

CAPITAL FELONY-MURDER, OBJECTIVE INDICIA, AND COMMUNITY SENTIMENT

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INTRODUCTION

"A living fossil"¹ — that was the oxymoronic phrase Justice Brennan used to describe the "curious doctrine" of felony-murder. Compared to what other judges, courts, and commentators have called it, however, Brennan's appellation is almost benign. The nineteenth century Victorian judge, Sir James Fitzjames Stephen, called the doctrine "astonishing"² and "mon-strous,"³ with "little or no authority,"⁴ and with a "credence gained only from repetition."⁵ One California court stated that the felony-murder rule "anachronistically resurrects from a bygone age a 'barbaric concept,'"⁶ which another California court stated "erodes the relation between criminal liability and moral culpability."⁷ Legal commentary on the felony-murder doctrine and the related doctrine of "vicarious" or "accessorial liability" has also been decidedly one-sided and negative.⁸ Writers have raised conceptual and constitutional chal-

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1. *Tison v. Arizona*, 481 U.S. 137, 159, *reh'g denied*, 482 U.S. 921 (1987) (Brennan, J., dissenting).
2. 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57 (1883).
3. *Id.* at 65.
4. *Id.* at 75.
5. *Id.* at 38. For Stephen's critique of Lord Coke's statement of the felony-murder rule, see *People v. Aaron*, 409 Mich. 672, 695 n.31, 299 N.W.2d 304, 310 n.31 (1980). See also *Regina v. Serne*, 16 Cox. Crim. Cas. 311 (1887).
6. *People v. Phillips*, 64 Cal. 2d 574, 583 n.6, 414 P.2d 353, 360 n.6, 51 Cal. Rptr. 225, 232 n.6 (1966).
7. *People v. Washington*, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).
8. See G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17 (1979); Fletcher, *Reflections on Felony-Murder*, 12 SW. U.L. REV. 413 (1981); Hall, *Theory and Reform of Criminal Law*, 29 HASTINGS L.J. 893 (1978); Hogan, *Crime, Punishment and Responsibility*, 24 VILL. L. REV. 690 (1978-79); Packer, *Criminal Code Revision*, 23 U.TORONTO L.J. 1, 4 (1973); Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985). See also Note, *Felony Murder in Texas: The Merger Problem*, 33 BAYLOR L. REV. 1035 (1981) [hereinafter Note, *The Merger Problem*]; Note, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CALIF. L. REV. 1299 (1984) [hereinafter Note, *The Dillon Dilemma*]; Note,

lenges to the doctrines' substantive assumptions and procedural presumption,⁹ and have called for limiting,¹⁰ revising,¹¹ and abolishing¹² the doctrine.¹³

Enmund v. Florida: The Constitutionality of Imposing the Death Penalty upon a Co-Felon in Felony Murder, 32 DEPAUL L. REV. 713 (1983) [hereinafter Note, *Co-Felon in Felony Murder*]; Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918 (1989) [hereinafter Note, *Tort Law*]; Note, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 1035 (1978) [hereinafter Note, *Death Penalty for Felony Murder*]; Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427 (1957); Note, *A Comparative Review of State's Recognition of Reduced Degrees of Felony Murder*, 40 WASH. & LEE L. REV. 1601 (1983).

9. The doctrine of felony-murder has been construed as either involving "transferred intent" or "constructive malice." See Roth & Sundby, *supra* note 8, at 453.

In the transferred intent view, we assume that the mental state required for the underlying felony (e.g., robbery, burglary, arson) substitutes for the mental state required for the homicide. Felony-murder becomes akin to a strict liability offense. There are three problems with this. First, strict liability offenses are "generally viewed with great odium." H. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 20 (1968). Second, the concept of transferred intent has been generally criticized as having "no proper place in criminal law." R. PERKINS, CRIMINAL LAW 921 (1982). And third, transferred intent appears inapplicable to most felony-murder situations, since "the state of mind which prompted the action [the underlying felony] does not constitute the particular *mens rea* required by law for the offense [homicide] charged." *Id.* at 923.

Under the constructive malice view, we presume the malice for the homicide from the mental state required for the commission of the felony. This view has its own problems. First, the intent to commit the underlying felony may be quite removed from the intent to commit murder, where malice and premeditation are typically cited. If this is the case, "malice" is stretched from the improbable to the implausible. Second, "the use of a conclusive presumption in the criminal law context raises grave constitutional questions." Roth & Sundby, *supra* note 8, at 457.

The accessory liability doctrine also involves transferred intent. The intent and culpability of the felon (the triggerman) is transferred undiminished onto co-felons who aid and abet in the felony.

10. One limitation was initiated by Judge Stephen in *Serne*. See *Aaron*, 409 Mich. at 672, 299 N.W.2d at 304 (quoting *Serne*, 16 Cox. Crim. Cas. 311.). Judge Stephen gave the following instructions to the jury:

[I]nstead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it should be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which causes death, should be murder.

Id. at 698, 299 N.W.2d at 312. Many state legislatures have incorporated language that restricts the felony-murder rule's application to violent felonies, or felonies that are dangerous to human life. Another variant of this limitation, incorporated in most statutes, lists the specific felonies (enumerated felonies) that will support a felony-murder charge; arson, rape, robbery, burglary, and kidnapping are most often cited. Note, *The Merger Problem*, *supra* note 8, at 1036. The reforms proposed by the Model Penal Code enumerates as felonies: "[T]he 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 force, arson, burglary, kidnapping, or felonious escape." MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980). The "merger doctrine" is another related variant that eliminates certain felonies (e.g., felonious assault) from felony-murder. Whereas the felony-murder doctrine may "attempt to split into unrelated parts an indivisible transaction" (e.g., aggravated assault and the act resulting in homicide), the merger doctrine prevents such a splitting. *Garrett v. State*, 573 S.W.2d 543, 546 (Tex. Crim. App. 1978). "If the underlying felony does not have an independent or collateral purpose distinct from the homicide, it is said to 'merge' with the homicide, and thus will not supply the *mens rea* necessary to support a murder charge." Note, *The Merger Problem*, *supra* note 8, at 1036.

Finally, one state, New Hampshire, limits the felony-murder rule's applicability to one crime — kidnapping. See *infra* notes 100, 102.

A second type of limitation involves "proximate causation," where the death is "a natural or probable consequence or a reasonably foreseeable consequence of the commission or

attempted commission of the felony." *Aaron*, 409 Mich. at 705, 299 N.W.2d at 315. In the language of the Model Penal Code's drafters, "[t]he homicide must be a natural and probable consequence of the felonious act." "Death must be 'proximately' caused." MODEL PENAL CODE § 201.2 comment 2, commentary at 37 (Tent. Draft No. 9, 1959). *But see* *People v. Fuller*, 86 Cal. App. 3d 618, 150 Cal. Rptr. 515 (1978); *People v. Antick*, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965). *See also* *Hall*, *supra* note 8, at 910.

A third limitation restricts the felony-murder rule's applicative reach when a third-party (e.g., the potential victim, a bystander, a police officer) kills. For example, if the potential victim in a liquor store robbery shoots and kills one of the robbers, this limitation prevents the surviving robber from being charged with felony-murder for the death of his co-felon. *See, e.g., People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). *But see, e.g., People v. Taylor*, 12 Cal. 3d 686, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

Extending this limitation based upon *who* does the killing, a few states restrict the applicability of the felony-murder rule to the principal felon (e.g., the triggerman), thereby excluding all accessories from the charge. *See infra* note 54. A few other states restrict the rule to the triggerman and co-felons whose participation in the crime was "substantial" or "not relatively minor," thereby eliminating only minor participants. *See infra* notes 55, 96. Some states, in their capital sentencing phase, limit the death sentence possibility for accessories by either excluding felony-murder as an aggravating circumstance or by making accomplice or minor participant status a mitigating factor. *See infra* notes 59, 62, 104.

A fourth limitation, used in only a few states, makes a distinction based upon *who dies*. The felony-murder rule is operable only if a police officer, correctional officer, or a child dies. *See infra* notes 57, 69, 91-93, 97.

A fifth limitation makes discriminations based upon the culpable mental state of the felon. A few states restrict the rule only to felons who manifest criminal negligence, grave risk, or extreme indifference to human life. *See infra* notes 53, 103. A number of states go further and require knowing, intentional, purposeful, or a premeditative mental state. *See infra* notes 52, 53, 99, 107-09.

11. Under revisions, the Model Penal Code would establish a rebuttable presumption of recklessness and indifference. MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980). New Hampshire is the only state to have adopted the rebuttable presumption. N.H. REV. STAT. ANN. § 630:1-b (1986).

Another revision creates an affirmative defense where the defendant:

- (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

N.Y. PENAL LAW § 125.25 (McKinney 1987). Four other states that have enacted similar provisions, see *Roth & Sundby*, *supra* note 8, at 447 n.8. For difficulties with meeting these requirements, see *Alderstein*, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249 (1975-76).

A radical revision suggests reconceptualizing felony-murder "as a felony plus a death," where tort principles would govern, "leaving the sole remedial action in the civil system." Note, *Tort Law*, *supra* note 8, at 1918.

12. Two states, Hawaii and Kentucky, abolished the felony-murder rule by statute. HAW. REV. STAT. §§ 707-701 (1985); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1990). Michigan abolished felony-murder by judicial decision. *Aaron*, 409 Mich. 672, 299 N.W.2d 304. England abolished the felony-murder rule in 1957. The Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, at 16.

13. *See supra* note 8. Three broad questions emerge from these commentaries. One question is whether these transfers violate the principle of proportionality embodied in the eighth amendment's prohibition against cruel and unusual punishment. *See Solem v. Helm*, 463 U.S. 277 (1983); *Coker v. Georgia*, 433 U.S. 584 (1977); *Robinson v. California*, 370 U.S. 660

Yet, after all is said, the doctrine is not done. By the authority of statute, common law, and, now, Supreme Court rulings, this living fossil not only survives, but left the Supreme Court bitterly divided and conflicted in *Enmund v. Florida*¹⁴ and *Tison v. Arizona*,¹⁵ two capital felony-murder cases.

The Supreme Court confronted the complex and divisive issue of "community sentiment" in both *Enmund* and *Tison*. For a number of reasons, courts have given community sentiment an increasingly prominent place within the eighth amendment's non-static orbit and within the nucleus of death penalty cases in particular, both of which come into play in capital felony-murder cases. First, regarding the eighth amendment's "cruel and unusual punishment" clause, the Supreme Court directly hinges the meaning of that phrase on the community's "evolving standards of decency,"¹⁶ whereby the latter defines the former. Second, in deciding if the eighth amendment's prohibition "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged"¹⁷ applies to the specific case at bar, the Court has increasingly relied on an analysis that gives proportionately great weight to community sentiment.¹⁸

A third reason for the prominent place of community sentiment in the jurisprudence of death and felony-murder involves "jury nullification"¹⁹ —

(1962); *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910). But see *Rummel v. Estelle*, 445 U.S. 263 (1980).

A second question is whether these transfers violate the principle of individualized sentencing. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Williams v. New York*, 421 U.S. 241 (1974). See also Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981).

A third question is whether the conclusive presumption violates the principle that the prosecution bears the burden of proving every element of first degree murder, including the requisite *mens rea*. See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Morissette v. United States*, 342 U.S. 246 (1952).

14. 458 U.S. 782 (1982).

15. 481 U.S. 137 (1987).

16. *Trop*, 356 U.S. at 101. See also U.S. CONST. amend. VIII. In *Weems*, the Court stated that the Clause forbidding cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378.

17. *Weems*, 217 U.S. at 371 (Field, J., dissenting) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892)).

18. To illustrate, in *Coker*, the plurality concluded that the imposition of the death penalty for the rape of an adult woman "was grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment," the Court "looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter." *Enmund*, 458 U.S. at 788-89 (quoting *Coker*, 433 U.S. at 592).

19. V. HANS & N. VIDMAR, *JUDGING THE JURY* (1986) (presents historical examples and an assessment of nullification); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1971) (presents historical examples and empirical evidence of nullification); Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25 (1985); Horowitz, *Jury Nullification: The Impact of Judicial Instructions*,

where jurors, despite the evidence and the law, bring in "not guilty" verdicts rather than convict defendants for crimes they consider unjust or expose defendants to punishments they consider too severe. While commentators have debated the virtues and vices of nullification,²⁰ the courts generally seek to avoid it.²¹

Fourth, in the post-*Furman*²² evolution of death penalty cases — where mandatory death penalties were ruled unconstitutional,²³ where the principle of individualized sentencing was affirmed,²⁴ and where legislatures may not limit the mitigating factors jurors may weigh²⁵ — the determination of who dies rests more squarely and finally on community sentiment, as represented by the jury.²⁶ Thus, by actually defining the eighth amendment's terms and delimiting its reach, by avoiding jury nullifications and deciding who dies, community sentiment places itself "front and center" within this legal drama.

The capital felony-murder cases of *Enmund* and *Tison* presented the Supreme Court with a compound question: Where does community sentiment stand on this matter, and where should the courts draw the constitutional line in order to accord with community sentiment? The *Enmund* Court cited *Coker v. Georgia*,²⁷ where "it was stressed that our judgment 'should be informed by objective factors to the maximum possible extent.'"²⁸ This reliance on objective criteria continued in *Tison*, despite Dressler's claims that "the criteria for objectively measuring proportionality are riddled with difficulties."²⁹ In *Enmund*³⁰ and *Tison*,³¹ both five-four decisions, the majority and minority conclusions from the objective criteria were far apart. Moreover, in both cases, the Court made assertions and reached "tenuous conclusions regarding societal opinion," conclusions which were "considerably weaker than the Court

Arguments, and Challenges on Jury Decision Making, 12 LAW & HUM. BEHAV. 439 (1988) (in these two articles, Horowitz presents experimental research on jury nullification).

20. See, e.g., Kadish & Kadish, *The Institutionalization of Conflict: Jury Acquittals*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 308 (J. Tapp & F. Levine eds. 1977); Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976).

21. See, e.g., Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 43 (1986).

22. *Furman v. Georgia*, 408 U.S. 238 (1972).

23. E.g., *Woodson*, 428 U.S. 280.

24. E.g., *Lockett*, 438 U.S. 586.

25. *Id.*

26. Gillers puts it this way: "Legislatures may still, of course, decide who cannot be executed, and subject to eighth amendment limitations, who may be executed, but they no longer have power to tell the sentencer how to decide who will be executed. That power, I will show, belongs entirely to the sentencer." Gillers, *supra* note 13, at 31.

27. 433 U.S. 584.

28. *Enmund*, 458 U.S. at 788 (quoting *Coker*, 433 U.S. at 592).

29. Dressler, *supra* note 8, at 38.

30. In *Enmund*, the majority held that: (1) the eighth amendment does not permit imposition of the death penalty on a defendant who aids and abets a felony in course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed, and (2) identical treatment of robbers and their accomplice, and attribution to the accomplice of culpability of those who killed victims, was impermissible under the eighth amendment. *Enmund*, 458 U.S. at 797.

implied."³² To illustrate one tenuous conclusion, the Court cited the following statistics in both *Enmund* and *Tison*.

Of 739 death row inmates, only 41 did not participate in the fatal assault. All but 16 of these were physically present at the scene of the murder and of these only 3, including *Enmund*, were sentenced to death in the absence of a finding that they had collaborated in a scheme designed to kill. The Court found the fact that only 3 of 739 death row inmates had been sentenced to death absent an intent to kill, physical presence or direct participation in the fatal assault persuasive evidence that American juries considered the death sentence disproportional to felony-murder *simpliciter*.³³

But these numbers (e.g., 3 and 739-3=736) do not prove what the Court concludes, for they are merely numerators. What is missing are the denominators — the number of such cases that were brought to trial (or the number of cases where conviction resulted). Only by knowing the denominators can we run statistical tests and draw legitimate conclusions about *differences* between capital felony-murder and other capital crimes (e.g., premeditated murder). This the Court did not do.³⁴

In Part I, this article reviews the objective methods used and the conclusions reached by the majority and minority in both *Enmund* and *Tison*, and presents a new analysis of that data. From the review and the new analysis, I make an assertion and put forth a conclusion. The assertion is that when the Supreme Court takes up the objective assessment task — when Justices gather, categorize, and draw conclusions from data, and when they evaluate the strength of those conclusions against the limitations of the methods used in collecting the data — the Court is functioning as a social scientist would. The conclusion is that the Courts have done a poor job of it, in some instances, drawing “conclusions that social scientists would not only be loath to draw, but would say are impermissible to draw.”³⁵

Part II presents and analyzes data that the Court overlooked in regard to the felony-murder and accessorial liability doctrines. In addition, this Part discusses the methodological limitations and weaknesses of the data derived from the empirical, objective indicia that the Court has traditionally relied upon. Finally, it suggests some empirical and experimental methods that the Court has not relied upon for arriving at more valid conclusions regarding community sentiment.

Part III details the results of several experiments relating to capital felony-murder and community sentiment and provides new and improved substance to the question of the community's sentiment. On the basis of those

31. In *Tison*, the Court held that the eighth amendment does not prohibit the death penalty as disproportionate when defendant's participation in a felony that results in murder is major and whose mental state is one of reckless indifference. *Tison*, 481 U.S. 158.

32. Note, *Co-Felon in Felony Murder*, *supra* note 8, at 729.

33. *Tison*, 481 U.S. at 148 (referring to *Enmund*, 458 U.S. at 789-92).

34. N. Finkel, *Capital Felony-Murder and Juror Nullification: An Empirical Refutation of the Supreme Court's Assertions* (March 1990) (Paper presented at the American Psychology-Law Society's Convention).

35. *Id.*

results, along with the studies which the Court overlooked, the article concludes that the Supreme Court's assertions about community sentiment in its 1987 decision in *Tison* are in error, and it adduces a discernible line that accords with community sentiment.

I. THE OBJECTIVE INDICIA IN *ENMUND* AND *TISON*

In summing up the results of its analysis in *Enmund* based on the objective indicia, the majority concluded that the current judgments of legislatures, juries, and prosecutors weighed heavily on the side of rejecting capital punishment. Only a small minority of states — eight — allowed the death penalty to be imposed solely because the defendant somehow participated in the robbery in the course of which a murder was committed, but did not take or attempt or intend to take life, or intend that lethal force be employed. The Court found overwhelming evidence that American juries had repudiated imposition of the death penalty for crimes such as Enmund's, the statistics demonstrating that juries — and perhaps prosecutors — considered death a disproportionate penalty for those who fall within Enmund's category.³⁶

Justice O'Connor, writing for the minority in *Enmund*, reached the opposite conclusion from analysis of the same objective indicia.

I conclude that the petitioner has failed to meet the standards in *Coker* and *Woodson* that the 'two crucial indicators of evolving standards of decency . . . — jury determinations and legislative enactments — both point conclusively to the repudiation' of capital punishment for felony murder. . . . In short, the death penalty for felony murder does not fall short of our national 'standards of decency.'³⁷

In 1986, five years after *Enmund*, a new case, *Tison v. Arizona*,³⁸ came before the Court. In *Tison* the facts, the state, and the statutory law³⁹ were different, and the objective indicia, particularly state death penalty and felony-murder laws,⁴⁰ had changed somewhat. A new ruling resulted, but the old disagreement remained over the correct "reading" of the objective indicia. To the new majority,⁴¹ the *Tison* brothers fell into an intermediate category. Although they (like Enmund) did not kill or attempt to kill, their case was unlike Enmund's felony-murder *simpliciter* case in that the *Tison* brothers' participation in the crime was judged "major" and their mental state "highly culpable," one that was characterized as showing "reckless indifference to

36. *Enmund*, 458 U.S. at 788-96.

37. *Id.* at 823 (quoting *Woodson*, 428 U.S. at 293) (emphasis in original).

38. 481 U.S. 137.

39. In *Enmund*, several Florida statutes applied. See 458 U.S. at 785. See also FLA. STAT. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1981). In *Tison*, an Arizona statute applied. See 481 U.S. at 153. See also ARIZ. REV. STAT. ANN. § 13-703(G)(3) (1978 & Supp. 1986).

40. See *infra* notes 96-116 and accompanying text.

41. In *Enmund*, the majority consisted of Justices White, Blackmun, Marshall, Stevens, and Brennan, and the minority consisted of Justices O'Connor, Powell, Rehnquist, and C.J. Berger. 458 U.S. 782. In *Tison*, the majority consisted of Justices O'Connor, White, Powell, Scalia, and C.J. Rehnquist, and the minority consisted of Justices Brennan, Marshall, Blackmun, and Stevens. 481 U.S. 137.

human life."⁴² Making these level-of-participation and level-of-culpability distinctions, the majority concluded:

Against this backdrop, we now consider the proportionality of the death penalty in these midrange felony-murder cases for which the majority of American jurisdictions clearly authorize capital punishment and for which American courts have not been nearly so reluctant to impose death as they are in the case of felony-murder *simpliciter*.⁴³

The *Tison* minority challenged the majority's distinction, its reading of the objective indicia, and its conclusion:

Notwithstanding the Court's unwarranted observations on the applicability of its new standard to this case, the basic flaw in today's decision is the Court's failure to conduct the sort of proportionality analysis that the Constitution and past cases require. Creation of a new category of culpability is not enough to distinguish this case from *Enmund*.⁴⁴

The minority went on to state:

The Court would thus have us believe that 'the majority of American jurisdictions clearly authorize capital punishment' in cases such as this. . . . This is not the case. . . . Thus, contrary to the Court's implication that its view is consonant with that of 'the majority of American jurisdictions,' . . . the Court's view is itself distinctly the minority position.⁴⁵

How is it that the majority and minority reached opposite conclusions from the same objective indicia in *Enmund* and *Tison*? To answer this question, we will review the majority and minority treatments of legislative enactments data in *Enmund*, and then review the treatments in *Tison*.

A. Legislative enactments analyses in *Enmund*

As to legislative enactments, the majority in *Enmund* concluded that only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die. Moreover, of the eight States which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances. While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither 'wholly unanimous among state legislatures,' . . . nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.⁴⁶

42. *Tison*, 481 U.S. at 157-58.

43. *Id.* at 155.

44. *Id.* at 168 (Brennan, J., dissenting).

45. *Id.* at 175 (Brennan, J., dissenting).

46. *Enmund*, 458 U.S. at 792-93 (quoting *Coker*, 433 U.S. at 596).

The minority, on the other hand, saw the legislative enactments data differently, and concluded that

[t]he Court's curious method of counting the States that authorize imposition of the death penalty for felony murder cannot hide the fact that 23 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim. . . . In short, the Court's peculiar statutory analysis cannot withstand closer scrutiny.⁴⁷

How did the majority and minority categorize legislative enactments to reach such differing conclusions? Is there a set of conclusions that can be drawn from the data that would "withstand closer scrutiny"?

The *Enmund* majority's distinctions begin by acknowledging that "thirty-six state and federal jurisdictions presently authorize the death penalty," and in four of those death penalty states "felony murder is not a capital crime."⁴⁸ The minority's distinctions begin in the same way, but it counts only the thirty-five states, excluding the federal jurisdiction,⁴⁹ which the majority counted in its thirty-six figure; other than that one jurisdiction difference, the states named in the majority and minority counts are the same.

From here, the distinctions and categories begin to diverge sharply. First, the majority's categories:

(1) The first category contains "only eight jurisdictions [that] authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life,"⁵⁰ with Florida being one of the eight.⁵¹

(2) A second category contains eleven states that "require some culpable mental state with respect to the homicide as a prerequisite to conviction. . . .";⁵² they further subdivide this category of eleven states into eight that require "knowing, intentional, purposeful, or premeditated killing as an element of

47. *Id.* at 822-23 (O'Connor, J., dissenting).

48. *Id.* at 789.

49. *Id.* at 819 (O'Connor, J., dissenting).

50. *Id.* at 789. See also CAL. PENAL CODE ANN. §§ 189, 190.2(a)(17) (West Supp. 1982); FLA. STAT. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1981); GA. CODE ANN. §§ 26-1101(b), (c), 27-2534.1(b)(2) (1978); MISS. CODE ANN. §§ 97-3-29(2)(e), 99-19-101(5)(d) (Supp. 1981); NEV. REV. STAT. §§ 200.030(1)(b), 200.030(4), 200.033(4) (1981); S.C. CODE ANN. §§ 16-3-10, 16-3-20(C)(a)(1) (Law. Co-op 1976 & Supp. 1981); TENN. CODE ANN. §§ 39-2402(a), 39-2404(i)(7) (Supp. 1981); WYO. STAT. §§ 6-4-101, 6-4-102(h)(iv) (1977).

51. *Enmund*, 458 U.S. at 789.

52. *Id.* at 789-90 & n.7. See also ALA. CODE §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 & Supp. 1982) (to be found guilty of capital murder, accomplice must have had "intent to promote or assist the commission of the offense" and murder must be intentional); ILL. REV. STAT. ch. 38, paras. 9-1(a)(3), 9-1(b)(6) (1979) (capital crime only if defendant killed intentionally or with knowledge that his actions "created a strong probability of death or great bodily harm"); LA. REV. STAT. ANN. § 14:30(1) (West 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), (C), (D), 2929.02(A), 2929.04(A)(7) (Baldwin 1982) (accomplice not guilty of capital murder unless he intended to kill); TEX. PENAL CODE ANN. §§ 19.02(a), 19.03(a)(2) (1974) ("intentionally commits the murder in the course of [a felony]"); UTAH CODE ANN. § 76-5-202(1) (1978) ("intentionally or knowingly causes the

capital murder," and three states that "require proof of a culpable mental state short of intent, such as recklessness or extreme indifference to human life, before the death penalty may be imposed."⁵³

(3) The next category is a mixture of three (to five) states plus the federal jurisdiction which, for a mixture of reasons, preclude the death penalty for *Enmund*-like circumstances. The first subcategory (one to three states) includes Maryland, which "flatly prohibits capital punishment in cases where the defendant did not actually commit murder,"⁵⁴ and two other states, Illinois and Virginia, which were counted under category (2), the eight states requiring knowing, intentional, purposeful, or a premeditated mental state. The next subcategory includes Colorado and the federal jurisdiction,⁵⁵ which the majority concluded preclude the death penalty when the defendant's participation "was relatively minor, although not so minor as to constitute a defense to prosecution."⁵⁶ The final state in this category is Vermont, which requires a second unrelated murder or the murder of a correctional officer for the death penalty to be invoked⁵⁷ — circumstances not found in *Enmund*.

(4) The final category contains nine states, subdivided into six and three, which "deal with the imposition of the death penalty for a vicarious felony-murder in their capital sentencing statutes. In each of these states, a defendant may not be executed *solely* for participating in a felony in which a person was killed if the defendant did not actually cause the victim's death."⁵⁸ The first subcategory contains six states⁵⁹ which "make it a statutory *mitigating*

death of another"); VA. CODE ANN. § 18.2-31(d) (1982) ("willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon").

53. *Enmund*, 458 U.S. at 790 & n.8. See also ARK. STAT. ANN. § 41-1501(1)(a) (1977) ("extreme indifference . . . life"); ARK. STAT. ANN. § 41-1501, commentary ("an inadvertent killing in the course of a felony will not . . . support . . . a conviction entailing punishment by death"); DEL. CODE ANN., tit. 11, §§ 636(a)(2), (6) (1979) ("recklessly" or "with criminal negligence" causes death during the commission of a felony); KY. REV. STAT. ANN. § 507.020(1)(b) (Michie/Bobbs Merrill Supp. 1980) (defendant must manifest "extreme indifference to human life" and "wantonly engag[e] in conduct which creates a grave risk of death . . . and thereby causes . . . death"). See also Commentary following Crim. Law of Kentucky Ann. Penal Code § 507.020, at 677 (1978) (each accomplice's "participation in [the] felony" must "constitut[e] wantonness manifesting extreme indifference to human life"). *Enmund*, 458 U.S. at 790 n.8.

