

COMMENT

DEATH BY ASSOCIATION: CONSPIRACY LIABILITY AND CAPITAL PUNISHMENT IN TEXAS*

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I. INTRODUCTION

On April 1, 1975, at a farmhouse in Florida, Sampson and Jeanette Armstrong robbed Thomas Kersey at gunpoint.¹ When Eunice Kersey, attempting to aid her husband, emerged from the house with a gun, Sampson shot and killed them both.² After the murders, the Armstrongs returned to a nearby car where Earl Enmund was waiting to help them escape.³

In the early hours of August 15, 1996, Mauriceo Brown shot and killed Michael LaHood in front of LaHood's home in San Antonio, Texas, following an attempted robbery.⁴ After the shooting, Brown returned to a car where Kenneth Foster, DeWayne Dillard, and Julius Steen—Brown's accomplices in two armed robberies committed earlier in the evening—were waiting, and the four men drove away.⁵

1. Enmund v. Florida, 458 U.S. 782, 783–84 (1982).

2. *Id.* at 784. Sampson Armstrong received the death penalty for the murders. *Id.* at 785. Jeanette Armstrong received three consecutive life sentences. *Id.* at 784 n.1.

3. *Id.* at 786. The trial court concluded that Enmund helped plan the robbery and that he shot the Kerseys, but the Florida Supreme Court rejected this finding and held that the only inference supported by the evidence was that Enmund drove the getaway car. *Id.* at 786 n.2.

4. Foster v. Quarterman, 466 F.3d 359, 362–63 (5th Cir. 2006).

5. *Id.* at 362. In 2006, Texas executed Brown for the murder. Texas Department of Criminal Justice, Executed Offenders, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited Jan. 5, 2009). Steen received a life sentence in

Although neither of the getaway drivers, Earl Enmund and Kenneth Foster, actually killed or even intended to kill anyone, both were convicted and sentenced to death for the killings.⁶ The U.S. Supreme Court later reversed Enmund's death sentence, holding that the Eighth Amendment prohibits the execution of a defendant who did not kill or intend to kill.⁷ The courts, however, did not reverse Foster's death sentence. Foster's life was spared, only hours before his scheduled execution, when the Governor of Texas commuted his sentence to life in prison.⁸

Texas convicted Foster under the conspiracy liability provision of the "law of parties."⁹ This theory of liability allows the State to convict a defendant for crimes committed by a co-conspirator even when the defendant did not intend for the actual offense(s) to occur.¹⁰ While many jurisdictions accept conspiracy liability,¹¹ the use of this theory of liability in death penalty cases potentially violates the Eighth Amendment's prohibition of "cruel and unusual punishments."¹² The Supreme Court addressed this issue in *Enmund v. Florida*, which limited

exchange for testifying on behalf of the prosecution, and Dillard is serving a life sentence for an unrelated capital murder. Ralph Blumenthal, *Not the Killer, but Still Facing a Date with the Executioner*, N.Y. TIMES, Aug. 30, 2007, at A18.

6. *Enmund*, 458 U.S. at 785; *Foster*, 466 F.3d at 363.

7. *Enmund*, 458 U.S. at 801. The Supreme Court has consistently applied the Eighth Amendment's prohibition of "cruel and unusual punishments" to the states through the Fourteenth Amendment. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (invalidating a California statute criminalizing drug addiction under the Eighth Amendment as applied through the Fourteenth Amendment). Additionally, the Texas Constitution contains a similarly worded prohibition against "cruel or unusual punishment." TEX. CONST. art I, § 13. For the sake of clarity and convenience, this Comment will refer exclusively to the Eighth Amendment for the proposition that no state may inflict cruel and unusual punishments.

8. Editorial, *Timely Judgment*, HOUSTON CHRON., Sept. 1, 2007, at B8 (commending Governor Perry's decision to commute Foster's sentence and arguing for elimination of party liability in death penalty cases). The Governor, however, did not base his decision on the fact that Foster did not actually kill anyone, but rather because of concerns about the prosecution trying Foster in a joint proceeding with the actual killer. *Id.*

9. *Foster*, 466 F.3d at 363; *see also* TEX. PENAL CODE ANN. §§ 7.01, 7.02(b) (Vernon 2003). In a similar case, Jeffery Lee Wood is currently on death row after being convicted under the law of parties for his role as a getaway driver in a 1996 convenience store robbery that resulted in the murder of a cashier. James C. McKinley, Jr., *Federal Judge, Chastising the Texas Courts, Orders a Stay of Execution*, N.Y. TIMES, Aug. 22, 2008, at A12. Daniel Reneau, who was executed in 2002, fired the fatal shots while Wood waited outside. *Id.*

10. TEX. PENAL CODE ANN. §§ 7.01, 7.02(b) (Vernon 2003).

11. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08, at 487 (3d ed. 2001) (citing *Pinkerton v. United States*, 328 U.S. 640, 647 (1946)).

12. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

the ability of states to execute accomplices and co-conspirators.¹³ Later, in *Tison v. Arizona*, the Court created a narrow exception to *Enmund*.¹⁴

The effect of the conspiracy liability provision in Texas is somewhat limited during the sentencing phase of capital trials.¹⁵ This Comment asserts, however, that these limitations do not adequately ensure defendants the full protection of *Enmund/Tison*. In order to ensure that the death penalty is applied consistently with the Eighth Amendment, Texas should not execute defendants convicted under the conspiracy liability theory. In the alternative, Texas should modify its death penalty scheme to require juries to find that the explicit requirements of *Enmund* and *Tison* are satisfied beyond a reasonable doubt before sentencing co-conspirators to death.

Part II outlines the relevant contours of the Supreme Court's Eighth Amendment restrictions on the death penalty. Part II focuses particularly on the *Enmund/Tison* rule introduced above. Part III briefly introduces the Texas capital punishment scheme and provides an overview of the law of parties. Part IV examines the application of the conspiracy liability theory in death penalty cases and the constitutional concerns raised by this practice. Possible solutions to these concerns are proposed by Part V. Part VI concludes that Texas should not impose the death penalty on defendants convicted under the conspiracy liability theory, or failing that, should require juries to explicitly examine the *Enmund/Tison* requirements before imposing death sentences.

II. EIGHTH AMENDMENT LIMITS ON THE DEATH PENALTY

The death penalty is a controversial issue that has provoked a long history of debate in the United States, which continues to this day.¹⁶ A comprehensive overview of the Court's death penalty

13. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that an offender's punishment must be tailored to his personal responsibility in the crime committed).

14. See *Tison v. Arizona*, 481 U.S. 137, 151 (1987) (holding that the death penalty does not offend the Eighth Amendment when applied to a felony murderer whose participation in the crime was major rather than minor).

15. See *infra* Part III.A (describing the sentencing phase of capital trials in Texas).

16. See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1542–43 (2008) (Stevens, J., concurring) (“Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol . . . but also about the justification for the death penalty itself.”); SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 22 (2003) (“To some extent, the debate about capital punishment has been going on almost since the founding of the Republic.”).

jurisprudence is far beyond the scope of this Comment. Instead, this Part will attempt to provide a brief overview of the decisions most relevant to conspiracy liability as used in Texas.

