to kill is

the death of another"); VA. CODE § 18.2-31(d) (Supp. 1981) ("willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon").

65. 102 S. Ct. at 3375 n.18 (citing NAACP LEGAL DEFENSE EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Oct. 20, 1981)).

66. *Id.* at 3375-76.

67. *Id.*

68. *Id.* at 3377.

69. *Id.* at 3378.

70. *Id.* at 3377 (citing H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1982)).

71. *Id.* at 3369.

72. *Id.* at 3379. This concurrence is a reiteration of Justice Brennan's dissenting opinion in *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (upholding the imposition of the death penalty for murder).

73. Justice O'Connor was joined by Chief Justice Burger, and Justices Powell and Rehnquist.

74. 102 S. Ct. at 3392. The dissent also contended that the death penalty for felony murder makes a significant contribution to the goals of retribution and deterrence. *Id.* at 3392 n. 42. The dissenting justices further expressed concern about the appropriateness of making intent a matter of constitutional law. *Id.* at 3391. In addition, Justice O'Connor recommended vacating the decision insofar as it affirmed the death sentence and remanding for a new sentencing hearing because of insufficient treatment of individual circumstances. *Id.* at 3392. Thus, the ultimate result of the dissent and the plurality is the same: Florida must resentence the petitioner. The dissent, however, would leave open the possibility of imposing the death sentence. *Id.* at 3392 n. 43.

subject to the death sentence for participating in a robbery that leads to murder in two-thirds of the states that permit the death penalty for murder.⁷⁵ This statutory interpretation suggests legislative acceptance rather than repudiation of capital punishment for felony murder.⁷⁶

The dissent also cautioned against uncritical acceptance of the statistics cited by the plurality. Those statistics purportedly demonstrated jury disfavor of imposing capital sentences without evidence of intent to kill.⁷⁷ The dissent remained unpersuaded by the figures because they did not indicate the number of homicides that were charged as felony murders, or the number of cases in which the state sought the death penalty for an accomplice guilty of felony murder. Further, the statistics reflected the number of offenders sentenced to death who did not pull the trigger, but did not indicate which of those had an intent to kill.⁷⁸ Since the two concepts are not completely analogous, the dissent expressed qualms regarding the relevance of the statistics.⁷⁹

Justice O'Connor acknowledged that proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness.⁸⁰ She questioned, however, the plurality's application of an eighth amendment proportionality test that excluded standards of blameworthiness other than specific intent.⁸¹ She found one standard of blameworthiness—the intent to commit armed robbery with knowl-

75. See ARIZ. REV. STAT. ANN. § 13-1105(A)(2), -1105 (C) (Cum. Supp. 1982); ARK. STAT. ANN. §§ 41-1501(1)(a), -1501 (3) (1977); CAL. PENAL CODE §§ 189, 190 (West Supp. 1982); COLO. REV. STAT. §§ 18-3-102(1)(b), 1-105(1)(a) (1978 & Cum. Supp. 1982); CONN. GEN. STAT. §§ 53a-54b, -54c, -35a(1) (1981); DEL. CODE ANN. tit. 11, §§ 636(a)(6), 636(b), 4209(a) (1974 & Cum. Supp. 1982); FLA. STAT. ANN. §§ 782.04(1)(a), 775.082(1) (West 1976 & Cum. Supp. 1982); GA. CODE ANN. § 26-1101(c), (d) (Cum. Supp. 1982); IDAHO CODE §§ 18-4003(d), 4004 (West 1979); IND. CODE ANN. §§ 35-42-1-1(2), -50-2-3(b) (West 1979); KY. REV. STAT. § 407.020(1)(b), (2) (Supp. 1980); MISS. CODE ANN. §§ 97-3-19(2)(e), -3-21 (Cum. Supp. 1982); MONT. CODE ANN. §§ 45-5-102(1)(b), -102 (2) (1981); NEB. REV. STAT. §§ 28-303(2), -105(1) (1979); NEV. REV. STAT. §§ 200.030(1)(b), .030(4)(a) (1981); N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (1978 & Supp. 1981); N.C. GEN. STAT. § 14-17 (1981); OKLA. STAT. ANN., tit. 21, §§ 701.7(B), .9(A) (West Cum. Supp. 1982); S.C. CODE ANN. §§ 16-3-10, -20(1) (Law Co-op 1976 & Cum. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 22-3-3, -6-1(1), -16-4, -16-12 (1979 & Supp. 1981); TENN. CODE ANN. § 39-2402(a), -2402 (b) (Supp. 1981); VT. STAT. ANN. tit. 13, §§ 2301, 2303(b), (c) (1974 & Cum. Supp. 1981); WASH. REV. CODE §§ 9A.32.030(1)(c)(1), .040(1) (1977 & Cum. Supp. 1982); WYO. STAT. §§ 6-4-101(a), -101 (b) (1977).

76. 102 S. Ct. at 3390.

77. *Id.* at 3388. The statistics were those put forth by the petitioner.

78. *Id.*

79. *Id.*

80. *Id.* at 3391.

81. *Id.*

edge of substantial risk of death or injury—especially compelling. Concluding that imposition of the death penalty under such circumstances is not cruel and unusual punishment, Justice O'Connor stressed that while *mens rea* is an important factor in determining blameworthiness, it does not require a finding of specific intent to kill.⁸²

The Supreme Court correctly employed proportionality analysis in deciding whether assignment of the death penalty in *Enmund* amounted to cruel and unusual punishment prohibited by the eighth amendment. In its analysis, the Court properly considered objective standards required by *Furman*⁸³ and outlined in *Coker*,⁸⁴ and determined that imposition of the death penalty under the circumstances did not comport with present standards of decency.⁸⁵ It is unclear, however, whether the Court used these objective indicia to guide its decision or simply to corroborate a position arrived at primarily through a subjective analysis.⁸⁶

Individual consideration is essential when evaluating the appropri-

82. *Id.*

83. 408 U.S. 328 (1972). *See supra* notes 40-43 and accompanying text.