54. *Enmund*, 458 U.S. at 791. MD. CODE ANN., art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty). In addition, two jurisdictions already accounted for in *supra* note 52 also preclude the death penalty where the defendant did not commit the murder. ILL. REV. STAT. ch. 38, paras. 9-1(a)(3), 9-1(b)(6) (1979) (defendant must actually kill victim); VA. CODE ANN. §§ 18.2-31(d), 18.2-10(a), 18.2-18(1982) (except in cases of murder for hire, only principal in the first degree may be tried for capital murder). *Enmund*, 458 U.S. at 791 n.9.

55. *Enmund*, 458 U.S. at 791 n.10.

56. *Id.* at 791 (quoting COLO. REV. STAT. § 16-11-103(5)(d) (1978); 49 U.S.C. § 1473(c)(6)(D)).

57. *Id.* at 791. See also VT. STAT. ANN. tit. 13, § 2303(b)(c) (Supp. 1981) (capital murder reserved for offenders who commit a second unrelated murder or murder of a correctional officer). *Enmund*, 458 U.S. at 791 n.11.

58. *Enmund*, 458 U.S. at 791 (emphasis in original).

59. *Id.* at 792 n.12. See also ARIZ. REV. STAT. ANN. § 13-703(G)(3) (Supp. 1981-82) ("relatively minor" participation); CONN. GEN. STAT. § 53a-46a(f)(4) (Supp. 1982) (same); IND. CODE § 35-50-2-9(c)(4) (Supp. 1981) (same); MONT. CODE ANN. § 46-18-304(6) (1981) (same); NEB. REV. STAT. § 29-2523(2)(e) (1979) (same); N.C. GEN. STAT. § 15A-2000(f)(4) (Supp. 1981) (same).

circumstance that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor."⁶⁰ The second subcategory contains three states⁶¹ which "exclude felony murder from their lists of aggravating circumstances that will support a death sentence."⁶² The majority does note that in all nine of these states "such a defendant could be executed for an unintended felony murder . . . if sufficient aggravating circumstances are present. . . ."⁶³

With these categories so set, the Court draws the following conclusions. First, "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."⁶⁴ For the second conclusion, the majority adds to those eight states of category (1) the nine states of category (4), where a defendant could be given the death sentence "if sufficient aggravating circumstances are present to outweigh mitigating circumstances,"⁶⁵ to reach the figure of seventeen — "only about a third of American jurisdictions."⁶⁶

In turning to the minority's categorizations, the starting point is the thirty-one out of thirty-five death penalty states where the felony-murderer could receive the death sentence.⁶⁷ The minority creates a four-category schema, although it claims to create only three categories.

(1) The first category contains twenty states "that permit imposition of the death penalty for felony murder even though the defendant did not commit the homicidal act, and even though he had no actual intent to kill."⁶⁸ To get this figure of twenty, the minority takes the eight states from the majority's category (1), adds the nine states of the majority's category (4), and adds Colorado, Vermont, and New Mexico to this group.⁶⁹

60. *Enmund*, 458 U.S. at 792 (emphasis in original).

61. *Id.* at 792 n.13. See also IDAHO CODE § 19-2515(f) (1979); OKLA. STAT. tit. 21, § 701.12 (1981); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1981).

62. *Enmund*, 458 U.S. at 792.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 819 (O'Connor, J., dissenting).

68. *Id.* at 820 (O'Connor, J., dissenting).

69. The minority adds Colorado, from the majority's category (3), because Colorado precludes death for minor participation; the minority implies that *Enmund's* circumstances could be considered more than minor participation, but this assertion is arguable, as "minor participation" allows for much interpretative room. The minority also adds Vermont, again from the majority's category (3), arguing, by inference, that if *Enmund's* accomplices had killed a correctional officer, or had committed a second unrelated murder, *Enmund* could have received the death penalty in Vermont even though he did not kill or intend to kill. And the minority also adds New Mexico, from the majority's category (2), which requires some culpable mental state; however, New Mexico makes an exception to the culpable mental state requirement when a police officer is killed. Hence, *Enmund* could have received the death penalty if a police officer had been killed. These last two additions, however, change the question from "How many states would allow for the death penalty in *Enmund-like* circumstances?" to "How many states would allow for the death penalty when the defendant does not kill or intend to kill, but all other circumstances are free to vary?"

(2) A second category includes three states,⁷⁰ Arkansas, Delaware, and Kentucky, which, "while requiring some finding of intent, do not require the intent to kill that the petitioner believes is constitutionally mandated before the death sentence may be imposed."⁷¹

(3) The third category contains seven states that require the specific intent to kill the victim;⁷² these seven states correspond to the majority's category (2), the eight states, minus New Mexico, which the minority included in its category (1).⁷³

(4) The fourth category contains three states, Illinois, Maryland, and Virginia, that restrict "the death penalty to those felony murderers who actually commit the homicide."⁷⁴

These additions and changes, in the main, *change the question*, sometimes subtly, albeit always in a broadening direction. The majority, sticking close to the *Enmund* facts, asks, in effect, "How many states would allow for the death penalty when the defendant does not kill or intend to kill, and where the other circumstances are *similar to Enmund*?" When the minority adds Colorado, Vermont, and New Mexico to its states in its category (1), the question changes to: "How many states would allow for the death penalty where the defendant's participation was judged to be substantial or major (e.g., Colorado), and where another unrelated death occurred (e.g., Vermont), and where a police or correctional officer died (e.g., Vermont or New Mexico)?"

The minority then adds its second category to its first category to get twenty-three states that "permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim."⁷⁵ The question broadens again because the minority (a) allows the circumstances of the killing to vary in any way (e.g., a second unrelated death, police officer dies), (b) permits a judgment of defendant's participation to reach the substantial or major level, and (c) assumes culpability to be reckless indifference. With these assumptions, permissions, and allowances, the question broadens and the numeric answer rises. What we end up with is the majority and minority asking quite different questions. No wonder different answers result.

Table 1 presents an alternative way of categorizing the legislative enactments data⁷⁶. This Table categorizes the states into groups ranging from most restrictive to least restrictive regarding capital felony murder. In the first column on the left are the fifteen states and the District of Columbia that have no death penalty at all, and in the second column are the four states that do not permit the death penalty for felony-murder: these nineteen states completely restrict the death penalty for felony-murder.

70. These three states fall within the majority's category (2) — requiring proof of a culpable mental state short of intent. *Id.* at 790.

71. *Id.* at 820-21 (O'Connor, J., dissenting).

72. *Id.* at 821 (O'Connor, J., dissenting).

73. *Id.* at 821 n.38 (O'Connor, J., dissenting).

74. *Id.* at 821-22 (O'Connor, J., dissenting).

75. *Id.* at 822 (O'Connor, J., dissenting).

76. See *infra* Appendix, at Table 1.

The remaining states allow for the possibility of the death penalty for felony-murder. They are placed along three continua, and then grouped and ordered. First, in terms of broad continua, we can discern three legislative distinctions based on (a) the defendant's level of participation, (b) the defendant's degree of culpability, and (c) who dies.

On the first continuum, level of participation, three states (Illinois, Maryland & Virginia) allow capital felony-murder only for the triggerman, thus precluding the death penalty for vicarious felony-murderers. The second group on this continuum contains Colorado and the federal jurisdiction, which permit the death penalty when the vicarious felony-murderer's participation is judged to be major or substantial, but not when participation is minor. The third and fourth groups along the level of participation continuum are those states that deal with non-triggermen felony-murderers in their capital sentencing statutes. The third group contains six states which make it a "statutory *mitigating* circumstance that the defendant was an accomplice . . . and his participation was relatively minor."⁷⁷ The fourth group contains three states which "exclude felony murder from their lists of aggravating circumstances that will support a death sentence."⁷⁸ Groups two, three, and four involve fine distinctions, arguable distinctions in terms of ordering them from more restrictive to less, but there are defensible reasons for this ordering.⁷⁹ The fifth and final group on the level of participation continuum contains the eight states, Florida included, which allow the non-triggerman to be sentenced to death and where no restrictions as to major participation are specified. These eight, then, as both the *Enmund* majority and minority recognize, represent the least restrictive, *simpliciter* case.

The second continuum represents the defendant's level of culpability. At the most restrictive end is the group of eight states requiring a high degree of culpability — where the statutory language contains terms such as "knowing," "intentional," "purposeful," and "premeditated."⁸⁰ In using such terms for felony-murder, these states require the same or a similar level of culpability for

77. *Enmund*, 458 U.S. at 792 & n.12.

78. *Id.* at 792 & n.13.

79. For group two, if the jury believes the defendant to be a minor participant, then the defendant cannot be sentenced to death no matter what other aggravating circumstances are present. For example, even if the triggerman's murderous act was particularly heinous, or if pecuniary gain was also a motive in the felony, these potentially aggravating circumstances would not affect the non-triggerman once the jury determined that his status was that of a minor participant. This is not so, however, for groups three and four.

Group three is judged more restrictive than group four because the "minor participant" status is *expressly* stated as a mitigating factor; thus the prosecution, if seeking the death penalty, has one mitigating strike that it must overcome. It might well overcome this one strike if enough aggravating factors are present, but it does start "one-strike-down."

Group four states have neither felony-murder as an aggravating factor nor minor participation as a mitigating factor. In comparison to group three, the prosecutor in a group four state does not start "one-strike-down."

80. ALA. CODE §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 & Supp. 1982); ILL. REV. STAT. ch. 38, paras. 9-1(a)(3), 9-1(b)(6) (1979); LA. REV. STAT. ANN. § 14:30(1) (West Supp. 1982); N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981); OHIO REV. CODE ANN. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (Baldwin 1982); TEX. PENAL CODE ANN. §§ 19.02(a), 19.03(a)(2) (1974); UTAH CODE ANN. § 76-5-202(1) (1978); VA. CODE ANN. § 18.2-31(d) (1982).

the felony-murderer as for the premeditated murderer.⁸¹ The next group on the culpability continuum contains three states that require a lower level of culpability than the first group, where the statutory language includes terms such as "extreme indifference," "grave risk," and "criminal negligence."⁸² Group three contains those same eight states (including Florida) that were the least restrictive on the level of participation continuum, which also specify no culpability requirement. These three groups impose either a high, moderate, or no culpability requirement.

The third continuum involves "who dies." At the most restrictive end is Vermont, which allows for the death penalty for the vicarious felony-murderer when a second, unrelated death occurs.⁸³ The next group includes two states, Vermont, again, and New Mexico, which allow for the death penalty for the vicarious felony-murderer if a police or correctional officer dies.⁸⁴ The other states, including Florida, make no restrictions based on who dies.⁸⁵

With this categorization schema in place, we can now ask and answer a number of questions that both the majority and minority posed explicitly or implicitly. These questions begin with the same stem, "In how many jurisdictions can the death penalty be imposed for felony-murder when the defendant. . . ?" For convenience, we might refer to this as *the numerator question*. A problem arose over the numerator in *Enmund* because the majority and minority asked different questions.⁸⁶ In addition, there is also *the denominator question*, which comes into play when either the majority or minority cites percentages. The denominator may be the total number (N) of states (i.e., N = 50 or N = 51, counting the federal jurisdiction, or N = 52, counting the District of Columbia), the number of death penalty (DP) states (i.e., DP = 35 or 36, counting the federal jurisdiction), or the number of capital felony-murder (FM) states (i.e., FM = 31 or 32, counting the federal jurisdiction).

Table 2⁸⁷ presents questions in the left-hand column and answers in the right-hand columns. The first number is the numerator, the number of states, and then three percentage figures follow, based on denominators of N, DP, and FM respectively.⁸⁸ Reading down the questions column, the questions progressively add more and more clauses, eliminating states with each clause; the states eliminated with each clause are listed in the parenthesis. The first set of questions (1-3), starting with the non-triggerman, removes those states with "who dies" restrictions. Questions 4 and 5 remove those states with culpability restrictions. And questions 6 and 7 remove those states with major participation restrictions and aggravating factors possibilities.

81. *Id.*

82. ARK. STAT. ANN. § 41-1501(1)(a) (1977); DEL. CODE ANN., tit. 11, §§ 636(a)(2), (6) (1979); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1990).

83. VT. STAT. ANN. tit. 13, § 2303(b)(c) (Supp. 1981).

84. N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981); VT. STAT. ANN. tit. 13, § 2303(b)(c) (Supp. 1981).

85. FLA. STAT. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1981).

86. *See supra* note 69.

87. *See infra* Appendix, at Table 2.

88. The federal jurisdiction is included in the numerator answer and included in all percentage calculations, as is the District of Columbia; hence, $N=52$, $DP=36$, and $FM=32$.

Where in this Table do we locate the number of states that match Enmund's situation? The answer is either twenty-two, nineteen, seventeen, or eight (at questions 4, 5, 6, or 7),⁸⁹ depending upon how Enmund's situation is categorized. If one believes, as perhaps the minority did, that Enmund manifested extreme indifference, then the answer is twenty-two (forty-two percent). However, since no evidentiary testimony relating to Enmund's culpability was offered, the minority's assumption of extreme indifference seems unwarranted.⁹⁰ If, as the minority believed, Enmund's role as the getaway driver was "substantial," then Enmund falls within the collection of nineteen states (thirty-seven percent).⁹¹

If one believes that, as a getaway driver, Enmund was a minor participant, but that other aggravating circumstances existed, then he falls within the seventeen states (thirty-three percent) category. If, like the majority, one believes that Enmund was both a minor participant and that aggravating factors did not outweigh mitigating factors, then the answer is eight states (fifteen percent). The percentage range emerging from this analysis is fifteen percent to forty-two percent. If we rule out the extreme risk category, the percentage range is fifteen percent to thirty-seven percent, far less than a majority of states.

This analysis produces answers closer to that of the majority in *Enmund* than to that of the minority. This analysis also establishes a categorization schema for evaluating *Tison*, and for evaluating the changes in statutory law that took place between *Enmund* and *Tison*. We now turn to *Tison*, and to the majority and minority readings of legislative enactments in that case.

B. *Tison's analysis of legislative enactments*

The new majority⁹² in *Tison* puts forth a strong conclusion — asserting that its legislative enactments analysis "powerfully suggests that our society does *not* reject the death penalty as grossly excessive under these [*Tison's*] circumstances,"⁹³ and, in fact, that "the majority of American jurisdictions clearly authorizes capital punishment"⁹⁴ in these circumstances. However powerfully this conclusion is stated, a careful reading of the majority's reasoning reveals either a contradiction or a questionable categorization of the *Tison* brothers' circumstances.

The framing question is this: How is it possible that the analysis in *Tison* now reveals an "apparent consensus,"⁹⁵ when our analysis of *Enmund's* legislative enactments data revealed a range of only fifteen percent to forty-two percent supporting the death penalty in *Enmund's* circumstances? Three

89. Since no second unrelated death occurred and no police or correctional officer died, the answers of twenty-eight or twenty-seven (at questions 2 or 3) are inappropriate.

90. The answer of twenty-two (at question 4) also seems inappropriate, because Enmund did not act with extreme indifference, a claim the *Tison* majority put forth for the *Tison* brothers, but one that was not explicitly put forth for Enmund.

91. The most informing percentage (hence the best denominator) for analysis is *N* (i.e., *N*=52), the total number of jurisdictions. Since Congress is an elected legislative body, and the District of Columbia has an elected Board of Supervisors, the *N* should be 52 instead of 50.

92. See *supra* note 41.

93. *Tison*, 481 U.S. at 154.

94. *Id.* at 155.

possibilities exist. The first is that legislative enactments shifted significantly in the five-year period between *Enmund* and *Tison*, moving enough states toward the less restrictive end of the continua to now produce a consensus. The second possibility is that the enactments did not shift, but that the categorization of the *Tison* brothers' circumstances brought the *Tison* case into a different category from *Enmund*, whereby we now find this case situated in majority company. The third possibility combines the first two, where a consensus now occurs because of both legislative and case shifting factors.

The first possibility — that legislative enactments shifted — is undercut by the majority's own conclusion that very little changed betwixt *Enmund* and *Tison*.⁹⁶ Table 3⁹⁷ presents the 1986 legislative landscape. As for the shifts, we first deal with those jurisdictions that shifted toward the less restrictive end. New Jersey⁹⁸ shifts from the "no death penalty" to the "death penalty but not for felony-murder" category, but still completely restricts in felony-murder situations. Oregon⁹⁹ shifts beyond the line, going from "no death penalty" to death penalty for felony-murderers when the culpability finding is intent to kill. Thus, Oregon is added to the "death penalty for felony-murder states" (FM denominator), although it is situated at the restrictive end of the culpability continuum. New Hampshire shifts beyond the line, now allowing the death penalty for felony-murder, but only when the killing occurs during a kidnapping or when a law enforcement officer is killed.¹⁰⁰ Maryland,¹⁰¹ which formerly allowed the death penalty only for the triggerman, now adds non-triggermen when the victim is a child.¹⁰² Illinois shifts on the culpability continuum from the most restrictive group, requiring intent, to the next group, requiring recklessness or extreme indifference.¹⁰³ Colorado shifts slightly from the "not minor but substantial participation" category to the "minor participation as a mitigating factor in the capital sentencing phase" category.¹⁰⁴

95. *Id.* at 154.

96. *Id.* at 152 n.4. "The state statutes discussed in *Enmund v. Florida* are largely unchanged."

97. *See infra* Appendix, at Table 3.

98. *Tison*, 481 U.S. at 152 n.4. "New Jersey has joined the ranks of the States imposing capital punishment in intentional murders but not felony murders." *See also* N.J. STAT. ANN. §§ 2C:11-3a(a),(c) (West Supp. 1986).

99. *Tison*, 481 U.S. at 152 n.4. "Oregon now authorizes capital punishment for felony murders when the defendant intends to kill." *See also* OR. REV. STAT. §§ 163.095(d), 163.115(1)(b) (1985).

100. *Tison*, 481 U.S. at 176 n.13 (Brennan, J., dissenting). *See also* N.H. REV. STAT. ANN. §§ 630:1, 630:1(III), 630:1-a(1)(b)(2) (1986) (death penalty reserved for killing a law enforcement officer, murder for hire, and killing during a kidnapping).

101. *Tison*, 481 U.S. at 176 n.13 (Brennan, J., dissenting). *See also* MD. ANN. CODE art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1), 413(d)(5) (1957 & Supp. 1986) (death penalty may be imposed only on person who committed the killing, but possible exception if victim is a child).

102. Maryland and New Hampshire are listed together under a new category, "child/kidnapping," on the "who dies" continuum. *See infra* Appendix, at Table 3. While the kidnapping situation might properly require a fourth continuum, of "how someone dies," to simply maintain as much consistency as possible between Tables 1 and 3, this situation was placed on the "who dies" continuum.

103. *Tison*, 481 U.S. at 152-53 & n.9. *See also* ILL. REV. STAT. ch. 38, paras. 9-1(a)(3), 9-1(b)(6) (1986).

104. *Tison*, 481 U.S. at 153 & n.7. *See also* COLO. REV. STAT. § 16-11-103(5)(d) (1978 & Supp. 1985).

As to shifts toward the more restrictive end, there is first Connecticut,¹⁰⁵ which matches Colorado's shift but in the opposite direction. Next is Vermont,¹⁰⁶ which further narrows capital felony-murder conditions to only situations involving the murder of a correctional officer, eliminating the "second unrelated death" condition. Two states, Mississippi and Nevada, shift from the felony-murder *simpliciter* group (requiring no culpability assessment) to the other end of the culpability continuum, now requiring "intent to kill."¹⁰⁷ California literally presents a question mark (see Table 3). The minority shifts California from the *simpliciter* group to the "intent" group based on a California Supreme Court¹⁰⁸ ruling, but the majority keeps it in the *simpliciter* group, arguing that the California Supreme Court ruled as it did only "in light of perceived federal constitutional limitations stemming from our then recent decision in *Enmund*."¹⁰⁹

In sum, six states¹¹⁰ shift slightly-to-moderately toward the less restrictive end, with five¹¹¹ of those six shifts affecting the death penalty for felony-murder. Four-to-five¹¹² states shift in the more restrictive direction, two or three¹¹³ of them making a substantial shift from the *simpliciter* to the "intent" end of the continuum. Although these numbers seem to balance and cancel out, one contra-indication to the majority's "no substantial change has occurred" position is that the most restrictive culpability group — requiring a mental state of knowing, intentional, purposeful, or premeditation — has grown and become the modal¹¹⁴ group. Whereas the majority reads these post-*Enmund* changes as balancing out, leaving legislative enactments "largely unchanged,"¹¹⁵ the minority reads these changes as confirming the conclusion that "a finding of intent to kill in order to impose the death sentence for felony murder"¹¹⁶ is now the consensus position.

105. *Tison*, 481 U.S. at 153 & n.6. See also CONN. GEN. STAT. § 53a-46a(g)(4) (1985).

106. *Tison*, 481 U.S. at 152 n.4. See also VT. STAT. ANN. tit. 13, §§ 2303(b), (c) (Supp. 1986).

107. "Mississippi and Nevada have modified their statutes to require a finding that the defendant killed, attempted to kill, intended to kill, or that lethal force be employed, presumably in light of *Enmund*." *Tison*, 481 U.S. at 152 n.4. See also MISS. CODE ANN. § 99-19-101(7) (Supp. 1986); NEV. REV. STAT. §§ 200.030(1)(b), 200.030(4), 200.033(4)(a)-(b) (1985).

108. *Tison*, 481 U.S. at 175 n.13 (Brennan, J., dissenting) (citing *Carlos v. Superior Court of Los Angeles Co.*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983)).

109. *Id.* at 153 n.8.

110. New Jersey, Oregon, Maryland, New Hampshire, Illinois, and Colorado.

111. Oregon, Maryland, New Hampshire, Illinois, and Colorado.

112. Connecticut, Vermont, Mississippi, and Nevada, plus the disputed California.

113. Mississippi and Nevada, plus the disputed California.

114. Containing the most entries of any of the groups on the capital felony-murder continua.

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

116. The minority opinion stated:

The Court would thus have us believe that "the majority of American jurisdictions clearly authorize capital punishment" in cases such as this. *Ante*, at 155. This is not the case. First, the Court excludes from its survey those jurisdictions that have abolished the death penalty and those that have authorized it only in circumstances different from those presented here. When these jurisdictions are included, and are considered with those jurisdictions that require a finding of intent to kill in order to impose the death sentence for felony murder, one discovers that approximately three-fifths of American jurisdictions do not authorize the

If the majority concedes, as it does, that legislative enactments remain largely unchanged, then the only logical justification for its conclusion — that the *majority* of American jurisdictions now authorize capital punishment for *Tison*-like circumstances — comes from classifying the *Tison* circumstances differently than *Enmund*, and this is what the majority does. The majority advances two grounds for placing *Tison* in a mid-level category rather than in the lowest level, *Enmund* category (i.e., felony-murder *simpliciter*): (1) the *Tison* brothers' *participation* in the felony was more major or substantial than *Enmund*'s,¹¹⁷ and (2) their *culpability*, as inferred from the record, might support a finding that they had "the culpable mental state of reckless indifference to human life."¹¹⁸

The record reveals that the *Tison* brothers, Ricky and Raymond, participated in a number of felonies leading up to their felony-murder conviction. First, they participated in breaking their father, Gary *Tison*, and his cellmate, Randy Greenawalt, out of Arizona State Prison at Florence, where their father was serving a sentence of life imprisonment "as the result of a prison escape during the course of which he had killed a guard."¹¹⁹ Ricky and Raymond entered the Arizona State Prison "carrying a large ice chest filled with guns."¹²⁰ The escape succeeded, and no shots were fired at the prison. At this point, no death had occurred for which the felony-murder rule could come into play.

Two days later, now driving toward Flagstaff in a Lincoln automobile, a tire blew out. They previously had a flat tire, so no spare tire was available. "The group decided to flag down a passing motorist and steal a car."¹²¹ "Raymond stood out in front of the Lincoln"¹²² while the others laid in wait. A Mazda, occupied by John Lyons, his wife, his son, and his niece, pulled over. "The Lyons family was forced into the backseat of the Lincoln"¹²³ and the car was driven off the highway into the desert, where "Gary fired his shotgun into the radiator, presumably to completely disable the vehicle."¹²⁴ "John Lyons asked the *Tisons* and Greenawalt to '[g]ive us some water . . . just leave us out here, and you all go home.' Gary *Tison* then told his sons to go back to the Mazda and get some water."¹²⁵

The petitioners' statements diverge to some extent, but it appears that both of them went back towards the Mazda . . . while Randy Greenawalt and Gary *Tison* stayed at the Lincoln guarding the

death penalty for a nontriggerman absent a finding that he intended to kill. Thus, contrary to the Court's implication that its view is consonant with that of "the majority of American jurisdictions," *ibid.*, the Court's view is itself distinctly the minority position.

Tison, 481 U.S. at 175 (Brennan, J., dissenting).

117. *Id.* at 151. The majority quotes the following: "In *Enmund*, unlike the present case, the defendant did not actively participate in the events leading to death (by, for example, as in the present case, helping abduct the victims) and was not present at the murder site." *Id.* at 145 (citing *Tison*, 142 Ariz. at 457, 690 P.2d at 758).

118. *Id.* at 151.

119. *Id.* at 139.

120. *Id.*

121. *Id.* at 139-40.

122. *Id.* at 140.

123. *Id.*

124. *Id.*

125. *Id.*

victims. Raymond recalled being at the Mazda filling the water jug "when we started hearing the shots. . . ." Ricky said that the brothers gave the water jug to Gary Tison who then, with Randy Greenawalt went behind the Lincoln, where they spoke briefly, then raised the shotguns and started firing. . . . In any event, petitioners agree they saw Greenawalt and their father brutally murder their four captives. . . . Neither made an effort to help the victims, though both later stated they were surprised by the shooting. The Tisons got into the Mazda and drove away. . . ."126

The Tisons were charged with armed robbery, kidnapping, car theft, and capital murder (based on felony-murder law). To the *Tison* majority, the participation of Raymond and Ricky in these acts was more major than Earl Enmund's acting as a getaway driver.

The minority in *Tison*, however, sees it differently.

[T]he uncontradicted statements of both petitioners are that just prior to the shootings they were attempting to find a jug of water to give to the family. . . . While the Court states that petitioners were on the scene during the shooting and that they watched it occur, Raymond stated that he and Ricky were still engaged in repacking the Mazda after finding the water jug when the shootings occurred. . . . Ricky stated that they had returned with the water, but were still some distance ("farther than this room") from the Lincoln when the shootings started . . . and that the brothers then turned away from the scene and went back to the Mazda.¹²⁷

To the minority, the Tison brothers were not directly at the scene, which is similar to Enmund, who was sitting in a car some 200 yards away from the Kersey farm house when his accomplices, Sampson and Jeanette Armstrong, opened fire, and killed Mr. and Mrs. Kersey. If there is a difference between the two cases here, it is one of yards.

As to *level-of-participation* similarities between the cases, neither the Tison brothers nor Enmund killed (i.e., all were non-triggermen) or intended to kill, and they all knew that a felony was occurring. As the minority notes, after the shootings Ricky and Raymond "expressed feelings of surprise, helplessness, and regret."¹²⁸ We could surmise that Enmund, at a distance of 200 yards, also heard the gun fire, was surprised, and perhaps felt regret. Yet neither Enmund nor the Tison brothers went to the aid of the victims or disso-

126. *Id.* at 141.

127. *Id.* at 165-66 (Brennan, J., dissenting). See also A. DERSHOWITZ, *THE BEST DEFENSE* 289 (1982).