While the Supreme Court has consistently upheld the constitutionality of the death penalty in general,¹⁷ it has repeatedly limited its imposition under the Eighth Amendment's prohibition of "cruel and unusual punishments."¹⁸ There are at least three dimensions to this constitutional prohibition. Historically, the Amendment was thought to have been directed at "proscribing 'tortures' and other 'barbarous' methods of punishment."¹⁹ In modern times, the Court has expanded the scope of the amendment to proscribe both excessive²⁰ and arbitrarily inflicted²¹ punishments even if not "barbar[ic]."²²

The precise contours of these constitutional limitations are not unchanging; they must be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society."²³ In delineating these standards, the Court "look[s] to objective indicia that reflect the public attitude toward a given sanction."²⁴ Such objective indicia include states' legislative decisions,²⁵ actual sentencing patterns of

17. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 168–69 (1976) (plurality opinion) (holding that the death penalty does not, under all circumstances, violate the Eighth Amendment); *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion) (in dictum) ("[T]he death penalty has been employed throughout our history, and, in a day when it is still widely accepted it cannot be said to violate the constitutional concept of cruelty.").

18. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–51 (2008) (holding that the Eighth Amendment prohibits the use of the death penalty as punishment for the rape of a child); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the Eighth Amendment prohibits the execution of defendants who were less than eighteen years old at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded defendants violates the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (holding that the Eighth Amendment prohibits the imposition of the death penalty for the crime of rape of an adult).

19. *Gregg*, 428 U.S. at 169–70.

20. See *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

21. See *infra* note 32 and accompanying text (discussing the Court's concerns with arbitrary sentencing as expressed in *Furman*).

22. See *Gregg*, 428 U.S. at 171 ("[T]he Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century.").

23. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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

25. *Id.* at 174 n.19 ("[L]egislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values. . . . [However,] legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power.").

juries,²⁶ evidence of historical practice,²⁷ and international opinion.²⁸

However, the analysis does not end there; “[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment.”²⁹ Ultimately, the Court must apply its own judgment.³⁰

A. Arbitrarily Imposed Punishments

In *Furman v. Georgia*, Justice Brennan opined that “the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.”³¹ Each of the concurring Justices in *Furman* agreed that when “discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”³²

26. *Id.* at 181 (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.”).

27. *Id.* at 176–78 (summarizing the history of the death penalty in the United States).

28. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion) (noting that other opinions have “t[aken] pains” to examine “international opinion concerning the acceptability of a particular punishment” and that the practices of other nations are “not irrelevant”). *But see Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (criticizing the majority’s “decision to place weight on foreign laws”). Recently the Court has also looked to opinion polls and the views of professional and religious organizations as indicia of contemporary values, a decision that has created some controversy among the justices. *See, e.g., id.* (“The Court’s suggestion that these sources are relevant . . . finds little support in our precedents . . .”).

29. *Gregg*, 428 U.S. at 182; *see also Furman v. Georgia*, 408 U.S. 238, 345 (1972) (Marshall, J., concurring) (“[T]he Eighth Amendment is our insulation from our baser selves. . . . Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.”).

30. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) (“[O]bjective evidence of contemporary values . . . is entitled to great weight, but it does not end our inquiry. ‘[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’” (quoting *Coker*, 433 U.S. at 597)).

31. *Furman*, 408 U.S. at 274 (Brennan, J., concurring).

32. *Gregg*, 428 U.S. at 189. While the majority in *Furman* did not agree on the rationale for their decision, each of the five Justices in the majority wrote separate concurring opinions expressing concerns about the arbitrary and unpredictable application of the death penalty. *See Furman*, 408 U.S. at 256 (Douglas, J., concurring) (“The high service rendered by the ‘cruel and unusual’ punishment clause . . . is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and

In *Gregg v. Georgia*, the Court reconsidered Georgia's death penalty scheme, which the state had amended in response to *Furman*,³³ and concluded that on its face the amended scheme had adequately addressed the Eighth Amendment concerns raised by the concurring Justices in *Furman*.³⁴ The same day it upheld Georgia's death penalty scheme in *Gregg*, the Court invalidated a North Carolina statute that mandated the death penalty for all first-degree murderers in *Woodson v. North Carolina*.³⁵ The Court concluded that "evolving standards of decency" prohibited the mandatory scheme at issue.³⁶ Unlike the Georgia scheme, the North Carolina scheme did not allow "particularized consideration of relevant aspects of the character and record of each convicted defendant."³⁷ Additionally, the Court suggested that a mandatory scheme could lead to greater arbitrariness in sentencing—some juries might refuse to convict in spite of the evidence if they felt the death penalty was not warranted in a particular case.³⁸

In the decisions that followed *Furman*, the Court imposed several requirements upon states in order to avoid arbitrary and capricious death sentencing. States must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"³⁹

to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."); *id.* at 291 (Brennan, J., concurring) ("The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it."); *id.* at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."); *id.* at 363–64 (Marshall, J., concurring) ("I believe that the following fact[] would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people . . .").

33. *Gregg*, 428 U.S. at 162–63 (discussing the amendments to the Georgia death penalty scheme).

34. *Id.* at 198.

35. *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

36. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

37. *Id.* at 303.

38. *Id.* at 302–03.

39. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); *Woodson*, 428 U.S. at 303).

Over the next several years, the Court continued to refine and elaborate upon these requirements. For example, *Zant v. Stephens* required states to “genuinely narrow the class of persons eligible for the death penalty and [to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”⁴⁰ *Godfrey v. Georgia* invalidated an aggravating circumstance under Georgia’s scheme that allowed a sentence of death “based upon no more than a finding that the offense was ‘outrageously or wantonly vile, horrible and inhuman.’”⁴¹ The *Godfrey* Court noted that “[a] person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’” Therefore, the aggravating circumstance failed to restrain arbitrary sentencing because it provided little guidance to the jury.⁴²

B. Excessive Punishments

The Court has also imposed several limitations prohibiting “excessive” punishments under the Eighth Amendment.⁴³ The Court applies a two-prong test: a punishment is excessive, and therefore unconstitutional, if it results in the “unnecessary and wanton infliction of pain” or if it is “grossly out of proportion to the severity of the crime.”⁴⁴

In applying the first prong of this test, the *Gregg* Court considered whether the death penalty could serve a legitimate social purpose or whether it simply amounted to a “gratuitous infliction of suffering.”⁴⁵ The Court considered two principal justifications for the death penalty: deterrence and retribution.⁴⁶ It found that although “[r]etribution is no longer the dominant objective of the criminal law,” it is neither “a forbidden objective nor one inconsistent with our respect for the dignity of men.”⁴⁷ The Court also examined statistical research evaluating the

40. *Zant v. Stephens*, 462 U.S. 862, 876–77 (1983).

41. *Godfrey*, 446 U.S. at 428.

42. *Id.* at 428–29.

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

44. *Id.*

45. *Id.* at 182–83.

46. *Id.* at 183.