84. 433 U.S. 584 (1977). *See supra* notes 46-52 and accompanying text.

85. *Compare supra* note 64 *with supra* note 75 and accompanying text. According to the dissent, 24 states authorize the death penalty for felony murder without first requiring a finding of specific intent to kill. *See supra* note 75. In construing capital sentencing statutes, however, the dissent seems to look exclusively at the provisions defining the crime of capital murder, ignoring corollary criteria included in the statutes. *Enmund v. Florida*, 102 S. Ct. at 3374 n.15. Moreover, most state statutes provide for a system of balancing specified aggravating and mitigating circumstances. Minor participation is frequently among the mitigating circumstances, and aggravating circumstances often require an intent to kill. *Id.* Thus, as the plurality points out, only nine states authorize the death penalty solely on the basis of participation in felony murder. This is a clear reflection of legislative rejection of strict application of the felony murder rule when capital punishment is involved. *See supra* note 64.

American juries have likewise repudiated imposition of the death penalty for aiding a felony murder. The statistics put forth by the petitioner clearly demonstrate this contention. 102 S. Ct. at 3374. No individual in the defendant's position has been executed in over twenty years and only three of the 796 prisoners on death row are similarly situated. *Id.* The dissent unsuccessfully attempted to undermine the validity of these statistics. *Id.* at 3379. Although lack of intent to kill was the main thrust of petitioner's defense, it did not take him out of the statistical category of nontriggermen. Moreover, as the plurality suggests, a finding that few prosecutors sought the death penalty for persons convicted of felony murder supports their contention that prosecutors view such a punishment as disproportionate to the crime involved. *Id.* at 3374. In addition, the dissent fails to offer any statistics which contradict the plurality's findings as to jury sentiments. Perhaps this is because none are available. On this basis, it appears that the plurality's application of the objective standards in this context is the more accurate assessment of public opinion.

86. *See supra* notes 53-58 and accompanying text.

ateness of a capital sentence.⁸⁷ *Lockett*⁸⁸ expressly states that in capital cases “the fundamental respect for humanity underlying the Eighth Amendment” requires careful consideration of the character of the offender and the circumstances surrounding the crime.⁸⁹

Conviction of an innocent defendant is opprobrious. This is especially true when a capital sentence accompanies the conviction, given the irrevocable nature of the penalty. Accordingly, special scrutiny in determining culpability is appropriate. Criminal intent, presumed through the felony murder rule, is itself of questionable status.⁹⁰ When further imputed through the law of accomplice liability,⁹¹ that presumed intent fails to serve as a sufficiently reliable indicator of the culpability necessary to support a death sentence. Thus, the *Enmund* Court correctly sought independent evidence of the petitioner’s state of mind.

The factual findings of the Florida courts precluded a finding of intent beyond the intent to rob.⁹² Imposition of the death penalty on a defendant who merely harbored such an intent contravenes the plurality’s determination to reserve capital sentences for the most extreme crimes.⁹³ Such drastic punishment is also blatantly contrary to the underlying premise of criminal justice in America: punishment of moral culpability.⁹⁴ Moreover, if such a defendant were sentenced to death, no more severe punishment will be available for those who are more culpable. If punishments are not graded, criminals may be encouraged to behave more violently.⁹⁵

The constitutional mandate of individualized consideration enabled the *Enmund* court to overturn the imposition of the death penalty. The goals outlined in *Furman*,⁹⁶ however, were to assure a degree of ration-

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

88. *Id.*

89. *Id.* at 605.

90. *See supra* note 3.

91. *See supra* notes 11-12.

92. *See Enmund v. Florida*, 102 S. Ct. 3368, 3371. *See supra* note 10 and accompanying text.

93. *See, e.g., Jurek v. Texas*, 428 U.S. 263 (1976) (petitioner’s death sentence for choking a ten year old girl upheld); *Proffitt v. Florida*, 428 U.S. 242 (1976) (petitioner’s death sentence for stabbing burglary victim upheld); *Gregg v. Georgia*, 428 U.S. 153 (1976) (petitioner’s death sentence for robbery and murder upheld).

94. *See W. LAFAVE & A. SCOTT, supra* note 2, § 5, at 21.

95. *See Andenaes, supra* note 48, at 968.

96. 408 U.S. at 238.

ality and uniformity in assessment of the death penalty.⁹⁷ Extensive individual consideration negates, in part, the attempts to standardize the process of capital sentencing which the courts and legislatures have been striving for since *Furman*. Consequently, although this holding is proper, given the current status of eighth amendment law, it does not steer the states in the direction of consistent administration of the death penalty.

The decision in *Enmund* to allow consideration of the individual's state of mind despite the felony murder rule and accessorial liability affirms the Supreme Court's commitment to prohibiting disproportionate sentences.⁹⁸ As long as the values of uniformity and individualized treatment remain in tension, however, the goals of *Furman* will remain elusive. If those goals cannot be met, capital sentences and thus capital punishment statutes will continually be held unconstitutional.

L.K.S.

97. See *supra* notes 5 & 40-43 and accompanying text.

98. See *supra* note 2. The felony murder rule has been rendered inapplicable in a capital sentencing context. This decision may trigger a complete abandonment of the rule. See *supra* note 3.