128. *Tison*, 481 U.S. at 166. Raymond's statement was:

Well, I just think you should know when we first came into this we had an agreement with my dad that nobody would get hurt because we [the brothers] wanted no one hurt. And when this [killing of the kidnap victims] came about we were not expecting it. And it took us by surprise as much as it took the family [the victims] by surprise because we were not expecting this to happen. And I feel bad about it happening. I wish we could [have done] something to stop it, but by the time it happened it was too late to stop it. And it's just something we are going to live with the rest of our lives. It will always be there.

Id. at 166-67 (quoting *Tison*, 142 Ariz. at 462, 690 P.2d at 763).

ciated themselves from the triggermen; moreover, both drove away with the triggermen. On the defendant's level-of-participation continuum, the minority finds no differences in kind, but a difference in degree, a few yards, perhaps, and this difference, to the minority, is not sufficient to shift *Tison* to a distinctly different category from *Enmund*.

But one can make a case for a participatory difference in kind as well as in degree. The *Tison* brothers supplied the triggermen with the loaded weapons that were used in the killings; *Enmund* did not. The majority might well regard this act, as the trial court did, as constituting "major/substantial" participation. By highlighting the similarities between the *Tison* brothers and *Enmund* — they did not kill, attempt to kill, or intend that anyone be killed — the minority in *Tison* appears to discount the furnishing of loaded weapons.

The defendants' level-of-culpability — "reckless indifference to human life"¹²⁹ — is the second distinction the majority makes between *Tison* and *Enmund*. This distinction, however, is more problematic than the participatory level distinction because no assessment of Ricky and Raymond *Tison*'s mental state was made at trial.

The Arizona Supreme Court attempted "to reformulate 'intent to kill' as a species of foreseeability."¹³⁰ The *Tison* Court rejected this reformulation as amounting "to little more than a restatement of the felony-murder rule itself."¹³¹ This reformulation takes the act, makes an assumption about what the defendants anticipated, and parlays both into a conclusion about the defendants' culpable mental state without "a thorough evidentiary hearing."¹³² This is but an instance of the very questionable assumptions and transfers that have long plagued the doctrine of felony-murder.¹³³ This "reformulation error" is the principal reason the Court gives for vacating and remanding for a determination of culpability.¹³⁴ Moreover, as the majority recognizes,¹³⁵ if it accepted this reformulation, then the culpability distinction between the *Tison* brothers and *Enmund* would vanish: for the claim could also be made that *Enmund*, upon seeing his co-felons leaving the car with loaded weapons to approach the Kersey house in order to commit armed robbery, must have anticipated that lethal force might be used.

129. *Id.* at 151.

130. *Id.* at 150. The Arizona Supreme Court put it this way: "Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." *Id.* (quoting *Tison*, 142 Ariz. at 456, 690 P.2d at 757).

131. *Id.* at 151.

132. *Id.* at 165 (Brennan, J., dissenting).

133. See *supra* notes 9-13 and accompanying text.

134. *Tison*, 481 U.S. at 138.

135. *Id.* at 150-51.

This definition of intent is broader than that described by the *Enmund* Court. Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony." *Enmund* himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves.

Once the majority rejects this reformulation as but “a restatement of the felony-murder rule itself,”¹³⁶ it faces a problem. For, following the dictates of *Enmund*, it has to find some level of culpability above *Enmund* in order to make the case that the death penalty in *Tison* is constitutionally permissible. The Court finally holds that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.”¹³⁷

The majority holds that two points need to be established, major participation and reckless indifference to human life. However, these two points begin to collapse into one, for “even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.”¹³⁸ That one (major participation) provides “significant support” for the other (the culpable mental state) is but an instantiation of the “constructive malice” doctrine.¹³⁹ If the culpable mental state of reckless indifference can be inferred from participation, the holding seems to lead back to the felony-murder rule itself, and to the reformulation the majority rejected. The majority makes no comment on this contradiction and circularity. Rather, it turns to the objective indicia — state felony-murder laws and judicial decisions after *Enmund* — to bolster its claim that a societal consensus exists to justify the death penalty even without a specific intent to kill.¹⁴⁰

In order to evaluate the contradictory claims of the majority and minority regarding legislative enactments and societal consensus for *Tison*-like circumstances, we pose a progressive series of questions¹⁴¹ based on the classification schema in Table 3. At the time of *Tison*, thirty-four jurisdictions allowed the death penalty for felony-murder in some situations (FM = 34), and thirty-eight jurisdictions permitted the death penalty in some circumstances (DP = 38), out of fifty-two jurisdictions overall, counting the District of Columbia and the federal jurisdiction (N = 52). The questions in Table 4, as in Table 2, progressively add more clauses, excluding states with each additional clause. The states eliminated with each clause are listed in the parentheses.

The first question, eliminating the death penalty for the “triggerman only” states, reduces the original thirty-four jurisdictions to thirty-three. The second question, eliminating the correctional or police officer death situation, reduces the number to thirty-one; and the third question, eliminating those states that require the highest level of culpability, reduces the number to twenty-two or twenty-three, with the dispute over California creating the ambiguity. At this point, those states with requirements that *Tison* does not meet have been eliminated.

Now we enter the realm of dispute. Question four eliminates four states that require proof of extreme indifference, grave risk, or criminal negligence. The majority claims that the case at bar *might* meet this culpability level, but

136. *Id.* at 151.

137. *Id.* at 158.

138. *Id.* at 158 n.12.

139. *See supra* note 9.

140. *Tison*, 481 U.S. at 152-54.

141. *See infra* Appendix, at Table 4.

acknowledges, as the minority stresses, that no such evidentiary finding was made, hence the grounds for vacating and remanding the case. If we grant the majority its "what might have been found" assumption,¹⁴² the *Tison* case is situated among the twenty-two to twenty-three states group. If we do not grant the assumption, the case, as the minority claims, is properly situated further down the list. Question five eliminates two jurisdictions requiring a major or significant level of participation. Here, again, we have a dispute. The majority claims that the Tison brothers' participation was more major than Enmund's and that it would meet the "major/substantial" test, but the minority claims otherwise.¹⁴³ Question six eliminates nine states when the aggravating factors do not outweigh the mitigating. The majority argues that the aggravating factors might outweigh the mitigating in *Tison*, but the minority argues the other way.¹⁴⁴

Question six eliminates two states which require the victim to be a child or die during a kidnapping. Since a kidnapping did occur in the *Tison* case, and because it involved the death of a two year-old child and a fifteen year-old girl, it does not eliminate those states. Combining those two states with the remaining five-to-six that are felony-murder *simpliciter* states, leaves seven-to-eight as a minimum for which there is no argument.

Given this hierarchy, *Tison* is situated between the twenty-two to twenty-three jurisdictions (forty-two to forty-four percent) at the high end and the seven-to-eight jurisdictions (thirteen to fifteen percent) at the low end. Even if we grant the majority all of its assumptions (i.e., that aggravating factors outweigh mitigating, that major participation occurred, and that a culpability level of extreme indifference was met), this forty-two to forty-four percent figure does not reach majority. By neither affirming or refuting these assumptions, "the *Tison* range" of thirteen percent to forty-four percent turns out quite similar to "the *Enmund* range" of fifteen percent to forty-three percent.

When the majority in *Tison* concludes that "[t]his substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does *not* reject the death penalty as grossly excessive under

142. In favor of granting the assumption is the fact that the trial judge found, as one of the statutory aggravating factors, that "the Tisons had created a grave risk of death to others (not the victims)." *Id.* at 142. The parenthetical phrase, "not the victims," we may assume, refers to the grave risk to the correctional officers at Arizona State Prison during the escape, which occurred two days before the specific felonies that triggered the felony-murder charge. Whether this act, two days prior, should be linked to the subsequent acts and be construed as showing a grave risk is debatable.

143. Supporting the majority's claim is the fact that "the judge specifically found that the crime was *not* mitigated by the fact that each petitioners' participation was relatively minor.' . . . Rather, he found that the 'participation of each [petitioner] in the crimes giving rise to the application of the felony murder rule in this case was very substantial.'" *Id.* (emphasis in original).

144. The trial judge found three statutory aggravating factors and three nonstatutory mitigating factors. The aggravating factors were: "(1) the Tisons had created a grave risk of death to others (not the victims); (2) the murders had been committed for pecuniary gain; (3) the murders were especially heinous." *Id.* at 142.

The three mitigating factors were: "(1) the petitioners' youth — Ricky was 20 and Raymond was 19; (2) neither had prior felony records; (3) each had been convicted of the murders under the felony-murder rule." *Id.* at 142-43.

these circumstances,"¹⁴⁵ it goes too far. There is neither a *powerful* percentage in *Tison* nor a *powerful* trend from *Enmund* to *Tison* to suggest that a majority of jurisdictions, let alone a "consensus," endorses the death penalty for felony-murder in *Tison*-like circumstances. This analysis of the data concerning legislative enactments suggests that the *Tison* majority has not made its case.

C. Jury Verdicts

In *Enmund*, the majority claimed that the evidence was "overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's,"¹⁴⁶ and that statistics "demonstrate that juries — and perhaps prosecutors as well — consider death a disproportionate penalty for those who fall within [petitioner's] category."¹⁴⁷ In reality, however, the evidence cited by the Court is not only *not* overwhelming, but so flawed that *nothing can be concluded* regarding jurors' sentiments. Furthermore, the evidence cited by the Court allows no inferences whatsoever about prosecutors.

First, we examine the evidence the *Enmund* Court used. The Court cites two surveys that the petitioner produced: a survey "of all reported appellate court decisions since 1954 in cases where a defendant was executed for homicide"¹⁴⁸ and a "survey of the Nation's death-row population,"¹⁴⁹ as of October 1, 1981. The first "survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed. All six executions took place in 1955."¹⁵⁰ The second survey found only three of 739 death row inmates who were sentenced to die and who were not the triggerman, did not hire or solicit someone to kill, and who were not physically present during the fatal assault.¹⁵¹

These numbers appear impressive at first glance. By simple subtraction, the first survey finds 6 death sentences for the accomplice felony-murder *simpliciter* situation versus 356 (362 - 6 = 356) death sentences where the accomplice felony-murder *simpliciter* situation did not obtain; the second survey yields numbers of 3 versus 736 (739 - 3 = 736). The fundamental statistical problem with this approach is that these numbers are all *numerators*. What are missing, and vitally needed for legitimate comparisons, are the *denominators* — the number of such cases that were brought to trial (or the number of cases where conviction resulted).¹⁵²

The minority can claim that a 3-3 tie (between aggravating and mitigating factors) does not support the claim that aggravating factors outweigh mitigating.

145. *Id.* at 154.

146. *Enmund*, 458 U.S. at 794.

147. *Id.* at 796.

148. *Id.* at 794.

149. *Id.* at 795.

150. *Id.* at 794-95.

151. *Id.* at 795.

152. See *supra* note 34; *Enmund*, 458 U.S. at 818 (O'Connor, J., dissenting).

Impressive as these statistics are at first glance, they cannot be accepted uncritically. So stated, the data do not reveal the numbers, or the number or fraction of cases in which the State sought the death penalty for an accomplice guilty of felony murder. Consequently, we cannot know the fraction of cases in which juries rejected the death penalty for accomplice felony murder

Id. at 818-19 (O'Connor, J., dissenting).

Using the last set of numbers (3 and 736), a hypothetical will illustrate the problem. Suppose that only five capital felony-murder cases were brought to trial where the defendant was not the triggerman, did not plan or intend for a death to occur, and was not on the scene. If five is the denominator, the three death sentences would represent a sixty percent death sentence rate. If, on the other hand, 1472 cases of capital murder were brought to trial where the defendant was on the scene or was the triggerman or did premeditate, then the 736 death sentences would represent a fifty percent death sentence rate. This illustrates that we need to know the denominators before making any statistical comparisons between the accessory felony-murder situations and instances of triggerman felony-murder or premeditated murder.

Two different denominators would be informative regarding jurors' sentiments. The first is the number of cases brought to trial for these two numerator categories (3 and 736). The second denominator of interest is the number of cases where conviction for the capital offense occurred. The first denominator, along with the number of guilty verdicts for felony-murder, the number of guilty to lesser offense verdicts, and the number of not guilty verdicts, would allow for an assessment of jury nullification. If jurors were nullifying (i.e., rejecting the felony-murder charge for accessories), we should see a significantly higher percentage of not guilty verdicts in felony-murder cases than in non-felony-murder cases. If jurors were partially nullifying, we should see a higher percentage of guilty to lesser offense verdicts. The second denominator reflects those cases where a guilty verdict to the capital charge was rendered. Using that denominator allows us to test the key question: Will jurors refuse to give the death penalty to a significantly greater extent when the situation is accessory felony-murder as opposed to triggerman felony-murder or common law murder?

The *Enmund* minority criticizes the statistics cited by the majority and its conclusions, making the aforementioned denominator point.¹⁵³ The majority acknowledges the criticism, but doubts "whether it is possible to gather such information."¹⁵⁴ This acknowledgment, however, does not lead the majority to back off its conclusion. Within social science, the claim that it may not be possible to get the denominators is no defense for illegitimate statistical conclusions.

The majority obfuscates the minority's main point by bringing up the possibility of prosecutorial nullification.¹⁵⁵ Any statistically sound conclusion about prosecutorial nullification requires denominators of a different sort. One denominator would be the number of potential accomplice felony-murder cases

153. *Id.* at 818-19 (O'Connor, J., dissenting).

154. The majority opinion stated:

The dissent criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the percentage of cases where the State sought the death penalty for an accomplice guilty of felony murder. We doubt whether it is possible to gather such information, and at any rate, it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder.

Id. at 796 (citations omitted).

155. *Id.*

prosecutors could have brought to trial, where the numerator is the number of such cases that they did bring. If this percentage were significantly lower than a similar percentage for premeditated murder cases, or triggerman felony-murder cases, for example, we might conclude something about prosecutorial nullification in accomplice felony-murder situations. A second denominator would be the number of cases where prosecutors obtained a guilty verdict and could have asked for the death penalty, where the numerator would be the number of cases where they did ask for the death penalty. If this percentage for accomplice felony-murder were significantly lower than triggerman felony-murder or premeditated murder cases, then we might conclude that prosecutors were rejecting the death penalty significantly more often in accomplice felony-murder situations than in other situations. These denominators were not available, hence none of the Court's conclusions have sound, statistical backing. These missing denominators would bring the careful social scientist to a halt, but their absence fails to stop or deter the majority in *Enmund* from asserting "overwhelming," yet unfounded, social science conclusions.

There is no need to tarry over *Tison*, because the Court merely cites the same statistics¹⁵⁶ it cited in *Enmund*. The minority critically notes that "[t]he Court today neither reviews nor updates this evidence."¹⁵⁷ If it had, says the minority, "it would have discovered that, even including the 65 executions since *Enmund*,"¹⁵⁸ not a single defendant "convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim . . . has been executed."¹⁵⁹

Justice O'Connor wrote the majority opinion in *Tison* and the minority opinion in *Enmund*. In *Enmund*, she noted the denominator problem and the weaknesses of all statistical conclusions based on numerators alone. In *Tison*, she no longer mentions the problem, and neither reviews the data again nor updates it. Yet, somehow, without explaining this apparent contradictory turn-about, she finds a societal consensus now exists¹⁶⁰ that justifies the death penalty in *Tison*-like circumstances. To paraphrase Justice O'Connor's dissent in *Enmund*, her majority opinion in *Tison* "cannot withstand closer scrutiny."¹⁶¹

II. REFLECTIONS ON OBJECTIVE INDICIA

A. Overlooked Indicia

In Bedau's¹⁶² study of death sentences in New Jersey for the 1907-1960 period, he compared the clemency board's "final disposition"¹⁶³ on two types of

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

157. *Id.* at 177 (Brennan, J., dissenting).

158. *Id.* at 177-78 (Brennan, J., dissenting).

159. *Id.* at 178 (quoting *Enmund*, 458 U.S. at 796) (Brennan, J., dissenting).

160. *Id.* at 154.

161. *Enmund*, 458 U.S. at 823.

162. Bedau, *Death Sentences in New Jersey: 1907-1960*, 19 RUTGERS L. REV. 1 (1964).

163.

The term *final disposition* is used to indicate the mode of termination of the death sentence. It includes execution and commutation, death other than by execution if it occurs while incarcerated under sentence of death, and transfer to the State

first degree murder punishable by death under New Jersey statute. Those two were "wilful, deliberate, and premeditated killing"¹⁶⁴ and "felony-murder,"¹⁶⁵ with the latter being neither rare¹⁶⁶ nor unknown¹⁶⁷ in New Jersey. Bedau found that felony-murderers were executed more often than non-felony-murderers (74.3 percent vs. 54.8 percent) and had their death sentences commuted less often (7.6 percent vs. 22.6 percent). Moreover, these significant differences were not attributable to differences between these groups in either prior criminal records or racial disparities. Bedau's results and conclusions were similar to those of an earlier Pennsylvania study,¹⁶⁸ which concluded that "a significantly higher proportion of felony murder than non-felony murder cases provoked the full extent of society's negative reaction to homicide."¹⁶⁹ The actions of clemency boards in New Jersey and Pennsylvania certainly run counter to the view that felony-murder, because of its lack of intent, deserves greater mitigation.¹⁷⁰

As a sidelight, Bedau noted that of the five felony-murders and the twelve non-felony-murders where a "police officer, prison guard, auxiliary policeman or court official"¹⁷¹ was the murder victim, none of the seventeen death sentences was commuted. This finding "reinforces the familiar presumption, recently confirmed directly by interviews and questionnaires of clemency boards, that little or nothing will be done to save the life of one who has killed a law enforcement officer."¹⁷² It also appears to reinforce the position of those states¹⁷³ that have enacted statutes indicating that the killing of a police or correctional officer is a felony-murder circumstance that truly warrants the death penalty.

Hospital for the Criminally Insane. It also includes subsequent acquittal or reconviction and retrial.

Id. at 6.

164. *Id.* at 12.

165. Felony murder was statutorily defined as "any killing committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery and sodomy." *Id.* at 13. See also N.J. REV. STAT. § 2A:113-2 (1951) (repealed 1979).

166. Bedau reports 105 felony murder cases for the 1907-1960 period. Bedau, *supra* note 162, at 14.

167.

Undoubtedly, the most famous crime in modern New Jersey history is the kidnapping, ransom, and killing of the infant son of Colonel and Mrs. Charles A. Lindbergh on March 1, 1932, near Hopewell. This crime resulted in the conviction and execution of Bruno Richard Hauptmann (No. 17400) on April 3, 1936. The indictment against Hauptmann, however, mentioned neither kidnapping nor ransom. Instead, it specified a charge of first degree murder, the killing of the child in the course of burglary, viz., the petit larceny of the clothing which the infant was wearing at the time. While hardly typical in any respect, the Hauptmann case is a famous illustration of the reach of the felony murder doctrine in New Jersey law.

Id. at 13 (footnotes omitted).

168. Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. & CRIMINOLOGY 301 (1962) (on Pennsylvania for 1914-1958).

169. *Id.* at 304.

170. See *supra* notes 1-13 and accompanying text.

171. Bedau, *supra* note 162, at 14.

172. *Id.* at 15.

173. See *supra* notes 57, 69, 100, 106.

A second study by Bedau¹⁷⁴ investigated one type of felony-murder, felony-murder rape (FMR), in Massachusetts, for the 1946-1970 period. Massachusetts was the only state that singled out FMR for the mandatory death penalty punishment.¹⁷⁵ The study compared seventeen cases of FMR against a control group of 108 cases of criminal homicide in which the offender was male and the victim was female. Bedau found that none of the seventeen FMR cases received the death penalty, while two of the 108 criminal homicide cases did. With these low numbers, however, Bedau could not run a valid statistical test for differences.¹⁷⁶

Bedau did find evidence of "prosecutorial nullification": prosecutors undercharged (i.e., failed to bring FMR charges when cases warranted it) in some cases. When prosecutors did go to trial with a FMR case, they accepted pleas to lesser offenses in forty-seven percent of those cases.¹⁷⁷ If the legislative intent was to give "a green light . . . to the zealous prosecutor" to seek the death penalty, Bedau concludes that "it would appear that prosecutors have ignored it."¹⁷⁸

As to the reasons prosecutors ignored the green light, we can only speculate. Did prosecutors believe that juries would flash a red light, nullifying the FMR charge to avoid the mandatory death sentence? We do not know. Prosecutorial decisions are no doubt complex, and it would be overly simplistic and probably erroneous to interpret prosecutorial decisions in FMR cases as merely reflecting, in an anticipatory way, community sentiment. And as for community sentiment, at least as measured by what juries do, the data provide an insufficient sample to gauge (i.e., less than half of the seventeen FMR cases went to the jury with the FMR charge). Furthermore, if there were substantially more cases going to juries, and if juries were nullifying, we could not tell *why* they were nullifying because too many variables were uncontrolled and confounded. For example, we would not know if juries were nullifying because they found the charge of FMR unfair, or because they were opposed to the mandatory death penalty that would follow. In this example, the mandatory death penalty is confounded with the FMR charge.

The *Enmund* and *Tison* Courts did not cite these studies of felony-murder in New Jersey, Pennsylvania, and Massachusetts. Even if the Supreme Court was aware of these studies, it might have discounted them as irrelevant. One reason for discounting these studies is that all three studies relied on pre-*Furman* judgments.¹⁷⁹ Even if we grant the assumption that these judgments of clemency boards, prosecutors, and, to a limited extent, juries, do reflect community sentiment, the Supreme Court could well argue that sentiments change and evolve with time, an argument the Court has made repeatedly.¹⁸⁰

174. Bedau, *Felony Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice*, X SUFFOLK U.L. REV. 493 (1976).

175. *Id.* at 494.

176. The low numbers of those receiving the death sentence (0 and 2), create a statistical problem. Numbers below five may lead to a violation of one of the assumptions of a valid chisquare (X^2) test. See W. HAYS, STATISTICS FOR PSYCHOLOGISTS 597 (1963).

177. Bedau, *supra* note 174, at 511 n.68.

178. *Id.* at 515.

179. *Furman*, 408 U.S. 238.

180. See *supra* notes 16-18 and accompanying text.

Thus, any generalizations from those times to the post-*Furman* times of *Enmund* and *Tison* would be suspect.

A related reason for discounting these data, a reason which bolsters the first point about changing times and sentiments, is that Massachusetts, New Jersey, and Pennsylvania, at the times of *Enmund* and *Tison*, were either non-death penalty states or states that did not allow the death penalty for felony-murder.¹⁸¹ The Supreme Court places primary reliance on legislative enactment as a reflector of community sentiment. Recently enacted statutes in those three states reveal substantial changes in community sentiment — changes which further undercut the reliability and validity of those pre-*Furman* studies as a measure of today's sentiment.

The overlooked indicia that we turn to next do not suffer from the "yesterday's news" problem. Moreover, the data come from the state of Georgia, which is not only a death penalty state, but one of the few states that makes felony-murder *simpliciter* a capital crime.¹⁸² Finally — and this is hard to overlook — the Supreme Court had this data at hand during *Tison*, having relied heavily on it in *McCleskey v. Kemp*,¹⁸³ a case it decided one day after *Tison*.¹⁸⁴ We now turn to the Baldus study.¹⁸⁵

Although the Baldus study did not isolate felony-murder as one of its many variables, we can get a fair approximation of how juries and prosecutors dealt with accomplice felony-murder. In the 1983 report of the study, the variable "[d]efendant was not the triggerman (NOKILL)"¹⁸⁶ correlated negatively with the death sentence. It is likely, according to Baldus,¹⁸⁷ that the negative correlation would have been even larger if just accomplice felony-murderers were included in NOKILL, since defendants who contracted to have others kill for them were also included in NOKILL. Another measure of accomplice felony-murder involves a comparison of death sentence rates¹⁸⁸ for cases where defendants killed zero people, killed one person, and killed two or more people: those rates were .13, .17, and .54,¹⁸⁹ respectively, with the accomplice felony-murderers falling in the .13 category. Still another variable that is likely to include accomplice felony-murderers is their "defendant was minor participant in the murder (STMIT6)," which had a partial regression coefficient of -.27. This negative correlation indicates that the more juries

181. See *infra* Appendix, at Tables.

182. *Id.*

183. 481 U.S. 279 (1987).

184. *McCleskey* was argued on October 15, 1986, and decided on April 22, 1987. *Tison* was argued on November 3, 1986, and decided on April 21, 1987.

185. Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 685 (1983) [hereinafter *Comparative Review of Death Sentences*] (For the NOKILL variable, the partial regression coefficient was -.13 and the beta weight was -.12); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985) [hereinafter *Contemporary Death Sentencing Systems*].

186. *Comparative Review of Death Sentences*, *supra* note 185, at 685.

187. Telephone interview with David C. Baldus, Professor of Law, University of Iowa College of Law (Oct. 5, 1988).

188. *Comparative Review of Death Sentences*, *supra* note 185, at 687. They define the "death sentence rate" as the "# death cases" / "# all cases."

189. *Id.*

regard a defendant as a minor participant in the murder, the less is the likelihood of a death sentence.

In the second Baldus report,¹⁹⁰ the researchers note that another mitigating factor that significantly lowered the risk of a death sentence was the defendant's being an underling ("DUNDERLG") in the murder. This DUNDERLG variable correlated negatively with prosecutors asking for the death sentence, with jurors giving the death sentence, and with a combined category reflecting prosecutorial and jury decisions.¹⁹¹ Finally, in as yet unpublished data,¹⁹² Baldus finds that the variable "defendant was accomplice to relatively minor act (STMIT6)" correlated negatively (-9.24) with juries giving the death sentence.

The Baldus study has limitations. For one, we cannot determine precisely the death rate for felony-murder triggermen. Although the triggerman condition was not present in either *Enmund* or *Tison*, knowing the death rate for this condition is necessary to determine if nullifications were occurring for accessory felony-murderers. A second limitation is that the Baldus researchers' non-triggerman variable (NOKILL), which does fit both *Enmund* and *Tison*, confounds the accomplice felony-murderers with those defendants who contracted for others to kill. This variable did show a low death sentence rate, and that rate would probably have been lower still if the contract murder cases had been factored out, but precisely how much lower we do not know. Third, the study may make too much of either the underling or minor participant variables as applied to *Tison* because the majority in *Tison* characterized the Tison brothers' participation as major and substantial. The underling and minor participant variables may speak more clearly and unequivocally to the *Enmund* situation, though.

Perhaps the best of the overlooked data is Dressler's,¹⁹³ which began with Bowers' *Executions in America*,¹⁹⁴ "purporting to list all executions committed in the nation from 1844 through August 10, 1967."¹⁹⁵ Dressler categorized the executed party as either the perpetrator, causal accessory,¹⁹⁶ or non-causal accessory. Of the 1,517 executions of which his researchers were able to get sufficient information, 1190 were of perpetrators (78.4 percent), seventeen were of causal accessories (1.1 percent), and ninety were of non-causal accessories (5.9 percent). The remainder were categorized as "special

190. *Contemporary Death Sentencing Systems*, *supra* note 185, at 1383, 1386.

191. The logistic coefficients for the DUNDERLG variable for prosecutor, jury, and combined were -6.88, -4.95, and -6.88 respectively; these negative correlations were the largest negative correlations they reported, and were significant at *p* values of .00001, .007, and .001 respectively. *Id.* at 1385-87.

192. The Table from which this correlation was drawn read "Appendix B-2, Regression Models Estimated for the Procedural Reform Study," and it was found under "3. These models identify the factors that explain which defendants received a death sentence in a penalty trial, post-*Furman*," at 085.

193. *Supra* note 8.