47. *Id.* (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)). *But see Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (“It is . . . retribution, that most often can contradict the law’s own ends. . . . When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”).

efficacy of the death penalty as a deterrent, but found the results inconclusive and ultimately deferred to the legislatures on this issue.⁴⁸

In the end, based on its analysis, the *Gregg* Court could not say that the Georgia Legislature was “clearly wrong” in its conclusion that some cases justify the use of capital punishment and, therefore, the penalty is not “unconstitutionally severe” in all circumstances.⁴⁹ Next, the Court applied the second prong, recognizing that “[t]here is no question that death as a punishment is unique in its severity and irrevocability[,]” but concluding that in the context of the “extreme” crime of deliberate murder, the punishment was not grossly disproportionate to the offense.⁵⁰

While *Gregg* requires a case-by-case analysis of multiple factors, the Court has also imposed several categorical rules prohibiting the death penalty in certain situations.⁵¹

C. *The Enmund/Tison Rule*

In *Enmund v. Florida*, the Court imposed a categorical rule that the Eighth Amendment does not allow the imposition of the death penalty on a defendant who participates in a felony involving a killing, but who does not himself kill, attempt to kill, or intend that a killing occur.⁵² However, in *Tison v. Arizona*, the Court created an exception to this general rule, allowing the death penalty in cases in which the defendant did not kill or intend to kill, but still played a “major” role in the accompanying felony and displayed “reckless indifference to human life.”⁵³ This *Enmund/Tison* rule sets limits within which states may impose capital punishment on defendants who did not kill or intend to kill.

1. *The Enmund Rule.* Prior to its decision in *Enmund*, the Court considered a similar set of circumstances in *Lockett v.*

48. *Gregg*, 428 U.S. at 184–86.

49. *Id.* at 186–87.

50. *Id.* at 187 (“It is an extreme sanction, suitable to the most extreme of crimes.”).

51. *See, e.g., Kennedy*, 128 S. Ct. at 2650–51 (prohibiting the use of the death penalty as punishment for rape of a child); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (prohibiting the execution of defendants who were less than eighteen years old at the time of their crime); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (prohibiting the imposition of the death penalty for the crime of rape of an adult).

52. *Enmund v. Florida*, 458 U.S. 782, 788 (1982).

53. *Tison v. Arizona*, 481 U.S. 137, 151 (1987).

Ohio.⁵⁴ The State had sentenced Sandra Lockett to death for her role as the getaway driver in an armed robbery that unexpectedly resulted in murder.⁵⁵ While the plurality opinion declined to consider the proportionality of Lockett's sentence,⁵⁶ Justice White addressed the issue in his separate opinion and argued that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim."⁵⁷

Justice Blackmun also authored an opinion in which he agreed that imposing the death penalty without any consideration of the defendant's involvement or degree of *mens rea* "skirt[s] the limits of the Eighth Amendment proscription . . . against gross disproportionality," but he did not find Justice White's suggested approach "entirely convincing" and thought that a bright-line rule would be unworkable.⁵⁸ Nevertheless, only four years later, Justice Blackmun joined Justice White's majority opinion in *Enmund*, adopting a bright-line rule similar to the one Justice White proposed in *Lockett*.⁵⁹

The facts in *Enmund* were similar to those in *Lockett*. Earl Enmund drove the getaway car during a robbery that unexpectedly resulted in the killing of two people.⁶⁰ The record contained no evidence that Enmund killed, intended to kill, knew that his cohorts would kill, or was even present at the scene of the killings, yet he was sentenced to death.⁶¹

The Court first examined the relevant objective indicia of contemporary values noting that, in the United States, "only eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life."⁶² Additionally, among the eight states that had enacted new death penalty statutes since 1978, none would permit the death penalty in Enmund's circumstances.⁶³ The

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

55. *Id.* at 593–94.

56. *Id.* at 609 n.16. The four-Justice plurality found the statute under which Lockett was sentenced unconstitutional because it did not permit "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases." *Id.* at 606.

57. *Id.* at 624 (White, J., concurring).

58. *Id.* at 613–14, 614 n.2 (Blackmun, J., concurring).

59. *See Enmund v. Florida*, 458 U.S. 782, 788 (1982).

60. *Id.* at 783–86.

61. *Id.* at 788.

62. *Id.* at 789.

63. *Id.* at 792.

Court also examined jury sentencing decisions citing a survey showing that out of 362 executions for homicide since 1954 (that were reported in appellate court decisions), only six of those executed were “nontriggerman felony murderer[s],” and all six were executed in 1955.⁶⁴ Based on these findings, the Court concluded that because most legislatures and juries would not permit the death penalty in circumstances like Enmund’s, such a punishment was inconsistent with contemporary values.⁶⁵

After considering this data, the Court conducted a proportionality analysis following the approach used in *Gregg*. The Court found Enmund’s sentence “excessive” under the Eighth Amendment for four reasons. First, robbery, while a serious offense, was not by itself severe enough to warrant the most extreme penalty.⁶⁶ Second, the state could not base Enmund’s sentence on the culpability of the actual killers; rather it must base Enmund’s sentence on his own culpability.⁶⁷ Third, the Court expressed doubt that the death penalty could serve as an effective deterrent for people who do not kill or intend to kill, and suggested that capital punishment could only deter premeditated or deliberate murders.⁶⁸ Finally, the Court considered the retributive goal of punishment. It concluded that because Enmund’s punishment had to be limited to his “personal responsibility and moral guilt,” the execution of Enmund “to avenge two killings that he did not commit and had no intention of committing or causing d[id] not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”⁶⁹

2. *The Tison Exception*. Five years later, in *Tison*, the Court created a narrow exception to the *Enmund* holding.⁷⁰ Compared to *Enmund*, the facts in *Tison* were aggravated. The defendants, armed with an ice chest full of weapons, helped to

64. *Id.* at 794–95.

65. *Id.* at 794–96.

66. *Id.* at 797.

67. *Id.* at 798.

68. *Id.* at 798–99. On this point, the Court seemed to foreshadow its later opinion in *Tison*, suggesting that if the likelihood that a killing would occur during a particular crime were substantial enough, then the defendant could potentially be responsible for the killing based on his or her participation in the associated crime. The Court, however, expressly rejected this rationale for robberies, citing statistics showing that less than 1% of robberies result in homicides. *Id.* at 799.

69. *Id.* at 801.

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

free two convicted murderers from prison.⁷¹ After the escape, the defendants and the escapees kidnapped a family of four, robbed them, and stole their car.⁷² Later the escapees murdered the family while the defendants stood by.⁷³ Although the defendants did not fire the fatal shots, both received the death penalty.⁷⁴

In assessing the constitutionality of their sentences, the Court purported to follow a similar approach to that used in *Enmund*.⁷⁵ The Court examined the relevant state statutes finding that, of the states that authorized capital punishment at the time, only eleven “forb[ade] imposition of the death penalty even though the defendant’s participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.”⁷⁶ Next, the Court addressed the defendants’ culpability, which in *Enmund* played a key role in undermining the retributive justification for the death penalty. The *Tison* Court acknowledged that the idea that “more purposeful” crimes deserve more serious punishments is “[d]eeply ingrained in our legal tradition.”⁷⁷ The Court, however, rejected the notion that “intent to kill” could always distinguish the most culpable offenders, because “nonintentional murderers may be among some of the most dangerous and inhumane of all.” Conversely, those who intentionally kill in self-defense are culpable, but not criminally liable.⁷⁸ Thus, the Court concluded that the culpability requirement of *Enmund* is met if the defendant was a major participant in the crime and showed “reckless indifference to human life.”⁷⁹

71. *Id.* at 139.

72. *Id.* at 139–40.

73. *Id.* at 141.

74. *Id.* at 141–43.

75. *Id.* at 152–54. *But see id.* at 168 (Brennan, J., dissenting) (criticizing the Court for its “failure to conduct the sort of proportionality analysis that the Constitution and past cases [such as *Enmund*] require”).