194. W. BOWERS, *EXECUTIONS IN AMERICA* 200-201 (1974). Dressler uses Appendix A.

195. Dressler, *supra* note 8, at 65.

196. "For purposes of the study, the only type of accessory identified as a causal one was a solicitor." *Id.* at 67 n.300.

unclear"¹⁹⁷ (twelve cases, .8 percent) or "unclear" (208 cases, 13.7 percent). Accessory felony-murderers would fall in the "non-causal accessories" group, representing 5.9 percent of those executed, but this percentage is not the percentage that answers the basic question. The basic question is, "What percentage of non-causal accessories brought to trial or convicted on the felony-murder charge received the death sentence?" Instead of a percentage calculated with the denominator being the total number of executions, we would want percentages calculated with the denominator being either the number of accessory felony-murder cases brought to trial or the number of cases where conviction resulted. Only if these percentages were significantly lower than the ones for perpetrators, would we clearly have evidence that community sentiment was against executing accessory felony-murderers.

In a further analysis of "Multi-Party Murder Transactions,"¹⁹⁸ Dressler does provide the numbers from which we can make telling comparisons. There were seventy-one cases in which both perpetrators and accessories were executed (32.3 percent), 140 in which the perpetrators were executed but not the accessories (63.6 percent), and only nine cases in which the accessories were executed but not the perpetrator (4.1 percent).¹⁹⁹ As Dressler puts it, "perpetrators were consistently treated more severely" and "executed far more frequently."²⁰⁰

The best²⁰¹ of Dressler's data come last. He first presents comparative treatment of perpetrators and accessories figures,²⁰² and summarizes the comparisons this way:

Of the 315 perpetrators in these multi-party murder transactions, 299, or 94.9, percent were executed. However, of the 317 accessories involved, only 107, or 33.8 percent, were executed. This dramatically demonstrates that perpetrators are thought by juries and/or prosecutors to be far more deserving of capital punishment than are accessories.²⁰³

He then presents figures for both perpetrators and accessories with which we can make "intent to kill" versus "felony-murder alone" comparisons.²⁰⁴ For executed perpetrators, prosecutors proved intent to kill in 79.5 percent of the cases, whereas they proved felony-murder alone (i.e., no intent to kill) in 5.8 percent of the cases. For executed accessories, the percentages were close, with prosecutors proving intent in 48.1 percent of the cases and felony-murder alone

197. "If there were two parties, one victim, and one person was executed but the other was not, and if the facts in the opinion suggest that only one person was the perpetrator, but the facts are otherwise unclear, the executed party was listed as 'special unclear'." *Id.* at 66 n.299.

198. *Id.* at 69, Table 4.

199. In computing the percentages, I eliminated from Dressler's Table 4 the thirty-five cases listed as "co-perpetrators executed" and five cases listed as "co-perpetrators executed, not executed," leaving only those categories where perpetrators and accessories are compared. Eliminating these cases reduces the denominator to 220.

200. Dressler, *supra* note 8, at 69.

201. It is "best" because the appropriate denominator is available — the total number of cases for perpetrators and accessories who did and *did not* get executed. This denominator allows for death rate percentages to be calculated for perpetrators and accessories.

202. Dressler, *supra* note 8, at 71, Table 6.

203. *Id.* at 71.

204. *Id.* at 72, Tables 7 & 8.

in 50.5 percent of them. Thus, "felony-murder was used more often to convict and execute an accessory than to execute perpetrators."²⁰⁵

Dressler concludes: "The study demonstrates legislative, prosecutorial and jury hesitancy or unwillingness to permit execution of accessories, particularly noncausal accessories, thereby providing empirical support for the theoretical arguments against applying the death penalty to accessories."²⁰⁶

While Dressler's data may be the best of the overlooked lot, problems still remain. For one, all the cases of non-causal accessory execution took place in pre-*Furman* times. Thus, if there is a trend,²⁰⁷ the fact that his data came from the 1935-1979 period may mean that they do not reflect what the Court most needs: today's community sentiment. For another, we cannot extract from Dressler's data the answers to the very fine-grained questions and distinctions with which the *Enmund* and *Tison* Courts were wrestling with concerning *different types of accessories*. On the level of participation, those distinctions involved getaway drivers, minor participants, major participants, and those who seemed to straddle the minor/major participation line. On the culpability level, those distinctions involved intent, reckless indifference to human life, and felony-murder *simpliciter*.

B. Objective Indicia and their Methodological Limitations

Dressler's pessimistic conclusion was that all "the criteria for objectively measuring proportionality are riddled with difficulties."²⁰⁸ Yet, in reaching his own conclusions about accessory felony-murder he belies his pessimism by bolstering his constitutional argument with just the sort of objective indicia²⁰⁹ he finds so difficult (or deficient). In this section, we look at an array of objective methods for assessing proportionality and community sentiment, and the limitations of each method. In undertaking this review, we seek to show that Dressler's conclusion — that "all of the 'objective' tools by which a court can evaluate legislative judgments are unacceptable"²¹⁰ — is too dire. Although no method is problem-free, we will suggest that the experimental method does stand above the rest as best for answering the particular fine-grained questions that so divided the *Enmund* and *Tison* Courts. This experimental method, long a staple in psychological research, and a method not reviewed by Dressler, affords degrees of control and precision that other methods lack. But first, we begin with the public opinion poll method.

205. *Id.* at 72.

206. *Id.* at 75.

207. "In addition, the period studied shows a trend toward fewer accessory executions, in both absolute and *per capita* terms." *Id.* at 67.

208. *Id.* at 38.

209. "These conclusions are supported by the author's study of modern death penalty legislation; of all executions from 1935 through May 31, 1979; and from his analysis of persons on death row in 1979." *Id.* at 75.

210. *Id.* at 41.

1. Public Opinion Polls

A public opinion poll or survey is one time-honored method for gauging community sentiment.²¹¹ While time-honored, it may also be the "least reputable"²¹² method for gauging the public's attitudes. The major problems with polls can be summarized under three headings: *when*, *what* and *how*, and *to whom*.

When concerns the timeliness of the poll for gauging current community sentiment. For example, Erskine's²¹³ work, in which she listed all of the available capital punishment polls from 1936 to 1969, does not inform us about today's sentiment. Clearly, we want the poll to be timely, but there can also be problems with polls that are too timely, as an example from the insanity²¹⁴ arena reveals. There were a number of polls²¹⁵ that followed closely on the heels of John Hinckley's shooting of President Reagan and others, a case²¹⁶ that triggered two years of Senate²¹⁷ and House²¹⁸ hearings on the insanity defense. The Hinckley shooting, and the subsequent verdict, may have inflamed passions and influenced sentiments such that respondents to those timely polls may have been more negative to the insanity defense in general than they otherwise might have been. The polls may have picked up a transitory and, perhaps, distorted sentiment. This transitory effect could come into play for death penalty polls as well.

What and how concerns the substance and style of the polling questions. Asking broad and general questions — like "Are you in favor of the death penalty?" or "Are you in favor of the insanity defense?" — is a poor and potentially misleading way to get specific readings regarding "concrete situations."²¹⁹ Furthermore, when we ask many such questions, we run into interpretative problems when the answers contradict one another. To illustrate,

211. Finkel, *De Facto Departures from Insanity Instructions: Toward the Remaking of Common Law*, 14 LAW & HUM. BEHAV. 105, 111 (1990).

212. Dressler, *supra* note 8, at 38.

213. Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 290 (1970).

214. N. FINKEL, *INSANITY ON TRIAL* ix (1988).

215. See *Nightline: Insanity Plea on Trial* (ABC television broadcast, June 22 1982); Ellsworth, Bukatay, Cowan & Thompson, *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 45 (1984); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984); Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393 (1986); Hans & Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 47 PUB. OPINION Q. 202 (1983); Hans & Slater, "Plain Crazy:" *Lay Definitions of Legal Insanity*, 7 INT'L. J.L. & PSYCHIATRY 105 (1984); Slater & Hans, *Public Opinion of Forensic Psychiatry Following the Hinckley Verdict*, 141 AM. J. PSYCHIATRY 675 (1984).

216. *United States v. Hinckley*, 525 F. Supp. 1342 (D. D.C. 1981).

217. *Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658 and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. 122 (1982); *The Insanity Defense, Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2745, and S. 2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. 128 (1982).

218. *Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 21 (1983); *Insanity Defense in Federal Courts: Hearings on H.R. 6783 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2nd Sess. 134 (1982)

219. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1248 (1974).

take the following four answers from an insanity survey by Hans: she found that (1) forty-nine percent favored or strongly favored abolishing the insanity defense, and (2) ninety-five percent favored reforming the defense. But she also found that (3) seventy-seven percent agreed or strongly agreed that the insanity defense is justified, and (4) sixty-four percent agreed that the defense is necessary.²²⁰ From such results, how can we interpret where community sentiment lies?

In addition to the substantive questions researchers ask, how they ask them and what responses they allow may markedly affect the results. Open-ended questions (e.g., "What are your views of the death penalty?") may yield quite different results from closed questions (e.g., "Do you oppose the death penalty?"). Whether the questions restrict respondent's answers to "yes" and "no," or provide a greater array of response options, is another factor to consider. Whether the questions tap only the respondent's opinion, or also the strength of the opinion, is yet another consideration. Two recent death penalty surveys illustrate this last factor. A 1986 Gallup Poll²²¹ reported seventy percent in favor of the death penalty, while another 1986 survey in Georgia²²² found three-fourths in favor of the death penalty. However, in the latter survey researchers asked another question which revealed that fifty-two percent favored abolishing the death penalty if offenders could be given life imprisonment with parole being impossible for twenty-five years, along with a restitution program. When the survey asks alternative questions or gauges the *strength* of the sentiment, we find that "support for the death penalty is not nearly as deep as it is broad."²²³

Although these potential methodological problems and pitfalls involving what questions researchers ask and how they ask them may seriously undermine the validity of the poll results, Vidmar and Ellsworth²²⁴ believe that the public opinion poll should not be condemned "as a method of discovery" because "its capacity for providing detailed and comprehensive information has not been properly exploited." Given that polls have been used and interpreted simplistically in the past, Hans' caveat, cautioning "against unquestioning acceptance of public opinion," is worth remembering.²²⁵

A third major problem involves the respondents — the individuals to whom the polling questions are given. Pollsters have become more aware of the sampling problems that can arise and more sophisticated in their selection procedures to ensure random and representative sampling. But a representative sample does not insure against the problem of an ignorant sample. As Vidmar and Ellsworth²²⁶ remarked about the death penalty issue, if "substantial segments of the public are ill-informed or completely ignorant about some of

220. Hans, *supra* note 215, at 400.

221. Haas & Inciardi, *Lingering Doubts About a Popular Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 11 (K. Haas & J. Inciardi eds. 1988) [hereinafter CHALLENGING CAPITAL PUNISHMENT].

222. Thomas & Hutcheson, *Georgia Residents' Attitudes toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues* (1986) (Paper prepared for the Clearinghouse on Georgia Prisons and Jails).

223. Haas & Inciardi, *supra* note 221, at 11.

224. Vidmar & Ellsworth, *supra* note 219, at 1268.

225. Hans, *supra* note 215, at 411.

the most elementary and important political and social questions," then why should justices be moved by such data? This was Justice Marshall's point in *Furman*,²²⁷ where he asserted that the public was ill-informed about capital punishment, and cautioned his brethren about uncritically accepting public opinion poll results. If a sizable segment of the community is ignorant about capital punishment in general, then a reasonable guess would peg the community's ignorance of the crime of capital felony-murder at nearly complete. Even if a well-designed public opinion poll were conducted, the ignorance factor would probably impeach the findings.

2. Legislative Enactments

We turn next to the measure most used by the Court: legislative enactments. That legislative enactment is most used is no surprise. Legislators have the constitutional authority to make law, and their authority derives from their status as the elect. These two features distinguish legislators from Supreme Court Justices, leading the latter to defer to the people's representatives on grounds that are both constitutional and politic. But from a purely scientific view, the fact that the acts of some have been legally designated as "yardsticks," does not validate the yardstick as an accurate measure of community sentiment.

Legislative enactment, at best, is an indirect measure of community sentiment. Legislators do not routinely poll their constituents before each and every vote, and they do not necessarily read and weigh all of the political winds equally, or proportionately to their strength. As Gillers puts it,

[a] legislator may believe, for example, that death penalty proponents in his constituency are more likely than its opponents to be single-issue voters or are more likely to organize against him, if he opposes capital punishment, than will opponents if he supports it. A constituency's willingness to vote based on a single issue and its degree of organization likely influence a lawmaker's decision and may skew the degree to which the pattern of legislation reflects community sentiment.²²⁸

When the issue is capital felony-murder, a likely unknown issue to most of the lawmaker's constituency, the legislator is not going to see passionate demonstrators on the capitol steps, or hear competing lobbyists in the corridors, or receive a heavy volume of mail on the matter. Outside of the conjecture that prosecutors might lobby for capital felony-murder as another arrow in their quiver, we see no signs of pro- or anti-felony-murder groups outside the pages of law reviews and legal commentaries.

In addition to being an indirect measure, legislative enactment is a confounded measure. When the Court assesses legislative enactment, that very assessment affects what legislators subsequently do. In scientific parlance, the Court's assessment is an intrusive measure, affecting the very thing it seeks to objectively assess. Legislators also assess the Court's assessment, as the *Tison*

226. Vidmar & Ellsworth, *supra* note 219, at 1263.

227. 408 U.S. at 362 (Marshall, J., concurring).

228. Gillers, *supra* note 13, at 72.

majority²²⁹ explicitly acknowledged, and then act and enact on that basis. Thus, legislative enactment may represent perceived community sentiment, perceived Supreme Court sentiment, or some unspecifiable confluence of both. It is not a pure reflection of community sentiment. And what it does reflect of community sentiment — through the potential “noise” of the confounding and through the potential distortion of indirection — may not be veridical. Thus, this “objective” index, unassailable, perhaps, on constitutional and political grounds, can be seriously challenged on scientific grounds.

Courts may use legislative enactments in two ways. One way is to compare the legislative enactments of *different jurisdictions*. We have already seen this approach produce conflicting interpretations in both *Enmund* and *Tison*.²³⁰ The second way, given short shrift in *Enmund* and *Tison*, is to compare legislative enactments within the same jurisdiction. One would compare the crime and penalty for felony-murder with other crimes and penalties. But as Dressler notes,

[t]he difficulty with this approach is, however, that it presupposes that the court which must make the comparison knows the relative severity of the various offenses within the jurisdiction. This is, in fact, the very question being litigated. At most, such a test only indicates whether the penalty for the questioned offense is proportional when compared to penalties for other crimes; it does not indicate whether the penalty is proportional to the seriousness of that particular crime. Thus, if other crimes within the jurisdiction are inappropriately penalized, the analysis is meaningless.²³¹

From legislative enactments data we seek to answer the question, “What forms of felony-murder, if any, deserve the maximum penalty of death?” As we saw,²³² there were thirty-four jurisdictions that allowed the death penalty for felony-murder in some circumstances at the time of *Tison*. A within-jurisdiction comparison can be made in each of those thirty-four jurisdictions between capital felony-murder and other capital crimes, and between capital felony-murder and other non-capital crimes. But here is where Dressler’s²³³ point comes into play. Unless one has an *a priori* scale of crimes, ordinarily arranged by seriousness (or moral culpability), one has no way to decide if this deadly desert is just.

If the case were different, it might be easier to decide. If we found a jurisdiction that made double-parking a more serious offense than armed robbery, to take an implausible example, we might easily conclude that this is unjust, citing our common sense intuitions that this is so. If common sense intuitions were not sufficient, we could do an empirical study in which we asked subjects drawn from the community to ordinarily rank and/or quantitatively rate types of crimes according to severity, thereby providing empirical

229. *Tison*, 481 U.S. at 152 n.4. “Mississippi and Nevada have modified their statutes to require a finding that the defendant killed, attempted to kill, or intended to kill, or that lethal force be employed, presumably in light of *Enmund*.”

230. See *supra* notes 46-145 and accompanying text.

231. Dressler, *supra* note 8, at 39-40.

232. See *infra* Appendix, at Table 4. See also *supra* note 141 and accompanying text.

233. Dressler, *supra* note 8 and *supra* text accompanying note 231.

support for our intuitive notions about the community's *a priori* scale. We could also cite the empirical fact that this is the only jurisdiction that punishes double-parking this severely, thus invoking an objective, inter-jurisdictional comparison to provide the measuring criterion for our intra-jurisdictional comparison. But that is any easy case. Our inter-jurisdictional comparison shows that a state that makes felony-murder a capital crime has plenty of company. Not finding a lone ranger state to characterize as empirically discrepant, we are left with the *a priori* scale, about which there is disagreement.

With intra-jurisdictional comparisons of legislative enactments we get no meaningful reading on capital felony-murder. With interjurisdictional comparisons, there are the potential problems of confounding and indirection, both of which may operate "to obscure the community view."²³⁴ Because jurors directly represent the community view, and because they, unlike legislators, weigh the facts against the law in the particular case at bar, jury verdicts have been examined closely by the Court. We will now closely examine jury verdicts as an objective index.

3. Jury Verdicts

At the outset, we must recognize that jury verdict data is typically aggregate data: that is, the verdicts of many cases are grouped together in some fashion.²³⁵ This grouping, the first step of a study, must also be done for a suitable control group, the group with which the primary group will be compared; the control group is a second aggregate. Grouping, per se, is no easy matter. Let us use a hypothetical. A researcher wishes to compare the sentences given by capital juries for two different capital crimes, felony-murder vs. non-felony-murder. The problem with the felony-murder group is that the group is too large and undifferentiated to answer the questions posed by *Enmund* and *Tison*: the felony-murder group contains both triggermen and accessories, when we want to separate the two for comparison purposes. Furthermore, if we had a group of accessories, as Dressler²³⁶ did, we would need further differentiations to separate accessories according to level of participation and level of culpability.

The control group can also be too large and undifferentiated. Dressler's "perpetrators" group contained a mixture of triggermen, some who premeditated and intended to kill, others who were felony-murder triggermen, and some who were felony-murder triggermen who also had intent.²³⁷ It is problematic enough when one group is mixed in unclear ways, but when both groups contain admixtures, we may end up with a comparison of one assorted fruit salad against another. A finding of a difference, if one occurred, would

234. Gillers, *supra* note 13, at 73.

235. It should be noted that the aggregate problem the *McCleskey* Court found with the Baldus study is not found here. The *McCleskey* Court rightly pointed out that aggregate data cannot speak to the *particular* case at bar. 481 U.S. at 297. An aggregate finding of racial discrimination in death sentences cannot tell us if *McCleskey's* jury was biased. The problem here, in felony-murder, is different. The questions in *Enmund* and *Tison* are about *types* of felony-murder and *types* of accessorial felony-murderers. They are aggregate questions, so to speak, and aggregate data can address such questions.

236. Dressler, *supra* note 8.

237. *Id.*

neither be surprising nor, more importantly, telling: it could not tell us precisely why these two groups are different.

This admixture problem plagues the Baldus²³⁸ study as well, when that study's data is used to address accessory felony-murder.²³⁹ All of the groupings cited earlier, NOKILL, STMIT6, DUNDERLG,²⁴⁰ contained admixtures of felony-murder and non-felony-murder situations, with the proportions being unknown.

We can use the Bedau²⁴¹ study of felony-murder-rape (FMR) to illustrate the problem with a grouping that is too small and too differentiated. His FMR group may be a unique and unrepresentative specie of the felony-murder genus, thus leaving generalizations to *all* felony-murder species open to critical challenge. A further problem is that only seventeen cases were found; too few to run statistical tests.²⁴² We have already noted the "denominator" problem²⁴³ in the studies the *Enmund* and *Tison* Courts cited, in which the failure to get denominators (the number of such cases that went to trial, or the number that led to conviction) rendered the numerator data inconclusive. Although the denominator problem affected that data, it is not a problem endemic to all studies. What is problematic and endemic to all studies is the "lack-of-control" problem.

We can understand the "lack-of-control" problem by reflecting on the aggregate group. For example, take as the group one-hundred accessory felony-murderers. These one-hundred defendants differ from one another in numerous ways: their age, background, education, and prior criminal record, to list but a few. Their cases differ from one another in many respects as well: the circumstances of the case, what they did, what they knew, what victim died, and the number and credibility of witnesses, for example. Their cases are tried before one-hundred different juries, in different states with different laws, perhaps, before different judges, with different lawyers and prosecutors, whose competence, attractiveness, and strategies may differ. All of these factors, some evidentiary and some extralegal,²⁴⁴ are variables which may be determinative in a particular case.

When we look at the second aggregate, the control group (let us take one-hundred cases where defendants are felony-murder triggermen), we have the problem that all of the variables mentioned above are present for this group as well. If these groups receive statistically different verdicts and punishments, we can still not conclude that the difference results from the triggerman vs. nontriggerman distinction. We might like to conclude that, but we are

238. See *supra* note 185.

239. It should be noted that the Baldus study was not addressing felony-murder or accessory felony-murder. That reconstruction is mine.

240. See *supra* notes 185-92 and accompanying text.

241. Bedau, *supra* note 174.

242. *Supra* note 176.

243. See *supra* notes 146-61 and accompanying text.

244. "Extralegal" factors are factors that should be irrelevant but which may affect jurors' judgments of defendants. For a discussion of extralegal vs. evidentiary findings, see generally Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987).

precluded from so concluding because so many other uncontrolled variables could account for the difference.

In short, from studies we never get causal relationships, but only correlations. Those correlational findings are typically followed by caveats, warning the reader that the correlation may be illusory, the product of unforeseen or uncontrolled factors. This problem does not condemn the study "as a method of discovery,"²⁴⁵ but it does limit its power and conclusiveness. Some questions and distinctions, like those raised in *Enmund* and *Tison*, may be too fine-grained for the groupings available to the researcher. The questions may demand hair-splitting defendants into groups that the researcher cannot obtain in natural settings. Finally, in order to pass muster, we may have to derive answers to empirical questions causally, not correlationally.²⁴⁶ Public opinion poll data, legislative enactments data, and studies of jury verdicts do not yield causal findings. Experiments do. We now turn to the experimental method.

4. *The Experimental Method*

To explicate the experimental method through a concrete example, we begin with a researcher designing a hypothetical experiment to test various hypotheses about felony-murder. One hypothesis involves whether the community supports or opposes the "transferred intent" doctrine²⁴⁷ of felony-murder. In one form of the transfer doctrine, the intent to commit the underlying felony is transferred and transformed into the intent to commit the homicide that resulted. The second form of transferred intent imputes the intent or culpability of the triggerman undiminished to accessories.²⁴⁸

For the first type of transfer, the researcher wishes to compare felony-murder triggermen to premeditated murder triggermen, holding all other variables constant, with comparisons being made on both verdicts and sentences. Regarding verdicts, one hypothesis would be that jurors, if they oppose the first kind of transfer in felony-murder, should show greater nullification for the felony-murder triggerman than for the premeditated murder triggerman. That is, we should see a higher percentage of not-guilty verdicts for the felony-murder defendant than for the premeditated murder defendant. But the

245. Vidmar & Ellsworth, *supra* note 219, at 1268.

246. Ellsworth notes that the causal vs. correlational issue was raised by Justice Powell in *McCleskey* in regard to the Baldus study.

Writing for the majority, Justice Powell made a faint-hearted attempt to question the conclusiveness of the research by arguing that the correlational data presented could not actually *prove* that race was the cause of the sentencing disparities. However, the Baldus study had controlled for over 200 other variables and found that none of them, alone or in combination, would explain the pattern of racial discrimination, and neither Justice Powell nor anyone else was able to come up with any other explanation for the racial effects. . . . The majority, however, repeatedly referred to the correlation of death sentences with race as "unexplained," for example, "where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."

Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT, *supra* note 221, at 188 (citing *McCleskey*, 481 U.S. at 1778).

247. See *supra* note 9.

248. *Id.*

researcher also realizes that if the subjects get only two verdict choices, guilty or not-guilty, he/she may miss another possible difference: jurors might "partially nullify"²⁴⁹ by bringing in a guilty verdict to a lesser offense, if they have that option. To test for this latter possibility, the researcher will give prospective jurors five verdict choices for each triggerman: (1) felony-murder (or first degree murder), (2) second degree murder, (3) voluntary manslaughter, (4) involuntary manslaughter, and (5) not guilty. The hypothesis is that jurors will nullify and/or partially nullify to a significantly greater degree for the felony-murder triggerman than for the premeditated murder triggerman.

The second comparison involves sentences, with the death penalty being of key concern. The researcher gives jurors two choices: life imprisonment or death. The hypothesis is that jurors will give the death sentence significantly less often for the felony-murder triggerman than for the premeditated murder triggerman. But a possible confounding occurs to the researcher. If jurors give the death sentence less often for the felony-murder triggerman than for the premeditated murder triggerman, are they, through their sentencing decisions, expressing the sentiment that the *crime of felony-murder* does not deserve the severest of the two sentences, or are they expressing a different sentiment — that the *death penalty* is too harsh for this crime? The researcher realizes that a confounding is occurring between "the severest sentence" and "the death sentence."

To separate this confounding, the researcher decides to use two conditions, one group getting the case under "capital" conditions where the death penalty is possible (i.e., the death vs. life imprisonment choice), and the other group getting the case under "non-capital" conditions (i.e., where the sentence choice is twenty years-to-life imprisonment, with jurors free to select either of the end-points or in-between values). If the death penalty for felony-murder seems too harsh to jurors, then we should see more nullifications in the capital condition than in the non-capital condition, for nullifications would preclude the death penalty. If, on the other hand, jurors believe that even twenty years-to-life is too harsh for the crime of felony-murder, we would expect similar rates of nullification in the capital and non-capital conditions.

To test the second type of transfer in felony-murder — the transfer of the triggerman's intent undiminished onto accessories — a different set of questions emerge, requiring additions to the experimental design. The questions here stem from *Enmund* and *Tison*, and they require that accessories of varying types be added as defendants, along with the triggerman. In *Tison*, the majority argued that the Tison brothers represented a different and more culpable type of accessory than Enmund, who was merely a getaway driver,²⁵⁰ while the minority disagreed.

249. The term "partial nullification," an admitted oxymoron, is chosen to distinguish it from its more familiar kin, "nullification," which typically involves a complete rejection of punishment and the charge through a not guilty verdict. While nullification is the more striking and troubling phenomenon, partial nullification phenomena may provide clues to researchers, legislators, and judges that jurors find the penalties for certain crimes disproportionately too severe, rather than unwarranted at all.

250. See *supra* notes 41-45 and accompanying text.

The researcher plans to design a basic case scenario where there are three accessories in addition to the triggerman. They will be the getaway driver, the lookout, and the sidekick. The accessories will differ in their knowledge of the crime, level of participation, closeness to the scene of the death, and opportunities to intervene.

The basic case scenario involves a robbery of a liquor store as the underlying felony. An elderly storekeeper will die during the robbery, triggering the felony-murder charge. The eventual triggerman (defendant D), the planner of the crime, meets with his eventual sidekick (defendant C) and proposes that they rob the liquor store. D wants a gun to threaten the storekeeper in case anything goes wrong. C tells D that he can get a gun from their friend, the eventual lookout (defendant B). D and C meet with B and tell him that they are planning to shoplift at a liquor store, ask B to serve as their lookout outside the store, and B agrees. They also ask B to furnish a gun just to threaten the clerk if they happen to be spotted while shoplifting, and B agrees. B provides a gun, and C furnishes the bullets for the gun. The getaway driver (defendant A), knows nothing, at this point. All four are in a car being driven by A, when D tells A to stop the car across the street from the liquor store and to keep the motor running. Defendants B, C, and D get out, C and D go inside the store while B acts as lookout outside the store. D and C rob the clerk of \$225.00, the clerk dies (in a way yet to be detailed), and the defendants flee to the car, telling A to "move it, let's get the hell out of here." When A asks "what's going on," D tells him to shut up and drive fast, and A complies. Unbeknownst to D and C, a stock boy in the back room of the liquor store hears and sees what is going on and quietly calls the police. Later he identifies D and C at trial. A passerby on the street gets a good look at A, B, C, and D, and also identifies them at trial. The other facts emerge from the testimony of the four defendants.