76. *Id.* at 154 (majority opinion).

77. *Id.* at 156.

78. *Id.* at 157. As examples of “nonintentional murderers” whose culpability “may be every bit as shocking to the moral sense as an ‘intent to kill,’” the Court describes “the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property.” *Id.* *But see id.* at 169–70 (Brennan, J., dissenting) (criticizing these examples because they both involve murders in which the defendant did, in fact, kill the victim and because the murders described, while not premeditated or deliberate, are nevertheless intentional).

79. *Id.* at 158 (majority opinion).

D. Implementation of the Enmund/Tison Rule

1. *Clarifying the Enmund Rule.* The federal circuit courts disagreed about how to interpret the constitutional requirements imposed by *Enmund*. The Fifth Circuit interpreted *Enmund* to require a finding by the trier of fact that the defendant killed, attempted to kill, or intended to kill.⁸⁰ In contrast, the Eleventh Circuit concluded that federal habeas review could satisfy the *Enmund* requirement.⁸¹

In *Cabana v. Bullock*, the Court resolved this issue and clarified its previous holding.⁸² The *Cabana* Court made clear that “*Enmund* does not impose any particular form of procedure upon the States.”⁸³ While *Enmund* did “impose[] a categorical rule [that] a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death,”⁸⁴ *Cabana* left the responsibility for implementing that rule in the hands of the states.⁸⁵

Additionally, the Court provided guidelines for federal habeas courts to ensure that *Enmund* was followed, requiring them to “examine the entire course of the state court proceedings against the defendant in order to determine whether at some point in the process, the requisite factual finding as to the defendant’s culpability has been made.”⁸⁶ In dissent, Justice Blackmun disagreed that the *Enmund* rule could be adequately satisfied at the appellate court level, arguing that the Court was “paying lipservice to the constitutional significance of *Enmund* while relegating *Enmund* findings to a position of judicial

80. *Bullock v. Lucas*, 743 F.2d 244, 247–48 (5th Cir. 1984) (finding that the jury could have found Bullock guilty of capital murder under the felony murder statute without finding him guilty of killing, attempting to kill, or intent to kill).

81. *Ross v. Kemp*, 756 F.2d 1483, 1488–89 (11th Cir. 1985) (“Specific jury findings on the defendant’s culpability are not a necessary constitutional corollary to the Court’s holding in *Enmund*.”).

82. *Cabana v. Bullock*, 474 U.S. 376, 382 (1986).

83. *Id.* at 386. *But see id.* at 402–03 (Blackmun, J., dissenting) (“That we have refused ‘to say that there is any one right way for a State to set up its capital sentencing scheme’ . . . does not mean that there are no wrong ways.” (citations omitted)).

84. *Id.* at 386 (majority opinion).

85. *Id.* at 386–87 (“At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution.”). *But see id.* at 394–95 (Blackmun, J., dissenting) (“The nature of the *Enmund* findings . . . dictates who must make them and at what point in the sentencing process they must be made.”).

86. *Id.* at 387 (majority opinion). *But see infra* Part IV.B (noting that the Court’s more recent decisions may require that juries make *Enmund/Tison* findings before imposing death sentences).

afterthought.”⁸⁷ He further stated that “[t]he Eighth Amendment requires that *Enmund* findings be made at the trial court level before the sentencer condemns a defendant to death.”⁸⁸

Despite disagreements about the implementation of the *Enmund* rule, the *Cabana* Court agreed that *Enmund* created a bright-line rule based on whether the defendant killed or intended to kill.⁸⁹ The *Tison* standard, created the following year, provides less certain guidance.⁹⁰

2. *Clarifying the Tison Exception.* After an extensive study of state appellate court decisions and a careful parsing of the *Enmund* and *Tison* opinions, one scholar identified several factors that courts have used to determine whether a defendant has met the vague criteria of “major participation” and “reckless disregard.”⁹¹

In order to qualify as a major participant, it appears that a defendant must be present at the scene of the killing and must play a significant role in the underlying crime relative to the other actors.⁹² The second *Tison* criterion, the mental state of “reckless disregard for human life,” likely arose from the Model Penal Code’s definition of “purposeful” or “knowing” killing. The Model Penal Code definition requires “extreme indifference to the value of human life,” a standard derived from the common law offense of “depraved heart” murder.⁹³ Two factors suggest when the reckless disregard standard is met: the dangerousness of the

87. *Id.* at 394–95 (Blackmun, J., dissenting).

88. *Id.* at 395. See also Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1154 (1990) (“The diffuse and inherently judgmental nature of a *Tison* reckless indifference finding makes federal review of such a finding by a state court problematic under any circumstances. . . . Because of the inherent difference between an *Enmund* determination and a *Tison* determination, however, *Bullock*, to the extent that it limits federal review of a state court decision, should not be held applicable to a *Tison* finding . . .”).

89. *Cabana*, 474 U.S. at 386 (majority opinion).

90. See Rosen, *supra* note 88, at 1162 (“The *Tison* reckless indifference standard is anything but a bright line. There is neither a clear line of demarcation nor any real guidance.”).

91. See generally David McCord, *State Death Sentencing for Felony Murder Accomplishes Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843 (2000) (analyzing the way state courts have applied the Supreme Court standards).

92. *Id.* at 876 (arguing that *Enmund*’s absence at the scene of the killing outweighed his significant role in the planning and carrying out of the robbery).

93. *Id.* at 879–80. Professor McCord notes three problems with using this standard for death eligibility: (1) the common law treated “depraved heart” murder as second-degree murder; (2) the distinction between extreme recklessness and recklessness is difficult to distinguish; and (3) “depraved heart” murder was never applied as a doctrine of accomplice liability at common law. *Id.* at 880–81.

associated felony and the defendant's knowledge of the accomplice's likelihood of killing.⁹⁴

The uncertainty surrounding the meaning of the *Tison* criteria underscores the risk of arbitrary sentencing inherent in *Tison* and is one reason why courts should abandon the *Tison* exception.

3. *The Continuing Viability of Tison*. The Supreme Court has not revisited the *Enmund* rule since *Tison*. The Court's recent death penalty decisions, however, suggest a shift in attitude that calls into question the continuing viability of the *Tison* exception.⁹⁵ *Penry v. Lynaugh*⁹⁶ and *Stanford v. Kentucky*,⁹⁷ decided two years after *Tison*, illustrate the Court's hesitancy to use the Eighth Amendment to restrict the death penalty at that time. More recently, however, in *Atkins v. Virginia*⁹⁸ and *Roper v. Simmons*,⁹⁹ the Court abrogated its decisions in *Penry* and *Stanford*, placing substantial limits on the use of the death penalty. Most recently, *Kennedy v. Louisiana* extended the prohibition of the death penalty as punishment for rape of an adult to include the crime of rape of a child. The Court held that for crimes against individuals, the death penalty must be reserved "for crimes that take the life of the victim."¹⁰⁰ These recent cases suggest a shift in the Court's and in society's attitudes regarding the death penalty since *Tison*.¹⁰¹

94. *Id.* at 882–83.

95. See Melanie A. Renken, Comment, *Revisiting Tison v. Arizona: The Constitutionality of Imposing the Death Penalty on Defendants Who Did Not Kill or Intend to Kill*, 51 ST. LOUIS U. L.J. 895, 897–98 (2007) (arguing that the continuing application of the death penalty in felony murder cases under *Tison* is inconsistent with the underlying concepts of the Court's more recent death penalty decisions).

96. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (upholding the imposition of the death penalty on mentally retarded defendants), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

97. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding the imposition of the death penalty for defendants who committed murder at sixteen or seventeen years of age), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

98. *Atkins*, 536 U.S. at 321 (holding that the execution of mentally retarded defendants is prohibited by the Eighth Amendment).

99. *Roper*, 543 U.S. at 578 (holding that the execution of individuals who were less than eighteen years of age at the time of their crime is prohibited by the Eighth Amendment).

100. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664–65 (2008).

101. See TUROW, *supra* note 16, at 20–21 (“[A] national reassessment of the death penalty . . . is quite clearly under way. . . . The American judiciary also seems to be exhibiting a new willingness to restrict the death penalty, led by the U.S. Supreme Court.”); see also Renken, *supra* note 95, at 897–98 (suggesting that “[t]he Court may be entering a new era”).

Like *Enmund* and *Tison*, the Court's decisions in *Atkins* and *Roper* rest on the issue of culpability.¹⁰² Indeed, culpability is at the core of the Court's Eighth Amendment jurisprudence. Diminished culpability tends to undermine both the deterrent and retributive justifications of the death penalty,¹⁰³ without which a punishment is unconstitutionally excessive.¹⁰⁴

As the law stands now, *Enmund/Tison* prohibits the execution of defendants who did not kill or intend to kill, unless the defendant was a major participant in a crime accompanying the killing and acted with reckless indifference to life. The following Part briefly describes the Texas death penalty scheme in order to provide the necessary background for the subsequent analysis of how Texas courts apply *Enmund/Tison*.

III. THE DEATH PENALTY IN TEXAS

Texas leads the nation in executions. Since 1976, Texas has conducted over one-third of all executions in the United States,¹⁰⁵ although it accounts for less than eight percent of the national

102. *Roper*, 543 U.S. at 571 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”); *Atkins*, 536 U.S. at 319 (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”); *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (“Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (“It is fundamental that ‘causing harm intentionally’ must be punished more severely than causing the same harm unintentionally.’ . . . *Enmund* did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed . . .” (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 162 (1968))).

103. *See, e.g., Atkins*, 536 U.S. at 319 (“With respect to retribution—the interest in seeing that the offender gets his ‘just deserts’—the severity of the appropriate punishment necessarily depends on the culpability of the offender.”); *Enmund*, 458 U.S. at 798–99 (“We are quite unconvinced . . . that the death penalty . . . will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation . . .’” (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting))).

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

105. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2008: YEAR END REPORT 1 (2008), available at <http://www.deathpenaltyinfo.org/2008YearEnd.pdf>. At the end of 2008, 1,136 people had been executed in the United States since 1976, 423 of whom were executed in Texas. *Id.*

population.¹⁰⁶ In 2008, Texas conducted eighteen of the thirty-seven executions carried out nationwide.¹⁰⁷

Texas uses a two-part capital punishment scheme.¹⁰⁸ Upon conviction of capital murder, the jury must then consider up to three “special issues.” The jury’s responses to these questions determine whether the defendant will receive the death penalty or life imprisonment.¹⁰⁹

A. *Capital Murder*

Texas modified its capital murder statute in response to the Supreme Court’s ruling in *Furman v. Georgia*, which declared the then-existing death penalty scheme unconstitutional.¹¹⁰ In *Furman*, the Court expressed concerns about the arbitrary and unpredictable manner in which the death penalty was imposed.¹¹¹ Texas’s amended capital murder scheme sought to avoid such arbitrariness by limiting the use of the death penalty to a narrow subset of the worst murders.¹¹²

To achieve this objective, the updated scheme required the jury to find that the defendant committed an intentional or knowing murder within one of five enumerated aggravating circumstances.¹¹³ Following a conviction under the amended scheme, the trial court conducted a separate sentencing proceeding in which the jury considered up to three special issues to determine whether the defendant received the death penalty or a life sentence.¹¹⁴ These special issues purportedly allowed the jury to consider all relevant mitigating evidence.¹¹⁵

Although the Supreme Court upheld the Texas scheme against a facial challenge in *Jurek v. Texas*,¹¹⁶ its constitutionality

106. U.S. Census Bureau, Texas QuickFacts, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Jan. 30, 2009).

107. DEATH PENALTY INFO. CTR., *supra* note 105, at 3.

108. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (Vernon 2006).

109. TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b), (e)(1) (Vernon 2006).

110. *See Jurek v. Texas*, 428 U.S. 262, 268–69 (1976) (plurality opinion) (noting that after Texas’s death penalty scheme was found unconstitutional in *Branch v. Texas*, decided with *Furman v. Georgia*, 408 U.S. 238 (1972), the Texas legislature enacted a new scheme limiting the types of offenses eligible for capital punishment).

111. *See supra* note 32 and accompanying text.

112. *See Jurek*, 428 U.S. at 279 (White, J., concurring).

113. *Id.* at 268 (describing the amended scheme).

114. *Id.* at 267.

115. *See infra* note 118 and accompanying text (discussing the *Penry* Court’s finding that, as applied, the special issues did not adequately allow the jury to consider all mitigating evidence).

116. *Jurek*, 428 U.S. at 276.

was again called into question in *Penry v. Lynaugh*.¹¹⁷ In *Penry*, the Court found that the Texas scheme was unconstitutional as applied, because it did not allow the jury to decline to impose the death penalty based on the mitigating evidence of the defendant's mental retardation and history of abuse as a child.¹¹⁸ Following *Penry*, Texas again modified its capital punishment system, rewriting the special issues to expressly require the jury to consider all relevant mitigating evidence.¹¹⁹

Texas's current capital murder statute is similar to the statute upheld in *Jurek*.¹²⁰ The current statute defines capital murder as intentional or knowing murder committed in any of nine additional aggravating circumstances.¹²¹ If the jury finds the defendant guilty and if the State decides to seek the death penalty, the jury must then consider up to three special issues during the punishment phase of the trial.¹²² The first issue requires the jury to find whether the defendant "constitute[s] a continuing threat to society."¹²³ The second requires the jury to determine whether the defendant, if convicted as a party, "actually caused the death of the deceased or . . . intended to kill the deceased or another or anticipated that a human life would be taken."¹²⁴ Finally, the third issue allows the jury to consider whether any mitigating circumstances warrant a sentence of life

117. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

118. *Id.* at 318–19 (noting that the statute in *Jurek* was upheld "on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence").

119. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon 2006); *see also* *McFarland v. State*, 928 S.W.2d 482, 521 (Tex. Crim. App. 1996) ("Article 37.071 § 2(e) is a codification of the *Penry* requirements . . .").

120. *Compare* TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2007), *with* *Jurek*, 428 U.S. at 265 n.1.

121. TEX. PENAL CODE ANN. § 19.03(a) (Vernon Supp. 2007). The nine circumstances include (1) murder of an acting peace officer or firefighter; (2) intentional "murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat"; (3) murder for remuneration; (4) "murder while escaping or attempting to escape from a penal institution"; (5) murder, while incarcerated, of an employee of a penal institution, or with the intent to establish, maintain, or participate in a prison gang; (6) murder while incarcerated for murder or capital murder or while serving a sentence of life imprisonment; (7) murder of more than one person during the same criminal transaction; (8) murder of an individual under six years of age; or (9) murder of a judge or justice of a court in retaliation for or on account of their service. *Id.*

122. TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b), (e)(1) (Vernon 2006).

123. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (Vernon 2006).

124. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (Vernon 2006).

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without parole instead of the death penalty as required by *Penry*.¹²⁵

A death sentence requires an affirmative finding, beyond a reasonable doubt, for the first two issues as well as a negative finding for the third; otherwise, the defendant receives life imprisonment without parole.¹²⁶ If the jury imposes a death sentence, the defendant is entitled to automatic review by the Texas Court of Criminal Appeals.¹²⁷

B. The Law of Parties

Sections 7.01 and 7.02 of the Texas Penal Code establish the circumstances under which a defendant may be charged for offenses committed by others and is commonly known as “the law of parties.”¹²⁸ Under Section 7.01, a person may be charged with an offense if the offense is committed by his or her own conduct or by the conduct of another for which the defendant is “criminally responsible.”¹²⁹ Section 7.02 identifies when a defendant is criminally responsible for the conduct of another.¹³⁰ This Comment focuses particularly on the theory of conspiracy liability established under Section 7.02(b). This section provides:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy.¹³¹

In order to convict the defendant as a party under Section 7.02(b), the jury must find that “the offense was committed in furtherance of the unlawful purpose” of the conspiracy and the offense “was one that should have been anticipated as a result of carrying out the conspiracy.”¹³² Although the provision refers to “conspiracy,” which the Penal Code defines as a separate

125. TEX. CODE CRIM. PROC. ANN. art 37.071, § 2(e)(1) (Vernon 2006).

126. TEX. CODE CRIM. PROC. ANN. art 37.071, § 2(g) (Vernon 2006).

127. TEX. CODE CRIM. PROC. ANN. art 37.071, § 2(h) (Vernon 2006). The Texas Court of Criminal Appeals is the highest state appellate court for criminal matters. J. Cathy Cochran, *The Court of Criminal Appeals of Texas*, 69 TEX. B.J. 218, 219 (2006).

128. TEX. PENAL CODE ANN. §§ 7.01, 7.02 (Vernon 2003).

129. TEX. PENAL CODE ANN. § 7.01 (Vernon 2003).

130. TEX. PENAL CODE ANN. § 7.02 (Vernon 2003).

131. TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

132. *Id.*

offense,¹³³ the State need not charge the defendant with conspiracy because the statute addresses only an “attempt to carry out a conspiracy.”¹³⁴ In short, Section 7.02(b) allows the State to convict a defendant without having to prove that the defendant intended or even anticipated the offense.¹³⁵ In the case of murder, this rule is similar to the common law felony murder rule in that both allow for conviction of a defendant who did not intend to kill.

C. *The Law of Parties and the Felony Murder Rule*

At this point, it is useful to briefly distinguish the law of parties from the felony murder rule. At common law, the felony murder rule imposed a form of strict liability for any killing committed during the commission of a felony.¹³⁶ The rule applied regardless of whether the defendant killed intentionally, recklessly, negligently, or accidentally.¹³⁷ The felony murder rule, which Justice Brennan criticized as “a living fossil,”¹³⁸ has endured in the United States despite extensive criticism.¹³⁹ England abolished the doctrine in 1957, and neither France nor Germany ever employed the felony murder rule.¹⁴⁰

Texas preserves this rule in section 19.02(b)(3) of the Penal Code.¹⁴¹ The penal code version, however, is more lenient than the strict liability common law rule, requiring that in the course of a felony, the defendant commit, or attempt to commit, “an act clearly dangerous to human life that causes the death of an individual.”¹⁴² The course-of-felony eligibility factor contained in

133. See TEX. PENAL CODE ANN. § 15.02 (Vernon 2003).

134. English v. State, 592 S.W.2d 949, 954 (Tex. Crim. App. 1980) (emphasis omitted).

135. Prystash v. State, 3 S.W.3d 522, 541 n.4 (Tex. Crim. App. 1999) (Keller, J., concurring).

136. DRESSLER, *supra* note 11, § 31.06, at 515.

137. *Id.*

138. Tison v. Arizona, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting) (“This curious doctrine is a living fossil from a legal era in which all felonies were punishable by death.”).

139. See DRESSLER, *supra* note 11, § 31.06, at 515 (discussing criticisms of the rule); see also OLIVER WENDELL HOMES, JR., THE COMMON LAW 57–58 (Little, Brown & Co. 1923) (1881) (“If the object of the [felony murder] rule is to prevent [accidental killings,] it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.”).

140. DRESSLER, *supra* note 11, § 31.06, at 515.

141. TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003).

142. *Id.*

the capital murder statute is also similar to the felony murder rule.¹⁴³ This widely used provision allows for capital murder convictions for intentional murders committed in the course of any of several enumerated felonies.¹⁴⁴ The course-of-felony provision, however, requires an intentional murder, and therefore is far more limited than the common law felony murder rule.¹⁴⁵

Section 7.02(b) of the law of parties is similar to the felony murder rule in that both allow a jury to convict a defendant of murder without requiring a finding that he or she intentionally or knowingly killed.¹⁴⁶ Additionally, the two rules can act in tandem because the law of parties is a theory of liability, and the felony murder rule provides for a substantive offense.¹⁴⁷ For example, a defendant can be convicted as a party when an accomplice commits felony murder. In this case, the jury could convict both the defendant and the accomplice of felony murder, but neither defendant would receive the death penalty because felony murder is not a capital offense in Texas.¹⁴⁸ However, if the State charges the killer with capital murder instead of felony murder, party liability could allow both to be sentenced to death.

A simple hypothetical best demonstrates the practical significance of this distinction: *X* and *Y* decide to rob a bank. *X*, armed with a gun, approaches the teller and demands the money while *Y* waits outside in the getaway car. If the teller then dies from a heart attack because of the robbery, *Y* could be convicted of felony murder as a party to the offense, but neither defendant would be eligible for the death penalty because felony murder is not a capital offense. On the other hand, if *X* intentionally shoots the teller, *Y* could be convicted of capital murder as a party to intentional murder in the course of an enumerated felony. As a result, the State could only seek the death penalty for *Y* in the second scenario, even though *Y*'s role in the crime was identical in both scenarios.

143. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 2007).

144. *Id.* This provision accounts for approximately 63% of capital murder convictions in Texas. TEX. DEFENDER SERV., MINIMIZING RISK: A BLUEPRINT FOR DEATH PENALTY REFORM IN TEXAS 33 (2005), available at <http://texasdefender.org/risk.pdf> (examining all direct appeals of capital cases from January 1, 2002 to December 30, 2004).

145. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 2007).

146. Compare TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003), with TEX. PENAL CODE ANN. § 7.02 (Vernon 2003).

147. TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003).

148. See *Cuevas v. State*, 742 S.W.2d 331, 343 (Tex. Crim. App. 1987) (“[F]elony murder in Texas is not a capital offense . . .”).

Section 7.02(b) of the law of parties allows the State to convict a defendant for a murder that the defendant did not commit or intend, but *Enmund/Tison* prohibits the imposition of the death penalty unless the defendant's conduct satisfies the major participant and reckless indifference requirements.¹⁴⁹ The next Part argues that the Texas scheme does not adequately address these requirements and therefore risks imposing death sentences that violate the Constitution.