Now we can compare the three accomplices, the getaway driver (A), the lookout (B), and the sidekick (C), to one another, and to Enmund and the Tison brothers. The getaway driver (A) did not know that a robbery had been planned or that one was taking place, although he may have suspected something, given the "keep the motor running" comment. A knew even less than Enmund did. Like Enmund, the getaway driver was not on the scene or close to the scene, and could not intervene at the time of the death. Also like Enmund, he did not separate himself from his associates, did not investigate what had happened, and aided after the death in the escape.

The lookout (B) certainly knew more and played a more significant role than did A. B knew that a crime was being planned, and though he was told that the crime was to be shoplifting, he might have guessed that it was to be something more, because he was asked to furnish a gun. B furnished the weapon, whereas defendant A and Enmund did not; B was closer to the scene than A or Enmund, perhaps even closer than the Tison brothers,²⁵¹ although not close enough to intervene. B did not separate himself from his associates,

251. In *Tison*, there was a discrepancy between Ricky and Raymond's testimony regarding how far away from the scene they were when the fatal shots were fired. *Tison*, 481 U.S. at 151. See also *supra* note 118 and accompanying text.

did not return to the scene to offer assistance to the victim, and continued on with the plan to flee.

The sidekick (C) knew more than A and B, for he knew that the plan was armed robbery. He was a more major participant than B, for he solicited the gun from B, supplied the bullets, and was directly on the scene, right next to the triggerman. He could have intervened, perhaps preventing the death, and certainly could have rendered assistance to the victim afterwards, but he did not. By being right on the scene and by having a greater opportunity to intervene, C can be regarded as a more major participant with greater culpability than that of the Tison brothers.

By creating these three different accessories, who he/she can array, along with the triggerman (D) along an ordinal scale of culpability, the researcher can test an hypothesis that suggests that jurors will convict and sentence defendants *proportionately* to their perceived culpability, rather than convicting and sentencing all to the same degree. In short, the hypothesis is that jurors will be *proportionalists* rather than *equalists*.²⁵² This hypothesis predicts that D will receive the highest conviction rate for the felony-murder charge and receive the highest proportion of death sentences. The hypothesis further suggests that both rates will drop as we descend the ordinal scale from D to C to B and to A.

The researcher chooses ordinal culpability positions of the three accessories to flank Enmund and the Tison brothers on the lower and higher culpability sides: compared to Enmund, A is less culpable, B is arguably²⁵³ more culpable, and C is unarguably²⁵⁴ more culpable. Compared to the Tison brothers, A and B are less culpable, but C is more culpable.²⁵⁵ The particular culpability settings for defendants A and B create a problem, though. One could easily argue that defendant A should not be charged with felony-murder, because he did not know that a felony was either planned or being executed; his involvement is after-the-fact, in aiding in an escape. The problem with defendant B is related: if the jurors believe that B thought that only shoplifting was occurring, then this crime²⁵⁶ might not trigger the capital felony-murder

252. The "equalist" position is what the felony-murder and accessory liability doctrines demand, and what many critics attack. See *supra* note 8. The critics, by and large, endorse the proportionalist position, which, in the words of a California court, *does not erode* "the relation between criminal liability and moral culpability." *Washington*, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446.

253. B's level of culpability compared to Enmund's is arguable. On the one hand, B provides the gun, which Enmund apparently did not, and B is closer to the scene of the death than Enmund was. On the other hand, if one believes that B truly thought that only the crime of shoplifting was in progress, while Enmund knew that an armed robbery was occurring, then one might judge Enmund more culpable than defendant B.

254. Defendant C and Enmund both know it is an armed robbery, but C provides the bullets, is in on the plan, and is right at the scene, with opportunities to intervene, which was not so for Enmund.

255. The Tison brothers had knowledge that a weightier crime was being committed than did either defendants A or B. Defendant C knew that armed robbery was occurring, but was at the scene, where the Tison brothers were not.

256. It would seem to take a felony to trigger felony-murder, but sometimes anomalous things happen in the context of felony-murder. Whether shoplifting would be classified as a felony or a misdemeanor hinges on the value of the goods stolen. A misdemeanor finding

charge in those states that enumerate the applicable felonies,²⁵⁷ and in most capital felony-murder states.²⁵⁸

To assess for this possibility, the researcher will have the prosecution bring a second charge against all of the defendants in addition to the primary charge of felony-murder. The second charge will be "conspiracy to commit a felony (robbery)."²⁵⁹ Three verdict choices will be available: guilty of conspiracy to commit a felony (robbery), guilty of conspiracy to commit shoplifting, and not guilty. This second charge allows for a clear assessment of nullification of the felony-murder charge, if nullifications do indeed occur: for if jurors find a particular defendant guilty of conspiracy to commit a felony (robbery), and if they follow the conclusive presumption of the felony-murder rule, then they should also find that defendant guilty of felony-murder. Thus, if a lower conviction rate for the felony-murder charge in relation to the conviction rate for the conspiracy to commit a felony (robbery) charge results, that would indicate that nullifications are occurring because the jurors are

would seem to rule out the possibility of felony-murder. But in *Fuller*, the court raised this interesting scenario:

So, if a merchant in pursuit of a fleeing shoplifter is killed accidentally (by falling and striking his head on the curb or being hit by a passing automobile), the thief would be guilty of first degree felony murder assuming the requisite intent to steal at the time of the entry into the store.

86 Cal. App. 3d at 627, 150 Cal. Rptr. at 520.

257. The enumerated felonies are typically those that are violent or dangerous to human life. See MODEL PENAL CODE, *supra* note 10. Again, under either violent or dangerous to human life, shoplifting would not seem to qualify as a felony. But if a merchant chases the shoplifter, and the latter jumps into a car to flee, but strikes and kills a pedestrian, he might be tried for felony-murder.

In *Fuller*, the defendants burglarized four vans in an empty car lot and stole four spare tires. This was a second-degree burglary not involving danger to human life. Unfortunately for the defendants, the police observed them, and a high-speed chase ensued, during which the defendants ran a red light, struck another automobile and the driver of that car was killed. The court ruled that for purposes of the felony-murder rule, "flight following a felony is considered part of the same transaction as long as the felon has not reached a 'place of temporary safety.'" 86 Cal. App. 3d at 623, 150 Cal. Rptr. at 517.

One commentary put the anomalous result in this context:

Had the defendants been fleeing from a more serious crime not considered inherently dangerous — grand larceny, for example — they would have been guilty of only vehicular manslaughter. In fact, if the defendants had been in a high-speed chase after stealing the vans rather than the spare tires, the grand theft charge would not have supported a felony-murder conviction.

Note, *The Dillon Dilemma*, *supra* note 8, at 1325.

258. Even in states where the felonies are not specifically enumerated, the point that "the felonious act must be dangerous to life" is typically followed. 409 Mich. 672, 699 & n.48, 299 N.W.2d 304, 312 & n.48. See also *supra* notes 5, 10. Again, shoplifting would not qualify in itself as dangerous to life, but with certain "emendations," it might. See *supra* notes 256-57.

259. The conspiracy charge used in this experiment is problematic. Conspiracy to commit robbery is different from the charge of armed robbery: the latter would trigger felony-murder in most states, whereas the former would not. One subject, a self-identified lawyer, picked up on this difference and wrote on his verdict sheet that guilt on the conspiracy to commit robbery charge would not serve as the underlying felony for felony-murder. He also wrote that "I assume you meant 'robbery' as the charge." We cannot say for certain that other subjects did not make this distinction, although no one else wrote comments, and we cannot say for certain that subjects treated the conspiracy to commit robbery as if it were robbery. What we can show is that when further experiments were run, where the case used was a disguised version of the *Tison* case and where the underlying felony was robbery, the pattern of verdicts and death sen-

apparently refusing to follow the conclusive presumption to its "guilty" conclusion.

The final variable the researcher will manipulate in this design refers to *how the victim dies*. Victims may die in a myriad of ways, with some regarded as particularly heinous, others as a result of provocation, and still others as accidental and tragic. For example, the victim might or might not have a gun. The latter situation might evoke a "defenseless killing" speech from the prosecutor, whereas an armed victim might evoke an "if not for the victim and his gun, no death would have occurred" speech from the defense. How jurors regard the death may produce sympathy or antipathy, and which sentiment results may well affect jurors' verdict and sentence decisions. In *Enmund*, for example, the victims died in a gun battle. The evidence at trial showed that when Sampson Armstrong grabbed eighty-six-year-old Thomas Kersey, held a gun to him, and told Jeanette Armstrong to get his wallet, Mr. Kersey cried for help, whereupon his seventy-four-year-old wife, Eunice, came around the house with a gun and shot Jeanette Armstrong; fire was returned and both Kerseys were killed.²⁶⁰ In contrast, the *Tison* record shows that there was no provocation and no gun battle; John Lyons pleaded for the life of his family, but all were shot anyway.²⁶¹ These differences may well produce different verdicts and sentences.

To test for this possibility, the researcher uses four different death scenarios. In case 1 (HEART), defendant D points the gun at the elderly clerk and threatens him with death if he doesn't open the cash register. After opening the register, the clerk grabs his chest, falls to the floor, cries out that he's having a heart attack, and subsequently dies. In case 2 (ACCIDENT), the clerk grabs at the gun in defendant D's hand, and as D tries to pull the gun back and out of the clerk's grasp, the gun discharges, a bullet hits the clerk, and he subsequently dies from the wound. In case 3 (HEINOUS), the same grab for the gun occurs as in case 2, but D successfully pulls the gun away, after which D smashes the gun again and again into the face of the elderly storekeeper, who falls to the floor with blood covering his face. D then fires all six shots in rapid succession into the storekeeper as he lies on the floor, and he subsequently dies from the wounds.²⁶² In cases HEART, ACCIDENT, and HEINOUS, defendant C says nothing and does nothing to stop the attack or the shooting. Case 4 (PREMED) is the premeditated murder condition for the triggerman. In this scenario, after the money is taken from the register, defendant C says "let's go," but D says "no, I've been waiting to nail this old guy for two years, and I'm not leaving any witness around." With that, D opens fire as C stands by, hitting the clerk with six bullets. The clerk dies from the wounds.

tence results was quite similar to what we will present here." Finkel & Smith, *Felony-murder: On Tison* (unpublished manuscript). See also *infra* note 301.

260. *Enmund*, 458 U.S. at 784, 802.

261. *Tison*, 481 U.S. at 140-41.

262. In some states, this situation might trigger a first degree, premeditated murder charge instead of the felony-murder charge for the triggerman. However, since "charging" involves considerable prosecutorial discretion, and the charge of felony-murder would be easier to prove, most situations like this would lead to the felony-murder charge. See generally G. FLETCHER, *supra* note 8.

In HEART, the felony-murder rule is invoked even though the death was arguably not foreseeable.²⁶³ Similar circumstances occurred in *People v. Stamp*,²⁶⁴ in which a sixty-year-old obese man with a history of heart disease was told to lie down on the floor during a robbery. Fifteen to twenty minutes after the robbery he collapsed and subsequently died of a heart attack. The court held that "the robber takes his victim as he finds him."²⁶⁵ ACCIDENT includes elements of provocation (the clerk's grab for the gun) and accident (the gun's discharging). HEINOUS involves a senseless beating and shooting, a heinous death. The researcher hypothesizes that the felony-murder conviction rate and the death sentence rate will increase as he/she progresses from HEART to ACCIDENT to HEINOUS. He/she also hypothesizes that the conviction and death rates for the premeditated murder triggerman (PREMED) will be significantly higher than those of the felony-murder triggermen (HEART, ACCIDENT, and HEINOUS, combined and averaged), and higher than those of the felony-murder triggerman in HEINOUS alone.

To summarize the design to this point, the researcher manipulates three independent variables. One variable is the *defendant*. There are four defendants, one triggerman and three accessories, who all differ in their levels of knowledge, participation, and culpability. This variable is called a *within-subject* variable, since each juror makes judgments on all four defendants. The second independent variable presents four different cases. This is a *between-subject* variable, since each juror gets only one case to decide. The third independent variable is the *capital vs. non-capital* condition, which is also a between-subject variable. Half the jurors get the case under capital conditions, where the death penalty is possible, and the other half gets the case under non-capital conditions, where the death penalty is precluded. The two major dependent variables (what is being measured) are the verdict decisions on the two charges and the sentencing decisions on the two charges.

The researcher must control many variables in order to avoid confoundings. For example, the age and the criminal record of the defendants are kept constant: all defendants are twenty-five-years-old, and none has a prior criminal record. To avoid certain extralegal variables from affecting judgments, for example, the appearance, dress, manner, and eloquence of the defendants and attorneys, the case is given to the jurors to read instead of staging a video-taped trial with actors playing the roles. To control for differences among states in their statutory definitions of felony-murder and other crimes, "generic" definitions are taken from *Black's Law Dictionary*.²⁶⁶ Further controls involve

263. It could also be argued that this situation satisfies the legal test for foreseeability. It is certainly foreseeable that pointing a gun at someone might cause anxiety and elevated blood pressure that may lead to a heart attack.

264. 2 Cal. App. 3d 203, 208, 82 Cal. Rptr. 599, 601 (1969).

265. *Id.* at 211, 82 Cal. Rptr. at 603.

266. BLACK'S LAW DICTIONARY (5th ed.1979). The definitions used were:

Conspiracy to Commit a Felony (Robbery). A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is . . . robbery.

Id. at 280.

Conspiracy to Commit Shoplifting. A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is . . . shoplifting.

random assignment of jurors to either the capital or non-capital condition, and the random assignment of the particular case. To control for order effects, the individual verdict sheets for the four defendants are randomly arranged in the case booklets following the written case, and the individual sentencing sheets are also randomly arranged.

In any experiment, a researcher must make choices. In this hypothetical experiment, the researcher chooses to focus on *jurors* rather than *juries*. The rationale for this decision is that the researcher wants to assess community sentiment as expressed by individual jurors unalloyed by group deliberations and the compromises that may result.²⁶⁷ One of the most difficult and oftentimes constrained choices an experimenter must make involves subjects — who will serve as mock jurors? Usually, the researcher seeks to generalize the obtained experimental results to actual jurors, but obtaining “representative” jurors may be quite difficult. Even if the researcher has access to actual jury rolls, a representative sample drawn from that list might still not match actual seated jurors, because exemptions and exclusions may skew the final jury composition in unknown ways. College students as mock jurors do not match actual jurors in age, education, and, probably, social class, although their verdicts and sentences might match those of actual jurors closely.²⁶⁸ Adults twenty-five-to-seventy-five years old would match better in terms of age, but other variables may not match.

Id.

First degree Murder. Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission . . . of a crime punishable with death or imprisonment for life, is murder in the first degree.

Id. at 571-71

Felony Murder Doctrine. At common law, one whose conduct brought about an unintended death in the commission . . . or attempted commission of a felony is guilty of murder.

Id. at 556.

Second degree Murder. The unlawful taking of human life with malice but without the other aggravating elements of first degree murder; *i.e.*, without deliberation or premeditation.

Id. at 1213.

Voluntary Manslaughter. Manslaughter [*i.e.*, the unlawful killing of another without malice, either expressed or implied] committed voluntarily upon a sudden heat of the passions.

Id. at 869.

Involuntary Manslaughter. Such exists where a person in committing an unlawful act not felonious or tending to great bodily harm, or in committing a lawful act without proper caution or requisite skill, unguardedly or undesignedly kills another.

Id.

267. The researcher could have done both, first obtaining judgments from jurors, and then having them deliberate in juries. See generally R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967). However, a repeated finding in the literature shows that jurors' initial verdict judgments comport closely with final jury verdicts. See generally R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983); H. KALVEN & H. ZEISEL, *supra* note 19; M. SAKS, *JURY VERDICTS* (1977); Davis, Kerr, Atkin, Holt & Meek, *The Decision Processes of 6 and 12 Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 *J. PERSONALITY & SOC. PSYCHOLOGY*. 1 (1975); Visher, *supra* note 244.

This hypothetical researcher decides to select two samples, college students of the eighteen-to-twenty-five age range, and non-student adults of the twenty-five-to-seventy-five age range. While these two groups, singly or combined, may not be representative of the composition of juries or the community-at-large, there is a way to increase one's confidence in this sample. All subjects will undergo *voir dire* questions to determine the number and percentage of each group who are "death-qualified," (DQs),²⁶⁹ "nullifiers"²⁷⁰ under either *Witherspoon*²⁷¹ or *Witt*²⁷² standards, "guilty phase includables" (GPIs),²⁷³ "*Witt* excludables,"²⁷⁴ and of "automatic death penalty" (ADPs)²⁷⁵ types. Nullifiers are those who would be excluded because they indicate that their views on the death penalty would prevent them from being fair and impartial in the verdict phase. GPIs are those who say they could be fair and impartial in the verdict phase, but are excluded because they also say that their views on the death penalty are such that they would never impose the death

268. Field & Barnett, *Simulated Jury Trials: Students vs. "Real" People as Jurors*, 104 J. SOC. PSYCHOLOGY 287 (1978) (finding that differences between students and adults accounted for less than four percent of the variance).

269. See generally Hans, *Death By Jury*, in CHALLENGING CAPITAL PUNISHMENT, *supra* note 221 at 149; Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984).

270. "Nullifiers" are prospective jurors excluded from capital juries because they state "that they cannot be fair and impartial in deciding guilt, knowing that a guilty verdict might ultimately result in imposition of the death penalty." Amicus Curiae Brief for the American Psychological Association, *In the Supreme Court of the United States: Lockhart v. McCree*, 42 AM. PSYCHOLOGIST 59, 60 (1987). [hereinafter cited as *Amicus*].

271. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968).

272. *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985).

273. In addition to nullifiers, a second group of *Witherspoon* excludables (WEs) are the Guilt Phase Includables (GPIs). The GPIs state that they would never vote to impose the death penalty, but state that "they can be impartial on the issue of the defendant's guilt or innocence." *Amicus, supra* note 270, at 60.

274. *Witt*, 469 U.S. at 424-25. *Witt* excludables are those who would be death-qualified under *Witherspoon*, but who would be excluded under the broader *Witt* standard because they state that their views on the death penalty would *substantially impair* their ability to perform their duties as a juror in accordance with the instructions and the oath. Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree*, 13 LAW & HUM. BEHAV. 185, 187 (1989).

Thompson uses the terms *guilt nullifiers* and *penalty nullifiers* to distinguish what have been called nullifiers and GPIs, respectively. He points out that these "two categories partially overlap because some potential jurors are both guilt nullifiers and penalty nullifiers, but a significant number would nullify only on penalty." *Id.* at 187

Thompson notes that

[t]his new standard probably expands the class of jurors considered nullifiers because it does not require that they make their bias 'unmistakably clear' before they may be excluded. Hence, it is likely that the percentage of eligible jurors excludable under *Witt* will be larger than the 21 percent-29 percent excludable under *Witherspoon*. How much larger the excludable group will be is a worthy question for future research.

Id. at 209.

To the open question posed by Thompson, regarding how much larger the excludable group would become when *Witt* excludables are added, we have an answer for this sample. The additional *Witt* excludables added 2.5 percent to the excludable group in experiment I, and .5 percent to the excludable group in experiment II.

275. "Automatic Death Penalty" (ADPs) jurors are excluded because they state that they "will always vote for the death penalty in a capital case." *Amicus, supra* note 270, at 60.

penalty in the sentencing phase. *Witt* excludables are those who indicate that their views on the death penalty would substantially impair their ability to perform as jurors in accordance with the judge's instructions and their oath. ADPs are those who are excluded because they indicate that they would always vote for the death penalty. The DQs are those who remain: they would vote for the death penalty in some cases, and they would be fair, impartial, and not substantially impaired.

From this death qualification process, the researcher can obtain groups of death-qualified students and non-student adults, individuals who could be on a capital jury. Classifying all subjects into "juror type" allows the researcher to compare this sample against national and state figures.²⁷⁶ If the percentages of subjects in the various death qualification categories track the national figures closely, the sample is not disparate from what we would find nationwide at least on this one important dimension.

There is one final wrinkle to this hypothetical experiment. The mock juror paradigm will tell us *what* these mock jurors do in terms of verdicts and sentences for differing conditions, cases, and defendants, but it will not tell us *why* — the reasons for their decisions. To get at the *why* question, the researcher designs a second part of the study, using the "ninth Justice" paradigm.

In this ninth Justice paradigm, a subject plays the part of a Supreme Court Justice, and is asked to render two decisions on a capital felony-murder case, one of the cases he or she did not decide as mock jurors. The decisions involve two constitutional challenges brought by the defendants: the first challenges the death sentence for felony-murder that all four defendants received, and the second challenges the felony-murder rule and conviction *per se*. Whereas Supreme Court Justices took up the first challenge in *Lockett*, *Enmund*, and *Tison*, they have not yet addressed the second challenge directly, although they may in the future. The decisions the mock Justice must reach are whether to "let-stand" or "reverse-and-remand" the death sentence and the conviction. It is called the *ninth* Justice paradigm because the subject is told that the other eight justices divided equally on the two issues, and that he or she has the deciding vote.

This paradigm addresses the *why* question when the researcher asks the mock Justices to list reasons for their "let-stand" or "reverse-and-remand" decisions. The researcher provides the mock Justices two lists, each containing eight reasons for letting the sentence stand or reversing and remanding. The reasons are direct quotes taken from Supreme Court decisions in *Lockett*, *Enmund*, and *Tison*.²⁷⁷ The subjects are also free to add their own reasons.

276. Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 LAW & HUM. BEHAV. 115 (1984) (Kadane reports percentages of DQs, GPIs, Nullifiers, and ADPs in a California poll and in a national poll).

277. The "let stand" reasons were given odd numbers, the "reverse and remand" reasons even numbers, to facilitate coding and analysis. The "let stand" list contained the following reasons.

1. Constitution does not prohibit states from enacting felony-murder statutes or from making aiders and abettors equally responsible, as a matter of law, with principals. *Lockett*, 438 U.S. at 602.

This paradigm, then, allows for a comparison between mock justices' reasons for their decisions, and the reasons put forth by the majority and minority in *Enmund* and *Tison*, thus giving us another measure of how accurately the Supreme Court measures the attitude of the public on this issue.

The author ran the experiment described above, and presents the results in the next section, along with those of a follow-up experiment. Before turning to the results, however, we first assess the strengths and weaknesses of the experimental method.

Legislative enactments, jury studies, and opinion polls cannot match the experimental method's precision and control. In the experimental method, a researcher can ask and frame precise questions and hypotheses, create fine-

3. One who purposely aids, helps, associates himself with another for the purpose of committing a crime is regarded as if he were the principal offender and is just as guilty as if the person performed every act constituting the offense. *Id.* at 593.

5. If the conspired crime and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide. An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances. *Id.*

7. The defendant manifested extreme indifference to human life and wantonly engaged in conduct which created a grave risk of death. *Enmund*, 458 U.S. at 790, n.8 (quoting KY. REV. STAT § 507.0.0 (1) (b) (Supp. 1980).

9. The death penalty for felony murder does not fall short of our national standards of decency. *Id.* at 823.

11. The eighth amendment does not prohibit the death penalty as disproportionate in a case of a defendant whose participation in the felony that results in murder and whose mental state is one of reckless indifference. *Tison*, 481 U.S. at 157-58.

13. Petitioner actively participated in the events leading to death by providing the murder weapon. *Id.* at 151.

15. Petitioner was present at the murder site, did nothing to interfere with the murder, and after the murder even continued on the joint venture. *Id.*

The "reverse and remand" list contained the following:

2. The eighth amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Enmund*, 458 U.S. at 797.

4. The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the eighth amendment's prohibition; it makes no distinction between a willful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. *Lockett*, 438 U.S. at 620 (Marshall, J., concurring).

6. Where the statute did not permit sentencing judge or jury to consider, as mitigating factors, defendant's lack of specific intent to cause death and defendant's role as accomplice, statute violated Eighth and Fourteenth Amendments. *Id.* at 604.

8. The petitioner's participation was relatively minor. *Enmund*, 458 U.S. at 792.

10. Only a small minority of States even authorize the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime. *Tison*, 481 U.S. at 149-50. Evidence that a death penalty is imposed only infrequently suggests not only that jurisdictions are reluctant to apply it but also that, when it is applied, its imposition is arbitrary and therefore unconstitutional. *Id.* at 176.

12. Putting petitioner to death to avenge a killing 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. *Enmund*, 458 U.S. at 801.

14. Deterrence of capital crimes is not a sufficient justification for executing petitioner. It is unlikely that the threat of the death penalty for murder will measurably deter one such as the petitioner who does not kill or intend to kill. *Id.* at 800.

16. The term "intent to kill" is not equivalent with the foreseeability-of-harm. *Tison*, 481 U.S. at 151. In this context — where the defendant has not killed — a finding that he nevertheless intended to kill seems indispensable to establishing capital culpability. *Id.* at 170.

grained distinctions, and exercise a high degree of control over extraneous and potentially confounding variables. Because the researcher manipulates variables in a systematic fashion, *causal* conclusions emerge, whereas only *correlational* statements emerge from studies, enactments, and polls.²⁷⁸

As to weaknesses, experimental work done in laboratories and classrooms may lack ecological validity.²⁷⁹ For example, in the experiment we laid out, playing the part of a juror is not the same as being a juror; reading a case is not the same as watching and listening to witnesses, attorneys, and a judge; and rendering a verdict for a nameless, faceless, paper defendant is not the same as convicting a flesh and blood human being. The experimenter chooses to simplify real life by design, and as the simplifications increase, ecological realism generally decreases. When the choice comes down to realism vs. control, the experimenter typically opts for the latter, for without control, little can be said with confidence. But the decision to control increases artificiality, and the results that emerge may or may not be generalizable to the real thing. Experimenters know that the perfect experiment in the social sciences is impossible. Actual cases do not come along that present just those conditions and defendants we would like to test. Courts would never sanction the control of, and intrusion into, courtroom processes that experiments require to reach sound scientific conclusions.

As the experimental task may not be representative of what actual jurors do, the subjects who perform the task may not be representative of actual jurors. Can we generalize to actual jurors, or to the community-at-large? Perhaps the only sentiments of which we can be truly confident are those of the subjects who serve. Experiments can, however, be replicated with different subjects. If the results with different subjects consistently match earlier results, we grow more confident in our generalizations.

In sum, the experimental method is an imperfect objective index, although it can provide empirical data of a different sort from those other imperfect objective indicia — public opinion polls, legislative enactments, and jury studies. But the fact that all indices have weaknesses does not confirm Dressler's conclusion that "all of the 'objective' tools . . . are unacceptable."²⁸⁰ While no one objective tool by itself may be perfectly acceptable, interpretative navigation by triangulation may yield an acceptable fix on community sentiment, where following any one index would not. If an objective reading of legislative enactments, jury studies, and experiments all point to a similar

278. See *supra* note 246 and accompanying text.

279. "Ecological validity" has become a fashionable term and movement within psychology of late, as it had been in chemistry when that science was young. But there are good reasons to question the fashion and to retain the experimental laboratory approach. See Banaji & Crowder, *The Bankruptcy of Everyday Memory*, 44 AM. PSYCHOLOGIST 1185 (1989). They question the claim "that the use of lifelike methods guarantees generality of conclusions to real-life situations." *Id.* at 1187. In fact, they argue "that ecological validity of the methods as such is unimportant and can even work against generalizability." *Id.* at 1187. "Our response is that the multiplicity of uncontrolled factors in naturalistic contexts prohibits generalizability to other situations with different parameters. The implication that tests in the real world permit greater generalizability is false once the immense variability from one real-world situation to another is recognized." *Id.* at 1189.

280. Dressler, *supra* note 8, at 197.

sentiment, then this convergent validity²⁸¹ of differing methods yielding similar conclusions increases our confidence in those conclusions. This may be enough. It may be the best we can do through objective indicia.