IV. CONSTITUTIONALITY OF THE LAW OF PARTIES IN CAPITAL CASES

For many years, Texas courts have applied the law of parties to capital cases.¹⁵⁰ The law of parties explicitly allows the State to attribute a principle's liability to an accomplice if the accomplice at least "should have . . . anticipated" the offense.¹⁵¹ *Enmund*, however, prohibited states from attributing the culpability of principles to their accomplices for death penalty purposes.¹⁵² Because the use of conspiracy liability would clearly violate *Enmund* if it were the sole basis for a death sentence, Texas courts have limited the use of the law of parties to the guilt-innocence phase of capital trials and prohibited the jury from applying the rule to the special issues answered during the punishment phase.¹⁵³

If the jury finds the defendant guilty of capital murder as a party, it must then answer the three special issues provided by Article 37.071 before it may impose the death penalty.¹⁵⁴ The second of these special issues, which is also known as the "antiparties" special issue, requires the jury to find whether the

149. See *supra* Part II.C (explaining the *Enmund/Tison* rule).

150. See, e.g., *English v. State*, 592 S.W.2d 949, 955 (Tex. Crim. App. 1980) (upholding application of § 7.02(b) to a capital murder case); *Livingston v. State*, 542 S.W.2d 655, 660 (Tex. Crim. App. 1976) (noting that §§ 7.01 and 7.02 may apply to capital murder convictions); *Smith v. State*, 540 S.W.2d 693, 696 (Tex. Crim. App. 1976) (upholding a capital murder conviction under the predecessor of §§ 7.01 and 7.02).

151. *Prystash v. State*, 3 S.W.3d 522, 540–41, 541 n.4 (Tex. Crim. App. 1999) (Keller, J., concurring) (emphasis omitted) (discussing the function of the anti-parties issue).

152. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding that it was "impermissible under the Eighth Amendment" for the State to "attribute[] to Enmund the culpability of those who killed [the victims]").

153. *Green v. State*, 682 S.W.2d 271, 286–88 (Tex. Crim. App. 1984) (discussing the requirements of *Enmund* and holding that "it is error to apply directly the law of parties to any of the punishment issues in a capital murder case" (citations omitted) (emphasis omitted)).

154. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2006); see also *supra* Part III.A (summarizing the text of the special issues).

defendant actually killed, intended to kill, or anticipated that a life would be taken.¹⁵⁵ This issue forces the jury to focus exclusively on the defendant's conduct, rather than the conduct of co-conspirators, and therefore avoids the attribution of culpability prohibited by *Enmund*.¹⁵⁶

However, the *Enmund/Tison* rule also prohibits the imposition of the death penalty on defendants who did not kill or intend to kill unless the defendant was a major participant and displayed reckless indifference to life.¹⁵⁷ The theory of party liability provided in Section 7.02(a) ostensibly avoids this issue because it requires the jury to find, during the guilt-innocence phase, that the defendant "intended to promote or assist the commission of an intentional murder."¹⁵⁸ On the other hand, Section 7.02(b) clearly dispenses with any intent requirement, thereby allowing a defendant to be convicted of any offense committed by a co-conspirator, as long as it "was committed in furtherance of the [attempted conspiracy] and was one that should have been anticipated" by the defendant.¹⁵⁹

The following Part examines the issue of whether, following a conviction under Section 7.02(b), the anti-parties charge satisfies the necessary *Enmund/Tison* requirements and concludes that it does not.

A. *The Anti-Parties Charge*

Shortly after *Enmund* and *Tison* were decided, the Texas Court of Criminal Appeals addressed the effect of those decisions on the death penalty scheme in *Cuevas v. State*.¹⁶⁰ The *Cuevas* court found that the *Enmund/Tison* rule was satisfied by a special issue, answered during the punishment phase, which required the jury to find "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result."¹⁶¹ Because the jury could not apply the law of parties during the punishment phase, this special issue required the jury to focus exclusively on the

155. *Prystash*, 3 S.W.3d at 540-41, 541 n.4.

156. 6 MICHAEL B. CHARLTON, TEXAS PRACTICE: TEXAS CRIMINAL LAW § 10.3, at 161 (1994).

157. *See supra* Part II.C.

158. *Lawton v. State*, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995) (citations omitted).

159. TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

160. *Cuevas v. State*, 742 S.W.2d 331 (Tex. Crim. App. 1987).

161. *Id.* at 343.

defendant's own conduct and to determine not only that the defendant reasonably expected death to result, but also that he or she acted *deliberately*.¹⁶² This special issue, which is no longer a part of the Texas death penalty scheme, imposed a much higher culpability standard than the current anti-parties charge.¹⁶³

After *Penry*, Texas again modified Article 37.071 adding the mitigation special issue now found in Section 2(e).¹⁶⁴ Additionally, the legislature removed the deliberateness instruction addressed in *Cuevas* and added the anti-parties charge, which requires the jury to find that the defendant killed, intended to kill, or anticipated that a life would be taken.¹⁶⁵ This question sought to clarify any remaining confusion about whether a defendant could be executed solely based on the conduct of his or her co-actors.¹⁶⁶ Although the addition of the anti-parties charge may have remedied constitutional concerns about the attribution of culpability, the deletion of the deliberateness special issue raises questions about the level of culpability required for a death sentence under *Enmund/Tison* when the jury convicts a defendant under Section 7.02(b).

1. *Culpability of Parties.* The anti-parties charge imposes a lesser culpability standard than the previous deliberateness issue that the *Cuevas* court found satisfied *Enmund/Tison*. The Texas Court of Criminal Appeals has repeatedly held “that the term ‘deliberately’ [as used in the prior version of Article 37.071] means something beyond ‘intentionally’ or ‘knowingly.’”¹⁶⁷ However, “the words ‘intended’ and ‘anticipated’ (in the anti-parties issue) appear to encompass the same or *less* culpability

162. *Id.*

163. See CHARLTON, *supra* note 156, § 10.3, at 117 (noting the deletion of the deliberateness special issue).

164. See *McFarland v. State*, 928 S.W.2d 482, 521 (Tex. Crim. App. 1996) (noting that Section 2(e) was added in order to comply with *Penry*'s requirement that the jury be able to consider, and give effect to, relevant mitigating evidence).

165. See CHARLTON, *supra* note 156, § 10.3, at 117 (discussing the 1991 amendments to Article 37.071).

166. *Id.* § 10.3, at 161. *But see* *Green v. State*, 682 S.W.2d 271, 286–88 (Tex. Crim. App. 1984) (holding that “it is error to apply directly the law of parties to any of the punishment issues in a capital murder case” (citation omitted) (emphasis omitted)).