To reject all objective indicia because no measure is perfect is to demand a level of certainty that no empirical social science can deliver. But such a rejection would have profound legal effects on eighth amendment cases. In a practical sense, it would condemn decisions to entirely subjective analysis, which would still be affected to some unknown degree by how the Justices' perceived sense of the community entered into their own balancing equations. This was Justice Scalia's point in *Stanford v. Kentucky*,²⁸² where he criticized the minority for abandoning "the demonstrable current standards of our citizens,"²⁸³ and thereby replacing "judges of the law with a committee of philosopher-kings."²⁸⁴

At the constitutional level, a rejection of objective indicia would imply a rejection of approximately one-hundred years of Court decisions recognizing the eighth amendment's progressive tie to the empirical reality of community sentiment. From Justice Field's dissent in 1892 in *O'Neil v. Vermont*,²⁸⁵ to the Court's 1910 opinion in *Weems*,²⁸⁶ through *Trop*,²⁸⁷ *Robinson*,²⁸⁸ *Furman*,²⁸⁹ *Gregg*,²⁹⁰ and *Coker*,²⁹¹ and through the capital felony-murder cases of *Lockett*,²⁹² *Enmund*,²⁹³ and *Tison*,²⁹⁴ a conceptual string weaves the woof of community sentiment into the warp of cruel-and-unusual punishment cases. Unravelling those threads would possibly increase, if not invite, nullifications. Based on all of the empirical data, including that in the following section, such an unravelling would be premature and unwise.

281. "Convergent validity" refers to different experiments, with different methods and subjects, producing similar results. As Ellsworth puts it, the Supreme Court apparently did not grasp this concept in *Lockhart*.

The "flaws" identified in individual studies were in no instance fatal flaws. But more important, the one-by-one elimination of studies from a consistent body of research shows an ignorance of the principle of convergent validity. The idea that new scientific truths are proven by means of a simple, perfect, definitive experiment is generally mistaken. Typically there are numerous sources of error and numerous confounding variables that must be controlled, and typically it is impossible to control them all in a single study. Thus the scientist must triangulate in on the truth by ruling out some alternative explanations in some experiments and other alternative explanations in other experiments until only one explanation is left that can account for the results of all the experiments. This is the method of convergent validation.

Ellsworth, *supra* note 246, at 196.

282. 109 S. Ct. 2969, *reh'g denied*, 110 S. Ct. 23 (1989).

283. *Id.* at 2980.

284. *Id.*

285. 144 U.S. 323 (1892) (Field, J., dissenting).

286. 217 U.S. 349.

287. 356 U.S. 86.

288. *Robinson v. California*, 370 U.S. 660 (1962).

289. 408 U.S. 238.

290. 428 U.S. 153.

291. 433 U.S. 584.

292. 438 U.S. 586.

293. 458 U.S. 782.

294. 481 U.S. 137.

III. EXPERIMENTAL RESULTS

A. Subjects

The subjects in both experiments (n=275 in experiment I, and n=212 in experiment II) consisted of students and adults. The students were undergraduate students from an eastern university, drawn from psychology courses, with a mean age of approximately twenty years, with all of the students volunteering for the experiment. The adults, ranging in age from twenty-one to seventy-eight, with a mean age of approximately forty-five, were recruited by the undergraduates; they also participated voluntarily.²⁹⁵ The education level of both groups was high, with the student's education level at approximately fourteen years, and the adults at approximately seventeen years. The gender distribution in both experiments was approximately forty-three percent males and fifty-seven percent females.

Although age, education, and gender distributions did not match closely with average jury composites, on the crucial dimension of "death qualification type" this sample did match national figures²⁹⁶ quite closely. Based on their answers to four death qualification questions, subjects were categorized into one of five groups, four groups being "excludables" and one group being death qualified.²⁹⁷ Table 5 presents the numbers, percentages, and distribution of student and adult subjects by "death qualification type" for both experiments, along with national percentages.²⁹⁸ The total distribution of juror types for experiments I and II, and for students and adults separately, approximated the national percentages.²⁹⁹

B. Results for Experiment I

1. Verdicts and Sentences

To properly assess mock jurors' verdicts on the felony-murder charge by defendant and by case, we first examine their verdicts on the conspiracy to commit a felony (robbery) charge. Table 6³⁰⁰ presents the conspiracy charge verdicts. The Table combines the student and adult subjects, because no significant verdict differences resulted between the two groups. It also combines capital and non-capital conditions, because no significant verdict differences resulted between those two conditions. Finally, the Table groups DQs with excludables, because no significant differences *as to verdict* emerged for those two groups.

Looking at the totals by defendant, we find that only seven percent of the mock jurors found defendant A guilty of conspiracy to commit robbery, thirty-

295. While all the subjects were told that their written responses would be treated in confidence, they were asked to provide their names and phone numbers to verify their participation. A random sampling of phone call checks to twenty percent of the adult sample group confirmed that the responses were indeed theirs.

296. Kadane, *supra* note 276. See also *infra* Appendix, at Table 5.

297. See *supra* notes 270-75 and accompanying text.

298. Kadane, *supra* note 276.

299. See *infra* Appendix, at Table 5.

300. See *infra* Appendix, at Table 6.

nine percent found defendant B guilty on that charge, but ninety-eight percent and ninety-nine percent found defendants C and D guilty, respectively. By obtaining verdicts for this conspiracy charge, we can assess whether mock jurors follow or refuse to follow (i.e., nullifying) the conclusive presumption³⁰¹ of the felony-murder rule. If they follow the conclusive presumption, then the percentages of guilty verdicts on the felony-murder charge should match these guilty percentages on the underlying felony charge. Table 7³⁰² presents the results for the felony-murder charge. The comparison of Tables 6 and 7 shows that the majority of mock jurors refuse to follow the conclusive presumption. For defendant A, seven percent find him guilty of the underlying felony, but only two percent find him guilty of felony-murder; thirty-nine percent find defendant B guilty of the underlying felony, but only fifteen percent find him guilty of felony-murder. These substantial percentage drops (more than two-thirds for A, more than half for B) indicate nullification of the conclusive presumption. For defendant C, whom jurors found guilty on the conspiracy charge (ninety-eight percent) almost as often as defendant D (ninety-nine percent), only forty-eight percent now find him guilty of felony-murder (i.e., a percentage drop of slightly more than half); for defendant D, the guilty percentage on the felony-murder charge was seventy-seven percent (down from the ninety-nine percent figure on the underlying felony charge), which reveals a sizable and significant nullification of the conclusive presumption *even for the felony-murder triggerman*.

The results in Table 7 speak directly to the accessorial liability doctrine, which holds all felons equally culpable and guilty. Whereas the accessorial liability doctrine reflects an "equalist" position (i.e., they are all equally guilty), the mock jurors' verdicts reflect a very clear de facto "proportionalist" position: their guilty verdict percentages vary significantly and ordinarily by defendant, according to defendants' level of participation and level of culpability.

Table 7 also shows that "heinousness of the death," which varies across the four cases, affects the guilty verdict percentage only for the triggerman, not the accessories. For defendant A, the felony-murder guilty percentages for the four cases were zero percent, zero percent, four percent, and four percent; for defendant B, they were eleven percent, eleven percent, eighteen percent, and nineteen percent; and for defendant C, they were fifty percent, forty-seven

301. See *supra* note 9. In Finkel & Smith, *supra* note 259, the researchers used a disguised form of the *Tison* case where the underlying felony was armed robbery. This avoids the problematic conspiracy to commit robbery, and makes for a cleaner test of whether DQ subjects nullify the conclusive presumption. The results compare Ricky (or Raymond) Tison vs. Randy Greenawalt (the triggerman) under two conditions — where they are tried separately, or tried together. The percentage of guilty verdicts for armed robbery (AR) and felony-murder (FM) and lesser offenses (LO) are presented, along with two death sentence percentages (D/N and D/FM). Tried separately:

Defendant	AR	FM	LO	D/N	D/FM
R. Tison	90 %	60 %	10 %	10 %	16.7 %
R. Greenawalt	100 %	63.2 %	36.8 %	47.4 %	75 %
Tried together:					
R. Tison	88.5 %	50 %	11.5 %	0 %	0 %
R. Greenawalt	96 %	92 %	0 %	72 %	78.3 %

302. See *infra* Appendix, at Table 7.

percent, forty-eight percent, and forty-eight percent. But for the triggerman (defendant D), the guilty percentage rises across cases: sixty-three percent for HEART, seventy-nine percent for ACCIDENT, and eighty-eight percent for HEINOUS.³⁰³ We believe that mock jurors see defendant D as more reckless and culpable in HEINOUS, but they do not transfer his increased recklessness and culpability to defendants A, B, and C, for their guilty percentages do not rise significantly across cases.

Finally, Table 7 presents nullification evidence regarding the felony-murder triggerman as compared to the premeditated murder triggerman (defendant D, case PREMED). The felony-murder triggermen are found guilty, on the average, by seventy-seven percent of the mock jurors, whereas the premeditated murder triggerman is found guilty by ninety-two percent of the mock jurors.

Table 8³⁰⁴ shows the number of death sentences and two death rate percentages for each defendant by case. The subjects represented in this table are the DQs who were in the capital condition.³⁰⁵ The first death rate percentage (D/N) represents the number of death sentences given (D) over the number of subjects who rendered a sentence for that case (N).³⁰⁶ In other words, if twenty-three DQ subjects received case HEART in the capital condition, it was possible for all twenty-three subjects to give the death sentence. The second death rate percentage (D/FM) represents the number of death sentences given over the number of subjects who rendered a guilty verdict on the felony-murder charge,³⁰⁷ or the first degree murder charge for the premeditated murder situation. The second death rate percentage reflects the number who could possibly get the death sentence after being found guilty.

We do see a clear defendant effect in death sentences. The D/N percentages for defendants A, B, C, and D across cases were zero percent, 1.9 percent, 5.6 percent and 16.5 percent respectively. Because the actual number of death sentences was so low for defendants A, B, and C, caution must be used before concluding anything about a trend across cases (i.e., a case effect). However, it is a fact that defendant B receives the death sentence only in HEINOUS, and half of defendant C's death sentences are in that same category. For the triggerman, the numbers are larger and the trend is clearer: as the death becomes more heinous across cases, the D/N percentages increase from 4.3 percent to twelve percent to twenty-nine percent. However, even in HEINOUS, this percentage (twenty-nine percent) is less than one-third the death rate for the premeditated murder triggerman (64.3 percent). This large death rate disparity between felony-murder and premeditated murder is/or may be an

303. Case PREMED is not added here, because the charge for defendant D was not felony-murder, but premeditated murder.

304. See *infra* Appendix, at Table 8.

305. This is the appropriate sample, because only DQs could serve on a capital jury, and they had the opportunity to give the death sentence only in the capital condition.

306. If twenty-three DQ subjects received case HEART in the capital condition, it was possible that all twenty-three subjects could have given the death sentence. Thus, twenty-three is the denominator, N, in the D/N death rate percentage calculation.

307. Although listed under D/FM, the percentage for defendant D in case PREMED should be understood as the number of death sentences given over the number of subjects who rendered a guilty verdict on the first degree (premeditated) murder charge.

indication that jurors are nullifying the death sentence for felony-murder triggermen. Jurors clearly perceived a difference between the felony-murder triggermen (D/N=16.5 percent over all of the felony-murder cases) and the premeditated murder triggerman (64.3 percent). When we look at the second death rate percentage, the disparity is still great (20.0 percent vs. 66.7 percent).

The striking defendant effect for verdicts and death sentences is repeated when we examine other sentences. For example, the "life sentence" percentages (L/N) for defendants A, B, C, and D were 1.5 percent, 6.5 percent, 20.4 percent, and 45.0 percent respectively across cases. The prison sentences (in years) for the felony-murder charge for the four defendants were 1.0, 8.2, 22.1, and 36.1 respectively. The sentences (in years) for the conspiracy charge for the four defendants were .6, 6.4, 8.9, and 9.3 respectively across cases. Proportional verdicts and sentences were the rule. The "life sentence" percentage, the felony-murder sentence, and the conspiracy sentence did not significantly increase across cases for defendants A, B, and C; however, all three measures increased across cases for defendant D. Thus, mock jurors see defendant D as more culpable and deserving of greater punishment when his actions are judged as more heinous, but mock jurors do not, in the main, transfer their harsher judgments of the triggerman to the co-felons.

2. *Mock Justices' Decisions*

In the second part of this experiment, subjects played the part of Supreme Court Justices and make two "let-stand" vs. "reverse-and-remand" decisions. The first decision was in regard to the death sentence received by all the defendants in the particular case, and the second in regard to the conviction on the felony-murder charge. Subjects made separate decisions for each defendant in the case. Tables 9³⁰⁸ and 10³⁰⁹ report the results. The results are based on all subjects, DQs and excludables, because the Supreme Court itself, the comparison group, currently contains both types of Justices.

Table 9 presents the "let-stand" (S) and "reverse-and-remand" (R) figures and percentages for the death penalty decision by defendant and by case. Most of the mock justices "reverse-and-remand" the death penalty, with a large and significant defendant effect: the "reverse-and-remand" percentages for defendants A, B, C, and D were ninety-seven percent, eighty-three percent, sixty-nine percent, and fifty-three percent respectively. Only for defendant D in HEINOUS do a majority of mock justices vote to "let-stand" (sixty-eight percent). There is a case effect only for the triggerman: for this defendant, the "let-stand" percentages increase as we look at HEART (thirty-six percent), ACCIDENT (forty-four percent), and HEINOUS (sixty-eight percent).

Examining the "let-stand" and "reverse-and-remand" figures for the felony-murder conviction challenge (see Table 10), we again find a significant defendant effect: the "reverse-and-remand" percentages decline as we go from the getaway driver (ninety percent) to the lookout (fifty-five percent) to the sidekick (thirty percent) to the triggerman (twenty-one percent). Comparing the percentages for the death penalty challenge with the percentages for the

308. See *infra* Appendix, at Table 9.

309. See *infra* Appendix, at Table 10.

conviction challenge (Tables 9 and 10), we see that subjects were more willing to let the conviction than the death penalty stand for each defendant in each and every case.

There was an overall significant case effect for the conviction challenge: mock justices were generally more willing to let the conviction on the felony-murder charge stand when the death was more heinous. This case effect was not significant for the getaway driver, although it was significant for the other three defendants. Examining the "let-stand" percentages for HEART, ACCIDENT, and HEINOUS, we find that, for the lookout, the percentages were thirty-six percent, forty-five percent, and fifty-two percent respectively; for the sidekick, they were sixty percent, sixty-seven percent, and eighty-six percent respectively; and for the triggerman, they were sixty-seven percent, seventy-nine percent, and ninety-six percent respectively.

3. Mock Justices' Reasons for Their Decisions

The researchers gave the mock justices a list of eight "let-stand"³¹⁰ reasons and a list of eight "reverse-and-remand"³¹¹ reasons.³¹² They also gave the subjects space to write down reasons that were relevant to them but not included in the lists. Very few subjects wrote additional reasons; most comments explained why a particular reason "fit" for a given defendant. The almost complete absence of additional reasons confirms that the two lists were inclusive.

Table 11³¹³ lists particular reasons subjects cited and their frequency by defendant, for "let-stand" and "reverse-and-remand" decisions on the death penalty challenge. There were no significant case effects for any of the defendants or any significant overall case effect, so Table 11 sums the data across cases.

There were significant defendant effects: the reasons subjects cited as relevant and determinative varied by defendant. Looking at the "reverse-and-remand" reasons, for defendant A (the getaway driver), the three most frequently cited reasons (12, 8, and 2) were the lack of retributive justice in giving the death penalty when the defendant did not commit and had no intention of committing the murder (12), the defendant's minor participation (8), and the unconstitutionality of the death penalty for an accessory when that defendant did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed (2). For defendant B (the lookout), the three most frequently cited reasons (2, 4, and 12) were the unconstitutionality of the death penalty for an accessory who did not kill (2), the death penalty's disproportionality for a defendant who didn't intend that a killing take place (4), and the failure of retribution (12). The same three factors cited for defendant B were cited for defendant C (the sidekick), although the order was

310. See *supra* note 277.

311. *Id.*

312. A close comparison of these two lists reveals that the factors are not "parallel." In addition, some of these factors relate to principles, while others relate to specific actions, while others relate to a specific defendant. A social scientist, beginning from scratch, might choose to design parallel lists of factors. We decided, however, to stick with the actual reasons given by majority and minority Justices in these cases despite the lack of parallelism between lists.

313. See *infra* Appendix, at Table 11.

slightly changed (4, 2, 12). For defendant D (the triggerman), the three most frequently cited factors (4, 10, 14) were the disproportionality of the death penalty where intent is not present (4), the infrequency, and hence the arbitrariness, of the death penalty in such circumstances (10), and the likely failure of deterrence for these circumstances (14).

The "let stand" reasons, which were fewer overall, revealed a significant defendant effect. Because the "let stand" reasons for defendant A were so few, we omit ordering those reasons. For defendant B, the most frequently cited reasons (3, 13, 1, and 15) involve the equalist position on guilt (3), the active participant factor, particularly the fact that this defendant supplied the murder weapon (13), the constitutionality of the equalist position (1), and the fact that the defendant did not interfere with the murder and continued on in the joint venture (15). For defendant C, the most frequently cited reasons (3, 15, 7) involve the equalist position on guilt (3), the defendant's non-interference with the murder and continued joint venture (15), and the manifestation of extreme indifference to human life (7). For defendant D (7, 11, 9), the extreme indifference factor was most frequently cited (7), followed by the view that the death penalty is not disproportionate when reckless indifference is the mental state (11), and the general belief that the death penalty does not fall short of standards of decency (10).

The above ordering of reasons by defendant does not take into account the fact that these reasons are not mutually exclusive and independent of one another; in fact, correlations exist among these reasons. We ran the statistical technique of cluster analysis³¹⁴ a number of times, in different ways,³¹⁵ in order to see how the different reasons cluster, and to see what "higher-order" factors would emerge. Cluster analyses were run for the "let stand" reasons and the "reverse and remand" reasons³¹⁶ separately. Those results are presented in Table 12.³¹⁷ For the "reverse and remand" analysis, three clusters emerged and accounted for .508³¹⁸ of the total proportion of the variance.³¹⁹ The first cluster contained reasons 6, 8, and 12, where subjects see felony-murder *per se* as disproportionate for minor accessories and not a just desert. We called this cluster "felony-murder disproportional for minor accessories."³²⁰ The second cluster contained reasons 2 and 4, where subjects

314. See M. ALDENDERFER & R. BLASHFIELD, CLUSTER ANALYSIS (1984).

315. A researcher doing a cluster analysis has a number of choices. One can do, for example, a centroid or principal components analysis; one can run the analysis on the correlational matrix or the covariance matrix; one can designate different "maxsearch" values, and so forth. We tried these various ways, and the results were quite similar across the different analyses.

316. We ran separate cluster analyses by defendant, and by case, but present only the overall analyses here.

317. See *infra* Appendix, at Table 12.

318. If all the variance were accounted for, the number would be 1.000.

319. This proportion figure of .508 represents a very sizable proportion of the total variance.

320. The "naming" of a cluster is a discretionary decision, not one that is furnished statistically for the researcher. The researcher knows the various factors (i.e., reasons) that comprise a given cluster, and then, based on those reasons, attempts to fashion a name that reflects that cluster of reasons. Given the discretionary nature of the naming task, the names chosen may be challenged, for it is, after all, a judgment call. The *fact* that these reasons go together to form a cluster is based on statistical analysis, and not subject to the same sort of challenge.

see the death penalty as disproportionate for accessories who do not intend and for triggermen who do not intend to kill. These reasons, when taken together, suggest that the subjects' "bright line" divides the premeditated murder from the non-premeditated, with the death penalty proportionate for the former but not for the latter. We denominated this cluster "death penalty disproportionate for felony-murder." Cluster three contained reasons 10, 14, and 16, which focus on the infrequency and arbitrariness of the death penalty, the failure of deterrence, and that intent seems indispensable to capital culpability. The lack of intent makes deterrence seem like a failure and makes the death penalty seem arbitrary, thus, we called this cluster "lack of intent."

For the overall "let stand" cluster analysis, three clusters emerged that accounted for .621 of the total proportion of the variance. The first cluster contained reasons 1, 3, 5, 13, and 15, which convey the equalist position (i.e., equal guilt and equal punishment for principal and accessories), particularly when accessories actively participate. We called this cluster "equalist position." The second cluster contained reasons 9 and 11, which relate to the general acceptance and proportionality of the death penalty for felony-murder, particularly when a participant's mental state is one of reckless indifference. We named this cluster "death penalty proportionate for reckless indifference." The third and last cluster to emerge contained only one reason (7), which reflects the "extreme indifference to human life and grave risk" factor. We called this cluster "extreme indifference/grave risk."

The *Tison* majority went to some lengths³²¹ to underscore the "extreme indifference/grave risk" factor as being the "bright line" distinction between *Tison* and *Enmund*. While the "let stand" mock justices also cite this factor (cluster 3), and while reckless indifference also emerges in cluster 2, the reader should remember that only 23.3 percent of the mock justices' decisions were "let stand" decisions, whereas 76.7 percent were "reverse and remand" decisions. The majority position in *Tison* represents a *distinct minority position* in this research. The community's majority sentiment (76.7 percent) stresses that "felony-murder *per se* is disproportionate for minor accessories," that the "death penalty is disproportionate for felony-murder," and that "lack of intent" makes the death penalty arbitrary, and inadequate as a deterrent.

The mock justices' reasons for their decision on the second challenge — to the conviction on the felony-murder charge — must be viewed with caution. Because the Supreme Court did not address this question directly in *Lockett*, *Enmund*, or *Tison*, we could not cull a comparable list of "let stand" or "reverse and remand" quotes addressing the felony-murder verdict *per se* from these cases. We decided to ask the mock justices to use the same lists they used for the death penalty challenge.³²² The problem is that a number of items on both lists, particularly the reverse and remand list, are not germane to the felony-murder conviction question. The lists, therefore, cannot be considered as representing all the points that lawyers or justices would make if the issue were at bar. Moreover, there is no guarantee that the key reasons lawyers or justices would cite are even on the list. Some subjects commented that this task was harder than the death penalty decision task, and more subjects wrote their

321. *Tison*, 481 U.S. at 138-58.

322. See *supra* note 277.

own reasons for this task than for the previous one. Thus, in analyzing these results, a parallel table of reasons by defendant for this decision may be misleading if the most relevant reasons were not listed to begin with. Although there was a significant defendant effect, as before, and this time a significant case effect, we chose to present only the overall cluster analysis because this analysis isolates higher-order factors that may be more likely to encompass the essential components of the subjects' decisions on this question than would individual reasons.

Table 13³²³ presents the cluster analysis results for the "let stand" and "reverse and remand" decisions on the felony-murder conviction question. The "let stand" reasons fell into three clusters, accounting for .539 of the total proportion of the variance. We named these three clusters "active participation," "reckless indifference," and "equalist."³²⁴ The "reverse and remand" reasons fell into three clusters, accounting for .528 of the total proportion of the variance. We called these three clusters "disproportionate," "minor participation," and "lack of intent to kill."

C. Implications and Open Questions

Based on these results, we note the following implications.

1. Community Sentiment Rejects the Accessorial Liability Theory.

The accessorial liability theory equates the culpability and guilt of all co-felons, triggermen and non-triggermen. If community sentiment embraced this theory, we should see similar verdicts, sentences, and "let stand" and "reverse and remand" decisions for the triggerman, sidekick, lookout, and getaway driver. We do not. Mock jurors and mock justices repeatedly and consistently make proportionate and discriminative judgments of defendants for each particular case. Thus, mock jurors and mock justices turn out overwhelmingly to be "proportionalists" rather than "equalists."

In *Lockett*, the Court held that the Constitution does not prohibit states from enacting felony-murder statutes or from making aiders and abettors equally responsible, as a matter of law, with principals.³²⁵ The *Lockett* Court stated "[t]hat States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge."³²⁶

This position is *de jure* law. But the community's position, call it *de facto* law, decidedly rejects this equalist, *de jure* position. Rejection of the accessorial liability theory is based on a proportionalist view that equalism is disproportionate and unjust. This proportionalist rejection of equalism is *independent* of the death penalty question, because the proportionalist effect occurs in the non-capital condition, where the death penalty is not an option.

323. See *infra* Appendix, at Table 13.

324. The "naming" was done by looking at the reasons or the part of a reason that addresses felony-murder *per se*, and not the death penalty. See *supra* note 320.

325. *Lockett*, 438 U.S. at 602.

326. *Id.*

2. Community Sentiment Nullifies the Felony-Murder Rule.

The conclusive presumption of the felony-murder rule transfers intent to commit the underlying felony into intent to commit the murder. Thus, if jurors find that defendants intended to commit the underlying felony, and that a death unarguably occurred, then they should find the defendants guilty of felony-murder — if they are following the rule. *In fact*, they show significant departures from the rule. Nullifications — complete, (i.e., not guilty verdicts) or partial (i.e., guilty to lesser offense charges) — occur for all defendants, in both capital and noncapital conditions. Nullifications are more pronounced for the getaway driver, lookout, and sidekick, but they also occur for the triggerman. Subjects see even the felony-murder triggerman as less deserving of the harshest verdict and stiffest sentence than the premeditated murder triggerman.

The causes of jury nullification have typically been attributed to the view that jurors judge the law to be unfair, or the sentence to be too harsh, or both.³²⁷ From the results in this first experiment, we see a nullification effect in the non-capital condition. This is consistent with the cluster analysis results of the mock justices' reasons for reversing and remanding the death sentence where the disproportionality of felony-murder *per se* was found to be a significant factor.

3. Community Sentiment Rejects the Death Penalty For All Accessories.

The death sentence rates³²⁸ for the accessories are low, varying from zero percent to 5.6 percent across cases for the first death sentence measure, and varying from zero percent to 15.4 percent across cases for the second death sentence measure. Thus, death qualified subjects reject the death penalty 94.4 percent (or 87.5 percent) of the time for the most culpable accessory (i.e., the sidekick). The mock justice findings show that sixty-nine percent will "reverse and remand" the death penalty for the sidekick.

The *Tison* majority attempted to draw a "bright line" between types of accessories. On the "death side" of the line were accessories like the *Tison* brothers whose level of participation in the crime was "major" and whose level of culpability showed a mental state of "reckless indifference." On the "non-death side" of the line were accessories like Enmund whose level of participation and culpability were less. This "bright line" which the *Tison* majority drew does not accord with community sentiment as found in this research. The community's line seems to separate triggermen from non-triggermen at a minimum; when the death is regarded as more accidental or inadvertent, even the triggerman is not over the line on the death sanctioned side.

327. See *supra* notes 19-20 and accompanying text.

328. No matter which way the death sentence rate was computed (i.e., D/N or D/FM), the rate is low for the accessories:

	A	B	C
D/N	0 %	1.9 %	5.6 %
D/FM	0 %	15.4 %	12.5 %

The *Tison* Court did capture a determinative factor — reckless indifference — although the Court applied this factor to the wrong defendant. The community's *de facto* position is that reckless indifference matters, but it matters most for the triggerman. The *Tison* Court applied the reckless indifference factor to the accessory. For the community, when reckless indifference is attributable to the triggerman, sixty-eight percent will let the death penalty stand for this defendant. In the same case, sixty-five percent will reverse and remand the death penalty for the sidekick.

Some caveats and open questions remain. It may be argued that the apparent rejection by these mock jurors and justices of the accessorial liability doctrine and the conclusive presumption of the felony-murder rule resulted in part from a majority of subjects not believing that the getaway driver and the lookout truly intended to commit a felony. If jurors were not convinced of guilt on the underlying felony, then a fair test of the conclusive presumption and the accessorial liability theory may not have occurred. This possibility, however, is contravened by the results for the sidekick, where ninety-eight percent found this defendant guilty of the underlying felony, yet significant nullifications occurred for the felony-murder charge. Nonetheless, in experiment II, the level of participation and culpability of all accessories will be increased to make it unmistakably clear that all were involved in the planning and execution of the robbery.

It may also be argued that the apparent rejection of the accessorial liability doctrine by these mock jurors and justices may be due in part to *perceived* low levels of culpability and recklessness and/or *perceived* low levels of participation by all the accomplices. We believe that our defendant C (the sidekick) had at least as high a level of culpability and participation as the *Tison* brothers, but perhaps our mock jurors and justices did not perceive even that level to be very high. If the levels of culpability and participation were increased for all accomplices, we might see subjects affirming, not nullifying, the accessorial liability doctrine. To test for this possibility, the following changes were made in the cases.

First, all four defendants clearly agree to the robbery plan. Second, the lookout and the sidekick both carry loaded guns in addition to the triggerman. Third, the sidekick as well as the triggerman both point their guns at the storekeeper. And fourth, the storekeeper now hesitates before opening the cash register as ordered by the triggerman, and at this point in the case scenario, both the triggerman and the sidekick fire their guns, sending warning shots over the head of the storekeeper. In this new rendition, the sidekick points his weapon at the victim and fires his weapon several times, actions which clearly go beyond what the *Tison* brothers did and actions that can be more easily construed as showing reckless indifference to human life.

In experiment II, we added some additional cases to test a variable not manipulated in experiment I. The variable involves "who dies." In experiment I, the victim was always the storekeeper. But in experiment II, the victim is either the storekeeper or a police officer. Recalling that a few states³²⁹ statutorily allow for the death penalty in felony-murder only when a police or

329. See *infra* Appendix, at Tables 1 & 3.

correctional officer dies, we decided to manipulate this variable to see its effects on verdicts and sentences.

In experiment II, we used six cases. In four of the cases, a gun battle ensues in the following way: the storekeeper pulls out a gun from under the register, and a police officer enters the store from the back room with his weapon drawn at the same time; the sidekick and triggerman, who have their weapons already drawn, along with the storekeeper and police officer, all open fire. In case 1 (D-KILLS-P), the triggerman kills the police officer, and in case 2 (D-KILLS-S), the triggerman kills the storekeeper. In case 3 (S-KILLS-P), the storekeeper inadvertently kills the police officer, and in case 4 (P-KILLS-S), the police officer inadvertently kills the storekeeper. In case 5 (RICOCHET), there is no gun battle; the storekeeper dies from a ricocheted bullet fired from the triggerman's gun during the warning shot episode; since the fatal shot might have as easily come from the sidekick's gun, we are able to test whether this smaller difference between triggerman and accessory produces an increase in the felony-murder verdicts and death sentences for the sidekick under these circumstances. Finally, case 6 (PREMED-2) is the premeditated murder control condition, where the triggerman, unbeknownst to any of the accomplices, premeditates the killing. However, unlike experiment I case PREMED, the warning shot episode occurs here as well. Subjects received one of these six cases as mock jurors under the capital condition only, and they received one of the remaining five cases as mock justices.

Another new variable was introduced in experiment II. It could be argued that the capital condition in experiment I was unrealistic, since mock jurors did not go through a capital phase, where prosecution and defense attorneys present arguments for aggravating and mitigating circumstances. In experiment I, mock jurors simply decided the sentence (death or life imprisonment) for the four defendants. The absence of arguments could have cut both ways, either increasing or decreasing the number of death sentences given.

Several commentators have addressed the topic of aggravating circumstances in regard to felony-murder.³³⁰ They argue that felony-murder artificially inflates the number of aggravating circumstances. For example, some states list the commission of another felony in the course of a murder as a statutory aggravating circumstance; but this separate aggravating factor may simply *define* felony-murder. Another aggravating factor in some states refers to an act carried out for pecuniary gain; but robbery *necessarily* involves pecuniary motives. Thus, a felony-murder defendant, facing a capital sentencing phase in a state that has both "commission of another felony" and "pecuniary gain" factors, starts off with two aggravating strikes against him. We do not know, following *Lockett*, precisely how many mitigating factors would be needed to offset the prosecution's "aggravating advantage," but we do know that the prosecution can easily, artificially, and definitionally satisfy its burden of identifying aggravating factors.³³¹ The prosecutor may counter this claim that the state has an "aggravating advantage," rightly claiming that some states³³²

330. See Note, *The Merger Problem*, *supra* note 8; Note, *Co-Felon in Felony Murder*, *supra* note 8; Note, *Death Penalty for Felony Murder*, *supra* note 8.

331. *Lockett*, 458 U.S. 586.

332. See *infra* Appendix, at Tables 1 & 3.

make it a statutory mitigating circumstance that a defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor. Other states³³³ exclude felony-murder from their list of aggravating factors that will support a death sentence. These latter two advantages go to the defendant.

In experiment II, we ran an empirical test of aggravating vs. mitigating factors. In it, we manipulated a variable we called "strong" or "weak" defense arguments. In the "weak" condition, the defense presents its own mitigating factors (e.g., the defendant's youth, the lack of a prior criminal record, etc.). In the "strong" condition, in addition to its own mitigating factors, the defense strongly counters and attempts to refute the prosecution's aggravating factors that appear artificial. Thus, in experiment II, all subjects receive a capital phase argument, either strong or weak. When the mock justices decide their case, they will also have before them either the "strong" or "weak" defense argument.

D. Results For Experiment II

1. Verdicts

On the conspiracy to commit a felony (robbery) charge, one-hundred percent of the mock jurors found every defendant guilty. The changes made in the cases from experiment I produced the intended effect. Given a one-hundred percent guilty verdict percentage for all defendants on the underlying felony, and given the uncontroverted fact that a death occurred in the course of the felony, a clear test of the conclusive presumption of the felony-murder rule can be made. If mock jurors are following the rule, we would expect a one-hundred percent (or close to one-hundred percent) conviction rate on the felony-murder charge. Table 14³³⁴ presents the verdict results³³⁵ on the felony-murder charge by defendant and by case. The felony-murder conviction percentages depart significantly³³⁶ from the expected one-hundred percent across all felony-murder defendants³³⁷ and cases: only 41.9 percent find the defendants guilty on the felony-murder charge, whereas 26.3 percent find them guilty of a lesser offense, and 31.8 percent find them not guilty. The sizable percentage of complete nullifications (not guilty verdicts), coupled with a sizable percentage of partial nullifications (guilty of a lesser offense verdicts), reveal that more than half the mock jurors nullify completely or partially the conclusive presumption rule.

When we look at the results by defendant, we find that the getaway driver is found guilty of felony-murder only 18.4 percent of the time and not guilty 55.7 percent of the time. The percentages of guilty verdicts and not guilty verdicts on the felony-murder charge for the lookout were 26.4 percent and 41.5 percent respectively. For the sidekick, the percentages were 53.8

333. *Id.*

334. *See infra* Appendix, at Table 14.

335. The adults and students were combined, as were the DQs and excludables, because there were no significant differences between these groups on the verdict measure.

336. χ^2 (df=3, N=212) = 312.2, $p < .001$.

337. Defendant D, case PREMED-2, was removed from the analysis, because this defendant was charged with first degree murder.

percent and 20.3 percent respectively. And for the triggerman, they were 73.5 percent and 6.1 percent respectively. This defendant effect, which replicates the results of experiment I, reveals that mock jurors again reject the equalist position of the accessorial liability theory in favor of proportionality.

The case picture is complicated. First, there is an overall significant case effect,³³⁸ with mock jurors reaching different verdict judgments depending upon the particular case. The "who dies" variable reveals a *qualified effect*. A comparison of cases 1 (D-KILLS-P) and 2 (D-KILLS-S) shows a statistically significant effect,³³⁹ with mock jurors giving a higher percentage of guilty verdicts for all defendants when the police officer dies than when the storekeeper dies. But the effect is qualified, as can be seen when S-KILLS-P is added to the comparisons: the verdicts are significantly harsher³⁴⁰ when the triggerman kills the police officer than when the storekeeper kills the police officer. In S-KILLS-P, the verdicts are not significantly different³⁴¹ from D-KILLS-S. Thus, it is not a "who dies" effect, but a "who dies by whose hand" effect.

When P-KILLS-S is examined, a counter-intuitive effect occurs. The P-KILLS-S verdicts are significantly³⁴² harsher than D-KILLS-S, although not significantly different from S-KILLS-P or D-KILLS-P. Why mock jurors are harsher to the defendants when the police officer kills than when one of the defendants kills is puzzling, and, at this point, we cannot say with any certainty what produces this effect.

Cases S-KILLS-P and P-KILLS-S differ from the other cases because there is no defendant-triggerman. Although both defendants C and D fire their weapons, neither fires the fatal shot. In these two cases, the distinction between "sidekick" and "triggerman" evaporates, and the mock jurors' verdicts reflect this fact. These are the only two cases where the verdict pattern for defendants C and D do not significantly differ.

We expected no significant differences between defendants C and D for case RICOCHET, but there was a significant difference. In RICOCHET, both C and D fired their weapons over the head of the storekeeper several times. It just so happened that the fatal ricocheting bullet came from D's gun. We thought jurors might reason that the bullet could have as easily ricocheted from C's gun, since both fired recklessly, and therefore there would be no significant difference in the verdicts for these two defendants. However, the fact that the fatal bullet came from one defendant and not the other did make a difference. When jurors can discriminate one of the defendants from the other as "the triggerman," the conviction rate on the felony-murder charge nearly doubles.

Case PREMED-2, where defendant D premeditates the killing unbeknownst to his accomplices, produces the highest conviction rate for the triggerman (one-hundred percent find this defendant guilty of premeditated mur-

338. X^2 (df=10, N=212) = 22.8, $p < .05$.

339. X^2 (df=2, N=74) = 10.5, $p < .01$.

340. For the D-KILLS-P vs. S-KILLS-P comparison, X^2 (df=2, N=72) = 6.9, $p < .05$.

341. For the S-KILLS-P vs. D-KILLS-S comparison, X^2 (df=2, N=74) = 3.39, n.s.

342. X^2 (df=2, N=75) = 9.8, $p < .01$.

der). Across defendants, however, D-KILLS-P produces similar verdict results. It appears that a felony-murder case where a defendant kills a police officer can produce as harsh a result for all defendants combined as a case involving premeditated murder (plus felony-murder for the accomplices). Community sentiment, then, takes a significantly different and harsher turn when a police officer dies at the hand of one of the defendants.

2. Death Sentences

Table 15³⁴³ presents the "death qualified" mock jurors' death sentence numbers and percentages by defendant and by case. Across cases, there is a significant defendant effect. Not one subject gave defendant A (the getaway driver) the death sentence. This defendant's two death sentence percentages (D/N and D/FM) were zero percent, despite the fact that this defendant was involved in the planning of a robbery and knew that deadly weapons were being carried. Only one subject gave defendant B (the lookout) the death sentence (in D-KILLS-P), even though this defendant was involved in the planning of the robbery and was carrying a deadly weapon; B's two death sentence rates were .78 percent and 2.5 percent. Ten subjects gave C (the sidekick) the death sentence, with six of those ten death sentences occurring in D-KILLS-P. Even though C was involved in the planning of the robbery, was present at the scene, was carrying a deadly weapon and fired that weapon, the two death sentence percentages were only 7.8 percent and 13.7 percent. Twenty subjects gave D the death sentence when the cases involved felony-murder, with nine of those twenty death sentences occurring in D-KILLS-P. When this defendant killed the police officer, the two death sentence percentages were 40.9 percent and 50 percent. By comparison, when the charge was first degree murder (PREMED-2), the death sentence percentages were both 94.4 percent. Here again, as in experiment I, death-qualified mock jurors make significantly different and harsher death sentence judgments when the case involves premeditated murder as opposed to felony-murder.

We broke the results for defendant D down even further. In the two cases where D was not the triggerman (S-KILLS-P and P-KILLS-S), the two death sentence percentages were 4.5 percent and 6.3 percent. In the three cases (D-KILLS-P, D-KILLS-S, and RICOCHET) where defendant D was the felony-murder triggerman, the two death sentence rates were 27.3 percent and 35.3 percent. In the one case (D-KILLS-P) where D killed the police officer, the death sentence percentages were 40.9 percent and 50 percent. Although these death percentages are substantial, they are still approximately one-half of the premeditated murder (PREMED-2) percentages (94.4 percent and 94.4 percent).

Using these death sentence percentage results, we will now try to situate Enmund and the Tison brothers into this context. Enmund, a getaway driver, most approximates our defendant A, who had death sentence percentages of zero percent. Community sentiment seems uniformly clear here — expressing the view that the death sentence for this defendant is not warranted.

343. See *infra* Appendix, at Table 15.

In our opinion, though it can be argued, the Tison brothers circumstances most approximate that of defendant B, the lookout: our defendant B knew about the felony and participated in it; he was carrying a weapon, and was close but not directly at the murder scene. Defendant B's death sentence percentages are quite low, .78 percent and 2.5 percent; in fact, the only time a mock juror gave the death sentence was when the triggerman killed the police officer (D-KILLS-P), a condition that did not occur in *Tison*.

It might be argued, however, that the Tison brothers' "best fit" is with defendant C (the sidekick). We do not think that this is either a best fit or a good fit, because defendant C is directly at the death scene and firing his weapon both recklessly (over the head of the storekeeper) and during the ensuing gun battle, conditions that did not occur in *Tison*. Critics might note, however, that several days after the killing of the Lyons family, the Tisons and Randy Greenawalt "were apprehended after a shootout at a police road-block."³⁴⁴ While the Supreme Court record does not mention if the Tison brothers were firing at the shootout, and the state of Arizona did not charge them with that crime,³⁴⁵ let us grant, for comparative purposes, the assumption that defendant C is the better fit.

Defendant C's overall death percentages were 7.8 percent and 13.7 percent. If we subtract out case D-KILLS-P results, where the police officer dies from the triggerman's bullet, a condition that did not occur in *Tison*, C's death percentages are 3.8 percent and 6.9 percent. Even if defendant C is the better fit, more than ninety-three percent of the death qualified jurors still refuse to give this defendant the death sentence following a felony-murder conviction. If we believe that defendant B is the better fit, 97.5 percent refuse to give the death penalty overall, and when a police officer doesn't die at the hands of the triggerman, one-hundred percent refuse to give the death sentence to B. If the Tison brothers are situated somewhere between defendants B and C, then we can say that between ninety-three percent to one-hundred percent of the jurors will refuse to give the death sentence for *Tison*-like defendants. These percentages certainly belie the majority's assertion in *Tison* about where community sentiment stands.

In concluding this section on mock jurors' death sentences, we should note that the capital phase arguments variable (whether or not the defense strongly rebutted the prosecution's aggravating factors) had no significant effect on death sentences. In fact, this variable had no discernible effect on mock jurors' sentences in general, or on mock justices' "let stand" or "reverse and remand" judgments. Given the community's sentiment against the death penalty for felony-murder in general, it appears that this community of jurors did not need to be reminded that felony-murder artificially inflates the number of aggravating circumstances.

344. *Tison*, 481 U.S. at 141.

345. The Tisons were charged with capital murder, "as well as for the associated crimes of armed robbery, kidnapping, and car theft." *Id.*

3. Mock Justices' Decisions

Table 16³⁴⁶ presents the results regarding the mock justices' "let stand" and "reverse and remand" decisions on the death penalty issue. There is, as in experiment I, a significant defendant effect.³⁴⁷ Across cases, the "reverse and remand" death sentence percentages were 92.4 percent for defendant A, 88.7 percent for defendant B, 71.0 percent for defendant C, and 59.5 percent for defendant D.

There was an overall significant case effect.³⁴⁸ Specifically, D-KILLS-P and S-KILLS-P, where a police officer is killed, are significantly³⁴⁹ different from cases D-KILLS-S, P-KILLS-S, and RICOCHET, where the storekeeper dies. In the police officer is killed cases, the "let stand" percentages were the highest (27.5 percent for D-KILLS-P, 35.2 percent for S-KILLS-P). In cases S-KILLS-P and P-KILLS-S, where there is no defendant triggerman, the mock justices treat defendants C and D similarly in terms of their decisions; when D is the triggerman, a clear difference emerges, with the triggerman getting a higher percentage of "let stand" decisions than the sidekick.

The overall case effect results from defendant D, for when we analyze the case effect by defendant, defendant D produces the only significant difference among cases. Looking exclusively at defendant D, the only case where more than half the mock justices let the death penalty stand is D-KILLS-P (58.8 percent), when this defendant kills a police officer.

Table 17³⁵⁰ presents the mock justices' reasons for their "let stand" and "reverse and remand" decisions on the death penalty by defendant summed across cases. There were significant defendant effects for both "let stand"³⁵¹ and "reverse and remand"³⁵² reasons, with defendant D being discernibly different from the accomplices. For the "reverse and remand" reasons, mock justices cite the same three reasons (2, 4, 12) in the same order for both defendants A and B: the unconstitutionality of the death penalty for an accessory who did not kill (2), the death penalty's disproportionality for a defendant who doesn't intend that a killing take place (4), and the failure of retribution in these circumstances (12). For defendant C, the three reasons were the same as for defendants A and B, but the order was slightly different (4, 2, 12). For defendant D, the most frequently cited reason was the death penalty's disproportionality when a defendant doesn't intend that a killing take place (4). Mock justices also cited three other reasons (10, 12, and 16) with equal frequency. Those reasons involve the infrequency and arbitrariness of the death penalty (10), the failure of retribution in these circumstances (12), and that foreseeability of harm is not the equivalent of intent to kill (16).

Since there were too few "let stand" decisions for defendants A and B, we begin with the mock justices' "let stand" reasons with regard to defendant C.

346. See *infra* Appendix, at Table 16.

347. X^2 (df=3, N=201) = 81.5, $p < .001$.

348. X^2 (df=4, N=171) = 22.5, $p < .001$.

349. X^2 (df=1, N=171) = 18.7, $p < .001$.

350. See *infra* Appendix, at Table 17.

351. X^2 (df=21, N=212) = 40.5, $p = .006$.

352. X^2 (df=21, N=212) = 94.2, $p < .001$.

The three most frequently cited reasons (7, 3, 15) were the defendant's manifestation of extreme indifference to human life (7), the equalist position on guilt (3), and that the defendant was present at the murder site and did not interfere with the murder (15). For defendant D, the three most frequently cited reasons (7, 11, 9) were extreme indifference to human life (7), the belief that the death penalty is not disproportionate when defendant's mental state is one of reckless indifference (11), and the general belief that the death penalty for felony-murder does not fall short of our national standards for decency (9).

We ran a cluster analysis for the "reverse-and-remand" and "let-stand" reasons across defendants. The results can be seen in Table 18.³⁵³ For the "reverse-and-remand" analysis, three clusters emerged and accounted for .522 of the total proportion of the variance. The first cluster contained reasons 10, 14, and 16, citing the infrequency and arbitrariness of the death penalty (10), its likely failure as a deterrent (14), and that intent to kill seems indispensable (16). We labelled this cluster "lack of intent to kill," which indicates that the lack of intent to kill undermines the death penalty's deterrent rationale and makes the death penalty appear arbitrary. The second cluster, containing reasons 2, 4, and 6, we named "death penalty disproportionate for accomplice felony-murderers who do not intend to kill." We called the third cluster, containing reasons 8 and 12, "death penalty's retributive failure when participation is minor."

The "let stand" cluster analysis produced three clusters which accounted for .541 of the total proportion of the variance. The first cluster, containing reasons 9 and 11, we labelled "death penalty proportionate and constitutional for reckless indifference felony-murder." We named the second cluster, containing reasons 1, 3, and 5, "equalist position." The third cluster, containing reasons 7, 13, 15, we labelled "active/major participation."

The mock justices' "let-stand" and "reverse-and-remand" decisions for the felony-murder conviction are presented by defendant and by case in Table 19.³⁵⁴ We again see a significant³⁵⁵ defendant effect. The "let-stand" percentages for defendants A, B, C, and D were 37.7 percent, 47.6 percent, 70.9 percent, and 81.0 percent, respectively. As in experiment I, mock justices were more willing to let the conviction than the death penalty stand for each defendant.³⁵⁶ The conviction decisions were not significantly different by cases.

The mock justices' reasons for their "let-stand" and "reverse-and-remand" decisions were also analyzed, and significant defendant effects emerged. However, given the earlier cited limitations of these reasons, we present only the cluster analysis results in Table 20.³⁵⁷ For the "reverse-and-remand" analysis, three clusters emerged and accounted for .543 of the total proportion of the variance. The first cluster, containing reasons 2 and 4, we named "proportionality for accessories," indicating that mock justices object to

353. See *infra* Appendix, at Table 18.

354. See *infra* Appendix, at Table 19.

355. For the "let stand" analysis, X^2 (df=21, N=212) = 89.3, $p < .001$; for the "reverse and remand" analysis, X^2 (df=21, N=212) = 45.5, $p = .001$.

356. See *infra* Appendix, at Table 19. Compare Table 16.

357. See *infra* Appendix, at Table 20.

equal guilt and equal punishment for accessories and triggerman. We labelled the second cluster, containing reasons 10, 12, 14, and 16, "lack of intent." The third cluster, containing reasons 6 and 8, we called "minor participation."

For the "let stand" analysis, three clusters emerged and accounted for .513 of the total proportion of the variance. We denominated cluster one, containing reasons 1, 3, and 5, "equalist position." Cluster two contained reasons 7 and 13, and cluster three contained reasons 9, 11, and 15; since both clusters contained a mixture of active/major participation reasons with culpable mental state of reckless indifference reasons, we labelled both clusters "major participation/reckless indifference."

E. Implications

The three implications of experiment I are affirmed by the results of experiment II.

1. Community Sentiment Rejects the Accessorial Liability Theory.

In experiment II, where one-hundred percent of the mock jurors found all four defendants guilty on the underlying felony charge, we now have a perfect precondition for assessing the equalist position of the accessorial liability theory. When we look at felony-murder convictions, death sentences, life sentences, imprisonment sentences, and "let-stand" or "reverse-and-remand" decisions for the death penalty and the felony-murder convictions, the results are the same. Mock jurors and mock justices reject the accessorial liability theory (the equalist position) overwhelmingly, and favor, instead, a proportional treatment of defendants based on their culpability as indicated by their level of participation.

2. Community Sentiment Nullifies the Felony-Murder Rule

A majority of the community nullifies the conclusive presumption of the felony-murder rule when we sum across defendants. By defendant, nullifications are greatest for the getaway driver and fewest for the triggerman, although even for the triggerman, the percentage is sizable. The percentages of subjects who follow the rule — who transfer the intent to commit the underlying felony into the intent to commit murder, and thus reach a guilty verdict on the felony-murder charge — were 18.4 percent for the getaway driver, 26.4 percent for the lookout, 53.8 percent for the sidekick, and 77.4 percent for the triggerman. The percentages of nullifications are high despite the fact that culpability and level of participation were increased for the accessories in experiment II, and despite the fact that every subject agreed that all defendants intended to and did commit the underlying felony.

3. Community Sentiment Rejects the Death Penalty For All Accessories.

The death sentence rates for the three accessories are quite low, despite the fact that culpability was increased for each accessory in experiment II. One death rate measure³⁵⁸ ranged from zero percent to 7.8 percent. The other

death rate measure³⁵⁹ ranged from zero percent to 13.7 percent. If we remove the "police officer dies from the triggerman's bullet" case (D-KILLS-P), the percentages drop even lower. The death sentence rates for the getaway driver become zero percent and zero percent; for the lookout, they become zero percent and zero percent; and for the sidekick, they become 3.8 percent and 6.9 percent.

Community sentiment draws a bright line between the triggerman and the accessories. The felony-murder triggerman who kills (D-KILLS-P, D-KILLS-S, and RICOCHET) gets the death penalty approximately three times³⁶⁰ more often than the sidekick, and approximately fourteen times³⁶¹ more often than the lookout.

4. Community Sentiment Does Take into Account the Killing of a Police Officer When a Defendant Does the Killing.

The death of a police officer does have a qualified effect. A few states³⁶² make the killing of a police or corrections officer in a felony-murder situation a death penalty offense. This position accords with community sentiment *in part*. Only when a defendant, as opposed to some other actor, such as the victim, kills the police officer do the felony-murder conviction rates and the death sentence rates increase.

5. Community Sentiment Does Show that Reckless Indifference To Human Life Makes a Difference, but the Difference Is Only for the Triggerman.

The *Tison* majority asserted that reckless indifference to human life makes a difference for *accomplices*, such as the *Tison* brothers. The data in experiment II refute this assertion. Subjects consistently discriminate between the triggerman and the accomplices, reserving the death penalty for the former even when both show reckless indifference.

6. The Majority and Minority in Tison Identified the Right Variables, but the Majority Erred in Regard to Community Sentiment.

The minority in *Tison* stressed the (1) disproportionality of felony-murder and the death penalty for accessories, (2) lack of intent to kill, and (3) minor participation factors. *The majority of the community* (78.9 percent) recognized these same factors. The majority in *Tison* stressed the (1) equalist position, (2) reckless indifference, and (3) active/major participation factors. Only a minority (21.1 percent) of the community cited these three factors in both experiments. By a ratio of almost 4:1, community sentiment accords with the minority opinion in *Tison*.

359. D/FM.

360. 35.3 percent/13.7 percent. The D/FM percent for defendant D in these three cases was 35.3 percent, whereas the D/FM percent for defendant C in the same three cases was 13.7 percent.

361. The D/FM percent for defendant B, the lookout, was only 2.5 percent in these three cases, compared to defendant D's 35.3 percent.

362. Vermont, New Mexico, and New Hampshire; see *supra* notes 57, 69, 91.

CONCLUSION

In the capital felony-murder cases of *Lockett*,³⁶³ *Enmund*,³⁶⁴ and *Tison*,³⁶⁵ the accessorial liability doctrine, the felony-murder rule, and the death penalty issue converged. The Court's decision making course through this thicket of issues was decidedly empirical. By examining objective indicia, such as legislative enactments and jury verdicts, the Court sought valid signs of community sentiment, signs that would illuminate a constitutional bright line. But this empirical road divided the *Enmund* and the *Tison* Courts, with majority and minority both opining that the other misread the signs, took a faulty turn, and lost their way in some empirical deadend.

When the Supreme Court takes up the objective assessment task, it is doing social science, and in *Enmund* and *Tison*, the Court did it poorly. In *Enmund*, the majority drew conclusions from aggregate jury data that social scientists would not only be loath to draw, but would say are impermissible to draw. In *Tison*, the majority drew conclusions from the legislative enactments data that were overstated, and in error. In both cases, the Court overlooked data that would have been informing to the questions at bar. In gathering data, in reading data, in understanding the different methods of gathering data and their limitations, and in recognizing the need for alternative methods of experimentally asking and answering questions, the Court's performance cannot withstand social science scrutiny.

In the social science analysis undertaken here, we analyzed a variety of objective indicia, and the results from these various methods converged, yielding similar conclusions. From the legislative enactments data, when states were categorized along three dimensions involving "level of participation," "level of culpability," and "who dies," the analysis found that for *Enmund*-like defendants, only fifteen percent to forty-three percent of the jurisdictions would allow for the death penalty, and for *Tison*-like defendants, only thirteen percent to forty-four percent of the jurisdictions would allow for the death penalty. These "ranges" refute the *Tison* majority's assertions that a majority of jurisdictions endorse the death penalty for felony-murder in *Tison*-like circumstances.

The aggregate jury data that the Court did not review showed prosecutorial and jury reluctance to permit the execution of felony-murder non-causal accessories. These studies suggest that community sentiment discriminates between felony-murder triggermen and felony-murder non-causal accessories, with the latter being significantly less likely than the former to get the death penalty.

Two experiments, using mock juror and mock justice paradigms, presented clear and consistent evidence that death-qualified subjects reject overwhelmingly the death penalty for *Enmund*-like and *Tison*-like accessories, even when major participation and reckless indifference were greater than the *Tison* case. Only when a felony-murder triggerman kills a police officer — a

363. 438 U.S. 586.

364. 458 U.S. 782.

365. 481 U.S. 137.

condition that did not obtain in *Tison* — is there significant (but less than majority) sentiment for the death penalty for the major accessory. Clearly, the community draws a bright line distinction between the felony-murder triggerman and all accessories. Moreover, the community makes a second bright line distinction on the death penalty question, giving the death penalty for the felony-murder triggerman far less frequently than for the premeditated murder triggerman.

In all of the subjects' decisions — be it verdicts, sentences, death penalty sentences, "reverse-and-remand" or "let-stand" decisions and reasons for their decisions — subjects turn out overwhelmingly to be "proportionalists" rather than "equalists": they make their decisions based on the level of culpability and level of participation of each defendant. Said another way, subjects overwhelmingly reject the accessorial liability theory. They also nullify the conclusive presumption of the felony-murder rule under capital and non-capital conditions, and the percentages of nullifications increase as the perceived culpability of the defendant decreases. By a wide margin, the majority community sentiment position holds that the death penalty is disproportionate for minor accessories, and for accessories who do not intend to kill.

The principle of convergent validity³⁶⁶ operates here. The results from different objective indicia yield a similar conclusion; the validity of that conclusion is *strengthened* by the fact that these different indicia, with their different methodological strengths and weaknesses, all point to a similar sentiment. This is how social science triangulates when no one definitive study or experiment is possible. The conclusion here is that the *Tison* Court drew the wrong conclusion regarding where community sentiment lies on felony-murder and the accessorial liability doctrines. A community sentiment bright line does emerge, its outlines are clear, and its underlying rationale is consistent with the principled reasons articulated by the *Tison* minority opinion. The community's bright line separates the felony-murder triggerman from *all* accessories.

The Supreme Court has sought a constitutional line that accords with community sentiment, and this research finds such a line. When the community's line is compared to where the *Tison* majority asserted it to be, we see that the Court is off the mark. To achieve accord between community sentiment and the law, this analysis shows that it is the *Tison* majority who must shift.

366. See *supra* note 281.

APPENDIX

Table 1

A Categorization Schema For Felony-Murder (F-M) Legislative Enactments from *Enmund*
 Most Restrictive ----- Least Restrictive

No DP	No DP for F-M	Possible DP for F-M				
Ak.	Mo.	Participation Continuum				
D.C.	N.H.	Triggerman	Accessories			
Haw.	Pa.	Ill.	Not Minor/ Substantial	F-M Not Aggravating	F-M Mitigating	Simpliciter
Iowa	Wash.	Md.	Colo. U.S.C	Idaho Okla. S. D.	Ariz. Conn. Ind. Mont. N.C. Neb.	Cal. Fla. Ga. Miss. Nev. S.C. Tenn. Wyo.
Kan.		Va.				
Me.						
Mass.						
Mich.						
Minn.						
N.J.						
N.Y.						
N.D.						
Or.		Culpability Continuum				
R.I.		Knowing, Intentional/ Purposeful, Premeditated		Extreme Indifference/ Grave Risk, Negligence		No Culpability Requirement
W.Va		Ala.	Ohio	Ark.	Ky.	Same as Simpliciter
Wis.		Ill.	Tex.	Del.		
		La.	Utah			
		N.M.	Va.			
		Who Dies Continuum				
		Second Unrelated Death		Police/Correctional Officer		
		Vt.		N.M.	Vt.	

Table 2

The Numbers (N) & Percentages (N%^a, DP%^b, FM%^c) of Jurisdictions where the Death Penalty for Felony-Murder is Possible under Varying Constraints^d at the Time of *Enmund*

In how many jurisdictions can the death penalty be imposed for felony-murder . . .	N	N%	DP%	FM%
1. when the defendant was not the triggerman (Md., Ill., Va.)	29	56%	81%	91%
2. where a second, unrelated death did not occur (Vt.)	28	54%	78%	88%
3. where a police/correctional officer did not die (N.M.)	27	52%	75%	84%
4. where defendant did not act knowingly, intentionally premeditatively (Ala., La., Ohio, Tex., Utah)	22	42%	61%	69%
5. where defendant did not show extreme indifference (Ark., Del., Ky.)	19	37%	53%	59%
6. where defendant did not play a major/substantial role (Colo., U.S.C.)	17	33%	47%	53%
7. where other aggravating factors did not outweigh mitigating factors (Idaho, Okla., Ariz., Conn., Ind., Mont., Neb., N.C.)	8	15%	22%	25%
<p>^a The N% is N/52, where the denominator (52) is the 50 states plus D.C. and the federal jurisdiction.</p> <p>^b The DP% is N/36, where the denominator (36) is the number of jurisdictions that have the death penalty.</p> <p>^c The FM% is N/32, where the denominator (32) is the number of jurisdictions that have the death penalty for felony-murder in some form.</p> <p>^d Each constraint is additive, and the jurisdictions deleted appear in the parentheses.</p>				

Table 3

A Categorization Schema For Felony-Murder (F-M) Legislative Enactments from *Tison*

Most Restrictive ----- Least Restrictive

No DP	No DP for F-M	Possible Death Penalty for F-M				
Ak.	Mo.	Participation Continuum				
D.C.	N.J.	Triggerman	Accessories			
Haw.	Pa.	Ill. Va.	Not Minor/ Substantial	F-M Not Aggravating	F-M Mitigating	Simpliciter
Iowa	Wash.		Conn. U.S.C	Idaho Okla. S. D.	Ariz. Colo. Ind. Mont. Neb. N.C.	Cal. Fla. Ga. S.C. Tenn. Wyo.
Kan.	Wis.	Culpability Continuum				
Me.		Knowing, Intentional/ Purposeful, Premeditated		Extreme Indifference/ Grave Risk, Negligence		No Culpability Requirement
Mass.		Ala.	Utah	Ark.	Ky.	Same as Simpliciter
Mich.		Cal.?	Va.	Del.	Ill.	
Minn.		La.	Or.			
N.Y.		N.M.	Miss.			
N.D.		Ohio	Nev.			
R.I.		Tex.				
W.Va.		Who Dies Continuum				
		Second, Unrelated Death		Police/Correctional Officer		Child
			N.M. Vt.		N.H. Md.	

Table 4

The Numbers (N) & Percentages (N%^a, DP%^b, FM%^c) of Jurisdictions where the Death Penalty for Felony-Murder is Possible Under Varying Constraints^d at the Time of *Tison*

In how many jurisdictions can the death penalty be imposed for felony-murder . . .	N	N%	DP%	FM%
1. when the defendant was not the triggerman (Va.)	33	63%	87%	97%
2. where a police/correctional officer did not die (N.M., Vt.)	31	60%	82%	91%
3. where defendant did not act knowingly, intentionally premeditatively (Ala., La., Ohio, Tex., Utah, Or., Miss., Nev., Cal.?)	22-23	42-44%	58-61%	65-68%
4. where defendant did not show extreme indifference (Ark., Del., Ky., Ill.)	18-19	35-37%	47-50%	53-56%
5. where defendant did not play a major/substantial role (Colo., U.S.C.)	16-17	31-33%	42-45%	47-50%
6. where other aggravating factors did not outweigh mitigating factors (Idaho, Okla., Ariz., Conn., Ind., Mont., Neb., N.C.)	7-8	13-15%	18-21%	21-24%
7. where the victim was not a child or did not die during kidnapping (Md., N.H.)	5-6	10-12%	13-16%	15-18%
<p>^a The N% is N/52, where the denominator (52) is the 50 states plus D.C. and the federal jurisdiction.</p> <p>^b The DP% is N/38, where the denominator (38) is the number of jurisdictions that have the death penalty.</p> <p>^c The FM% is N/34, where the denominator (34) is the number of jurisdictions that have the death penalty for felony-murder in some form.</p> <p>^d Each constraint adds on to the ones that preceded it.</p>				

Table 5

The Number & Percentage of Death Qualified (DQ), *Witt* Excludable (WE), Guilty Phase Includable/Witherspoon Excludable (GPI), Nullifiers (N) & Automatic Death Penalty (ADP) Subjects

Juror Type	Experiment I						Experiment II					
	Students		Adults		Total		Students		Adults		Total	
	n	%	n	%	n	%	n	%	n	%	n	%
DQ	102	67.5	99	79.8	201	73.1	68	81	103	80.5	171	80.6
WE	3	2.0	4	3.2	7	2.5	0	0	5	3.9	5	2.4
GPI	27	17.9	11	8.9	38	13.8	10	11.9	16	12.5	26	12.3
N	14	9.3	9	7.3	23	8.4	5	6.0	3	2.3	8	3.8
ADP	5	3.3	1	.8	6	2.2	1	1.1	1	.8	2	0.9
Total	151	100	124	100	275	100	84	100	128	100	212	100

Juror Type	Kadane ^a
	%
DQ	79.3%
WE	— ^b
GPI	11.6
N	8.1
ADP	1.0
Total	100%

^a Kadane (1984)

^b Kadane's research preceded *Wainwright v. Witt* (1985), and thus *Witt* Excludables (WE) were not assessed. Since WEs would have been DQs prior to *Witt*, those numbers could be added to the DQs to get a more exact comparison.

Table 6

The Number & Percentage of Conspiracy to Commit Robbery (R), Conspiracy to Commit Shoplifting (S), and the Not Guilty (N) Verdicts on the Conspiracy to Commit a Felony (Robbery) Charge by Defendant and by Case

Case	Defendant												Total / Case		
	A			B			C			D			R	S	N
	R	S	N	R	S	N	R	S	N	R	S	N	R	S	N
Heart															
n	2	4	57	24	39	0	63	0	0	63	0	0	152	43	57
%	3	6	91	38	62	0	100	0	0	100	0	0	60	17	23
Accident															
n	2	5	63	24	46	0	69	1	0	69	1	0	164	53	63
%	3	7	90	24	66	0	99	1	0	99	1	0	59	19	22
Heinous															
n	7	9	51	33	34	0	65	2	0	66	1	0	171	46	51
%	10	13	77	49	51	0	97	3	0	99	1	0	64	17	19
Premed.															
n	7	9	59	26	49	0	73	2	0	73	2	0	177	62	59
%	9	12	79	35	65	0	97	3	0	97	3	0	59	21	20
Total / Defendant															
n	18	27	230	107	168	0	270	5	0	271	4	0			
%	7	10	83	39	61	0	98	2	0	99	1	0			

Table 7

The Number & Percentage of Felony-Murder (F-M), Guilty to Lesser Offense (LO), and Not Guilty (N) Verdicts on the Felony-Murder Charge by Defendant & by Case

Case	Defendant												Total / Case		
	A			B			C			D					
	F-M	LO	N	F-M	LO	N	F-M	LO	N	F-M	LO	N	F-M	LO	N
Heart															
n	0	4	59	7	29	27	31	22	9	39	19	4	77	74	99
%	0	6	94	11	46	43	50	35	15	63	31	6	31	30	39
Accident															
n	0	5	65	8	36	26	33	26	11	55	15	0	96	82	102
%	0	7	93	11	52	37	47	37	16	79	21	0	34	29	37
Heinous															
n	3	10	54	12	27	28	32	24	11	59	8	0	106	69	93
%	4	15	81	18	40	42	48	36	16	88	12	0	40	26	34
Premed.															
n	3	5	67	14	32	29	36	28	11	69 ^a	6	0	53 ^b	65	107
%	4	7	89	19	42	39	48	37	15	92	8	0	24	29	47
Total / Defendant															
n	6	24	245	41	124	110	132	100	42	153 ^c	42	4			
%	2	9	89	15	45	40	48	37	15	77	21	2			

Note: Lesser Offenses (LO) include second degree murder, voluntary manslaughter, and involuntary manslaughter.

^a This is the first degree (premeditated) murder figure, since that was the charge for defendant D in case Premed.

^b This total for the case excludes defendant D, thus represents only the felony-murder defendants (A, B, & C).

^c This total for defendant D excludes case Premed., and thus represents only the felony-murder cases.

Table 8

The Number of Death (D) Sentences & Two Death Rate Percentages (D/N^a & D/FM^b) by Defendant & by Case for the Death Qualified (DQ) Subjects in Capital Condition

Case n	Defendant												Total / Case			
	A		B		C		D		D		D					
	D	D/ND/FM	D	D/ND/FM	D	D/ND/FM	D	D/ND/FM	D	D/ND/FM	D	D/ND/FM	D	D/ND/FM		
Heart																
23	0	0	0	0	0	0	1	4.3	8.3	1	4.3	7.7	2	2.2	7.1	
Accident																
25	0	0	0	0	0	0	1	4	8.3	3	12	13	4	4	11.1	
Heinous																
31	0	0	0	2	6.5	66.7	3	9.7	27.3	9	29.0	31	14	11.3	32.6	
Premed.																
28	0	0	0	0	0	0	1	3.6	7.7	18 ^c	64.3	66.7	1 ^d	1.2	5	
Total / Defendant																
107	0	0	0	2	1.9	15.4	6	5.6	12.5	13 ^e	16.5	20	21 ^f	5.3	16.5	

^a The number of death sentences divided by the number of subjects rendering a sentence for that defendant in that case.

^b The number of death sentences divided by the number of subjects who rendered guilty verdict on the felony-murder charge.

^c This is the number of death sentences and the death rates for first degree murder, since that was the charge for defendant D in Premed.

^d This total for the case excludes defendant D, and thus represents only the felony-murder defendants (A, B, & C).

^e This total for defendant D excludes case Premed., and thus represents only the felony-murder cases.

^f This total across cases and defendants includes only felony-murder case defendants.

Table 9

The Reverse & Remand (R) and Let Stand (S) Numbers and Percentages for the Death Penalty Decision by Defendant & By Case

Case	Defendant								Total / Case	
	A		B		C		D		R	S
	R	S	R	S	R	S	R	S	R	S
Heart										
n	87	3	82	8	65	26	57	32	291	69
%	97	3	91	9	71	29	64	36	81	19
Accident										
n	62	4	53	13	46	20	37	29	198	66
%	94	6	80	20	70	30	56	44	75	25
Heinous										
n	57	1	47	13	37	20	18	39	159	73
%	98	2	78	22	65	35	32	68	69	31
Premed.										
n	59	1	47	13	41	19	-- ^a	--	147	33
%	98	2	78	22	68	32	--	--	82	18
Total / Defendant										
n	265	9	229	47	189	85	112	100	795	241
%	97	3	83	17	69	31	53	47	77	23

^a The mock justices were not asked to make a decision for defendant D in case Premed. because first degree (premeditated) murder was the charge.

Table 10

The Reverse & Remand (R) and Let Stand (S) Numbers & Percentages for the Felony-Murder Conviction Decision by Defendant & by Case

Case	Defendant								Total / Case	
	A		B		C		D		R	S
	R	S	R	S	R	S	R	S	R	S
Heart										
n	80	10	58	32	54	36	29	60	203	156
%	89	11	64	36	40	60	33	67	57	43
Accident										
n	61	5	36	30	22	44	14	52	133	131
%	92	8	55	45	33	67	21	79	50	50
Heinous										
n	51	7	29	31	8	49	2	55	90	142
%	88	12	48	52	14	86	4	96	39	61
Premed.										
n	53	6	27	32	15	44	-- ^a	--	95	82
%	90	10	46	54	25	75	--	--	54	46
Total / Defendant										
n	245	28	150	125	81	191	45	167	521	511
%	90	10	55	45	30	70	21	79	50.0	49.5

^a The mock justices were not asked to make a decision for defendant D in case Premed. because first degree (premeditated) murder was the charge.

Table 11

The Frequency Figures for the Reasons Cited by Subjects for their Reverse & Remand (R) and Let Stand (S) Decisions on the Death Penalty Question by Defendant.

Reason ^a	Defendant				Total
	A	B	C	D	
Reverse & Remand					
2	140	136	104	15	395
4	115	134	114	55	418
6	88	73	55	21	237
8	164	55	13	2	234
10	32	35	38	39	144
12	167	116	87	27	397
14	58	51	50	33	192
16	52	54	59	30	195
Let Stand					
1	1	26	41	20	88
3	2	32	50	15	99
5	1	18	41	24	84
7	2	16	43	78	139
9	3	10	24	44	81
11	4	14	35	54	107
13	2	31	27	10	70
15	4	26	45	10	85

^a See *supra* note 167.

Table 12

Cluster Analysis Results for the Reverse & Remand and Let Stand Reasons on the Death Penalty Decision

Cluster	Reasons	Cluster Name
<i>Reverse & Remand (77%)</i>		
I	6, 8, 12	Felony-murder disproportionate for minor accessories
II	2, 4	Death penalty disproportionate for felony-murder
III	10, 14, 16	Lack of intent
Total proportion of variance = .508		
<i>Let Stand (23%)</i>		
I	1, 3, 5, 13, 15	Equalist position
II	9, 11	Death penalty proportionate for reckless indifference felony-murder
III	7	Extreme indifference/grave risk
Total proportion of variance = .621		

Table 13

Cluster Analysis Results for the Reverse & Remand and Let Stand Reasons on the Felony-Murder Conviction Decision

Cluster	Reasons	Cluster Name
<i>Reverse & Remand (50.5%)</i>		
I	2, 4, 10, 12, 14	Disproportionate
II	8	Minor participation
III	6, 16	Lack of intent to kill
Total proportion of variance = .528		
<i>Let Stand (49.5%)</i>		
I	13, 15	Active participation
II	7, 9, 11	Reckless indifference
III	1, 3, 5	Equalist
Total proportion of variance = .539		

Table 14

The Number & Percentage of Felony-Murder (F-M), Guilty to Lesser Offenses (LO), and Not Guilty (N) Verdicts on the Felony-Murder Charge by Defendant & by Case

Case <i>n</i>	Defendant					
	A			B		
	F-M	LO	N	F-M	LO	N
D-Kills-P (<i>n</i>=36)						
n	8	12	16	11	14	11
%	22.2	33.4	44.4	30.6	38.8	30.6
D-Kills-S (<i>n</i>=38)						
n	4	13	21	6	12	18
%	10.5	34.2	55.3	15.8	36.8	47.4
S-Kills-P (<i>n</i>=36)						
n	5	9	22	9	9	18
%	13.9	25.0	61.1	25.0	25.0	50
P-Kills-S (<i>n</i>=37)						
n	9	6	22	13	9	15
%	24.3	16.2	59.5	35.1	24.4	40.5
Ricochet (<i>n</i>=34)						
n	4	8	22	7	11	16
%	11.8	23.5	64.7	20.6	32.3	47.1
Premed-2 (<i>n</i>=31)						
n	9	7	15	10	11	10
%	29.0	22.6	48.4	32.3	35.4	32.3
Total/Defendant						
n	39	55	118	56	68	88
%	18.4	25.9	55.7	26.4	32.1	41.5

Table 14, continued

Case <i>n</i>	Defendant					
	C			D		
	F-M	LO	N	F-M	LO	N
D-Kills-P (<i>n</i>=36)						
n	25	6	5	30	6	0
%	69.4	16.7	13.9	83.3	16.7	0
D-Kills-S (<i>n</i>=38)						
n	13	13	12	27	11	0
%	34.2	34.2	31.6	71.1	28.9	0
S-Kills-P (<i>n</i>=36)						
n	21	9	6	23	7	6
%	58.3	25.0	16.7	63.9	19.4	16.7
P-Kills-S (<i>n</i>=37)						
n	25	7	5	25	7	5
%	67.6	18.9	13.5	67.6	19.9	13.5
Ricochet (<i>n</i>=34)						
n	15	10	9	28	6	0
%	44.1	29.5	26.4	82.4	17.6	0
Premed-2 (<i>n</i>=31)						
n	15	10	6	31 ^a	0	0
%	48.4	32.2	19.4	100	0	0
Total/Defendant						
n	114	55	43	133 ^b	37	11
%	53.8	25.9	20.3	73.5	20.4	6.1

Table 14, continued

Case <i>n</i>	Total by Case		
	F-M	LO	N
D-Kills-P (<i>n</i>=36)			
n	74	38	32
%	51.4	26.4	22.2
D-Kills-S (<i>n</i>=38)			
n	50	51	51
%	32.9	33.6	33.6
S-Kills-P (<i>n</i>=36)			
n	58	34	52
%	40.3	23.6	36.1
P-Kills-S (<i>n</i>=37)			
n	72	29	47
%	48.7	19.5	31.8
Ricochet (<i>n</i>=34)			
n	54	35	47
%	39.7	25.7	34.6
Premed-2 (<i>n</i>=31)			
n	65	28	31
%	52.4	28.6	25
<p>Note: Lesser Offenses (LO) include second degree murder, voluntary manslaughter, and involuntary manslaughter.</p> <p>^a This is the first degree (premeditated) murder figure, because that was the charge for defendant D in Premed-2.</p> <p>^b This total for defendant D excludes Premed-2, and thus represents only the felony-murder cases.</p>			

Table 15

The Number of Death (D) Sentences and Two Death Rate Percentages (D/N^a & D/FM^b) by Defendant & by Case for the Death Qualified (DQ) Subjects

Case <i>n</i>	Defendant					
	A			B		
	D	D/N	D/FM	D	D/N	D/FM
D-Kills-P						
22	0	0	0	1	4.5	14.3
D-Kills-S						
27	0	0	0	0	0	0
S-Kills-P						
22	0	0	0	0	0	0
P-Kills-S						
22	0	0	0	0	0	0
Ricochet						
17	0	0	0	0	0	0
Premed-2						
18	0	0	0	0	0	0
Total/Defendant						
128	0	0	0	1	.9	2.5

Table 15, continued

Case n	Defendant					
	C			D		
	D	D/N	D/FM	D	D/N	D/FM
D-Kills-P						
22	6	27.3	40	9	40.9	50.0
D-Kills-S						
27	1	3.7	10.0	6	22.2	31.6
S-Kills-P						
22	0	0	0	1	4.5	7.1
P-Kills-S						
22	1	4.5	5.6	1	4.5	5.6
Ricochet						
17	2	11.8	25.0	3	17.6	21.4
Premed-2						
18	0	0	0	17 ^c	94.4	94.4
Total/Defendant						
128	10	7.8	13.7	20 ^d	18.2	24.1

Table 15, continued

Case <i>n</i>	Total / Case		
	D	D/N	D/FM
D-Kills-P			
22	16	18.2	34.8
D-Kills-S			
27	7	6.5	18.9
S-Kills-P			
22	1	1.1	2.8
P-Kills-S			
22	2	2.3	3.7
Ricochet			
17	5	7.4	16.1
Premed-2			
18	17	23.6	28.8
Total/Defendant			
128	31 ^e	6.3	13.8

^a The number of death sentences divided by the number of subjects rendering a sentence for that defendant in that case.

^b The number of death sentences divided by the number of subjects who rendered a guilty verdict on the felony-murder charge.

^c This is the number of death sentences and the death rates for first degree murder, because that was the charge for defendant D in Premed-2.

^d This total for defendant D excludes case Premed-2, and thus represents only the felony-murder cases.

^e This total across cases and defendants includes only felony-murder case defendants.

Table 16

The Reverse & Remand (R) and Let Stand(S) Numbers & Percentages for the Death Penalty Decision by Defendant & by Case

Case	Defendant								Total / Case	
	A		B		C		D		R	S
	R	S	R	S	R	S	R	S	R	S
D-Kills-P										
n	33	2	32	3	21	13	14	20	100	38
%	94	6	91	9	62	38	41	59	73	27
D-Kills-S										
n	28	3	28	3	22	9	20	10	98	25
%	90	10	90	10	71	29	67	33	80	20
S-Kills-P										
n	26	6	23	9	17	15	17	15	83	45
%	81	19	72	28	53	47	53	47	65	35
P-Kills-S										
n	34	1	35	1	28	8	27	9	124	19
%	97	3	97	3	78	22	75	25	87	13
Ricochet										
n	35	3	34	4	32	6	22	14	123	27
%	92	8	90	10	84	16	61	39	82	18
Premmed-2										
n	39	1	37	4	29	10	-- ^a	--	105	15
%	98	2	90	10	74	26	--	--	88	12
Total / Defendant										
n	195	16	189	24	149	61	100	68	633	169
%	92	8	89	11	71	29	59	41	78.9	21.1
^a The mock justices were not asked to make a decision for defendant D in case Premmed-2 because first degree (premeditated) murder was the charge.										

Table 17

The Frequency Figures for the Reasons Cited by Subjects for their Reverse & Remand (R) and Let Stand (S) Decisions on the Death Penalty Question by Defendant.

Reason ^a	Defendant				Total
	A	B	C	D	
Reverse & Remand					
2	141	125	75	33	374
4	128	121	95	62	406
6	76	78	53	30	237
8	107	64	19	5	195
10	29	29	31	29	118
12	110	92	66	29	297
14	45	39	35	25	144
16	57	58	52	29	196
Let Stand					
1	7	9	20	15	51
3	10	14	33	18	75
5	8	10	21	20	59
7	6	10	39	57	112
9	5	4	11	30	50
11	5	6	21	35	67
13	3	9	25	27	64
15	6	10	29	17	62

^aSee *supra* note 167.

Table 18

Cluster Analysis Results for the Reverse & Remand and Let Stand Reasons on the Death Penalty Decision

Cluster	Reasons	Cluster Name
<i>Reverse & Remand(78.9%)</i>		
I	10, 14, 16	Lack of intent to kill
II	2, 4, 6	Death penalty disproportionate for felony-murderers who do not intend to kill
III	8, 12	Death Penalty's retributive failure when participation is minor
Total proportion of variance = .522		
<i>Let Stand(21.1%)</i>		
I	9, 11	Death penalty proportionate and constitutional for reckless indifference felony-murder
II	1, 3, 5,	Equalist position
III	7, 13, 15	Active/major participation
Total proportion of variance = .541		

Table 19

The Reverse & Remand (R) and Let Stand(S) Numbers & Percentages for the Felony-Murder Conviction Decision by Defendant & by Case

Case	Defendant								Total / Case	
	A		B		C		D			
	R	S	R	S	R	S	R	S	R	S
D-Kills-P										
n	22	13	17	17	8	26	4	30	51	86
%	63	37	50	50	24	76	12	88	37	63
D-Kills-S										
n	15	16	12	19	7	24	5	25	39	84
%	48	52	39	61	23	77	17	83	32	68
S-Kills-P										
n	19	13	17	15	8	24	7	25	51	77
%	59	41	53	47	25	75	22	78	40	60
P-Kills-S										
n	26	10	20	16	14	22	11	25	71	73
%	72	28	56	44	39	61	31	69	49	51
Ricochet										
n	23	15	21	17	10	28	5	31	59	91
%	61	39	55	45	26	74	14	86	39	61
Premed-2										
n	27	13	24	17	15	24	-- ^a	--	66	54
%	68	32	59	41	39	61	--	--	55	45
Total / Defendant										
n	132	80	111	101	62	148	32	136	337	465
%	62	38	52	48	30	70	19	81	42	58
^a The mock justices were not asked to make a decision for defendant D in case Premed-2 because first degree (premeditated) murder was the charge.										

Table 20

Cluster Analysis Results for the Reverse & Remand and Let Stand Reasons on the Felony-Murder Conviction Decision

Cluster	Reasons	Cluster Name
<i>Reverse & Remand(42%)</i>		
I	2, 4	Proportionality for accessories
II	10, 12, 14, 16	Lack of Intent
III	6, 8	Minor participation
Total proportion of variance = .543		
<i>Let Stand(58%)</i>		
I	1, 3, 5	Equalist position
II	7, 13	Major participation/reckless indifference
III	9, 11, 15	Major participation/reckless indifference
Total proportion of variance = .513		