167. *Prystash v. State*, 3 S.W.3d 522, 541 (Tex. Crim. App. 1999) (Keller, J., concurring) (citing *Ramirez v. State*, 815 S.W.2d 636, 653–54 (Tex. Crim. App. 1991); *Tucker v. State*, 771 S.W.2d 523, 537 (Tex. Crim. App. 1988); *Heckert v. State*, 612 S.W.2d 549, 552–53 (Tex. Crim. App. 1981)).

than the culpable mental states required for establishing the offense of capital murder.”¹⁶⁸

In cases in which the defendant is convicted of capital murder as a party under Section 7.02(a)(2), the lower culpability standard imposed by the anti-parties issue is unlikely to raise any *Enmund/Tison* concerns.¹⁶⁹ This is because in order to convict under Section 7.02(a)(2), the jury must find that the defendant “act[ed] with [the] intent to promote or assist the commission of the [capital murder].”¹⁷⁰ This means that the jury has already found that the defendant acted intentionally, with respect to the murder, before it even reaches the sentencing phase in which it decides whether the defendant anticipated that the offense would occur.¹⁷¹

However, under Section 7.02(b), the jury need not find that the defendant intended to promote or assist in the offense, only that the defendant “should have . . . anticipated” that the offense would occur.¹⁷² As a result, the conviction of a defendant for capital murder under Section 7.02(b) does not necessarily require a finding that the defendant killed, attempted to kill, or intended to kill as required by *Enmund*.¹⁷³ Therefore, in order for the defendant to be sentenced to death, *Tison* requires that the defendant acted with reckless indifference to life and was a major participant in the accompanying felony.¹⁷⁴ The jury never explicitly makes these *Tison* findings.¹⁷⁵

The question then, is whether the anti-parties charge, which requires that the defendant at least “anticipated that a human life would be taken,”¹⁷⁶ demonstrates the same level of culpability as *Tison*. This Comment concludes that it does not.

2. *Inadequacy of the Anti-Parties Charge.* In *Ladd v. State*, the Texas Court of Criminal Appeals rejected an *Enmund/Tison* challenge to the anti-parties issue stating that “[a]nticipating that a human life will be taken is a highly culpable mental state,

168. *Prystash*, 3 S.W.3d at 541.

169. *Lawton v. State*, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995) (holding that “[n]either *Enmund* nor *Tison* are directly applicable to Article 37.071” when the defendant is convicted as a party under § 7.02(a)(2)).

170. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003).

171. *Lawton*, 913 S.W.2d at 555.

172. TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

173. See *supra* Part II.C.1 (discussing the *Enmund* rule).

174. See *supra* Part II.C.2 (discussing the *Tison* exception).

175. See *supra* Part III (outlining the Texas capital punishment scheme).

176. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 2006).

at least as culpable as the one involved in *Tison v. Arizona*.¹⁷⁷ This holding, however, is erroneous because it contradicts the clear language of *Tison*.

In *Tison*, the Court flatly rejected the Arizona Supreme Court's interpretation that "[i]nten[t] to kill [under *Enmund*] 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."¹⁷⁸ The Court rejected this interpretation as overly broad, noting that "[p]articipants in violent felonies like armed robberies can frequently 'anticipat[e] that lethal force . . . might be used'" and concluded that "Enmund himself may well have so anticipated."¹⁷⁹ The *Tison* Court plainly recognized that with violent crimes, "the possibility of bloodshed is . . . generally foreseeable and foreseen; it is one principle reason that felons arm themselves."¹⁸⁰ Even so, the Court concluded that a defendant who anticipated violence, without major participation and reckless indifference, did not demonstrate the level of culpability the Eighth Amendment requires.¹⁸¹

Therefore, contrary to the *Ladd* court's conclusion, the anti-parties special issue, requiring only that the defendant anticipated the taking of a life, is not equivalent to the reckless indifference and major participation requirements of *Tison*. As a result, when the jury convicts a defendant of capital murder under Section 7.02(b), the jury is never required to make the requisite *Enmund/Tison* findings.

This is problematic because the lack of such a jury finding increases the risk that the sentence does not satisfy *Enmund/Tison* and because, in light of recent cases, the Constitution might require that a jury make these types of determinations.

177. *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999) (emphasis omitted); see also *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006) ("Foster obviously displayed reckless indifference to human life. The jury found as much when it answered [the anti-parties issue] in the affirmative . . ."); *Gongora v. Quarterman*, 498 F. Supp. 2d 919, 925 (N.D. Tex. 2007) ("[A] jury finding that Gongora anticipated the death of a person meets, if not surpasses, the moral-culpability threshold of 'reckless indifference to human life' under *Tison*.").

178. *Tison v. Arizona*, 481 U.S. 137, 150 (1987) (quoting *State v. Tison*, 690 P.2d 755, 757 (Ariz. 1984)).

179. *Id.* at 150–51.

180. *Id.* at 151.

181. *Id.* at 150–51.

B. The Role of Juries

In reviewing the constitutional validity of death sentences imposed under Section 7.02(b), federal habeas courts have resorted to examining the state court records of proceedings against the defendant for evidence of sufficient culpability, as allowed by *Cabana*.¹⁸² However, a finding by an appellate court that the defendant was a major participant and displayed reckless indifference hardly provides the same protection as an explicit finding of those facts by a jury.¹⁸³ Additionally, by allowing an appellate court to determine this issue, the state risks inappropriately “diffusing the sentencer’s sense of responsibility” for the decision to execute the defendant.¹⁸⁴

In *Walton v. Arizona*, Justice Stevens emphasized the historical importance of jury determinations of death eligibility.¹⁸⁵ In dissent, he argued:

[I]n 1791, when the Sixth Amendment became law . . . “the English jury’s role in determining critical facts in homicide cases was entrenched. As factfinder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury’s role in finding facts that would determine a homicide defendant’s eligibility for capital punishment was particularly well established*. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant’s state of mind. By the time the Bill of Rights was adopted, the jury’s right to make these determinations was unquestioned.”¹⁸⁶

182. *Cabana v. Bullock*, 474 U.S. 376, 387 (1986) (instructing federal habeas courts to “examine the entire course of the state court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant’s culpability has been made”); *see, e.g.*, *Clark v. Johnson*, 227 F.3d 273, 280–82 (5th Cir. 2000) (concluding that a finding by the Texas Court of Criminal Appeals that there was sufficient evidence to convict Clark of capital murder as a primary actor satisfied the *Enmund/Tison* requirements, despite the possibility that the jury could have convicted Clark merely as a party under § 7.02(b)).

183. *See Cabana*, 474 U.S. at 400 (Blackmun, J., dissenting) (“[T]he Eighth Amendment not only requires that the sentencer make *Enmund* findings before it decides that a defendant must die, but also requires that the *Enmund* factfinder be present at the trial, to see and hear the witnesses.”).

184. *Id.* at 397.

185. *Walton v. Arizona*, 497 U.S. 639, 709 (1990) (Stevens, J., dissenting).

186. *Id.* at 710–11 (quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10–11 (1989)).

The Court in *Walton*, citing its decision in *Cabana*, held that the state was not required to submit aggravating factors to the jury even though these factors determined whether the defendant would receive the death penalty.¹⁸⁷ Eventually, however, Justice Stevens's view prevailed; in *Apprendi v. New Jersey*, the Court undermined the holding of *Walton*,¹⁸⁸ and ultimately overruled it in *Ring v. Arizona*.¹⁸⁹

1. *The Role of Juries after Apprendi and Ring.* In *Apprendi*, the Court acknowledged the importance of juries, requiring that a jury must find all facts that increase the maximum penalty for a crime.¹⁹⁰ The Court, however, declined to extend this holding to capital sentencing schemes based on its earlier decision in *Walton*.¹⁹¹

In *Ring v. Arizona*, the Court revisited the issue in the context of the Arizona capital sentencing scheme it previously upheld in *Walton*.¹⁹² The jury found Timothy Ring guilty of felony murder, but the trial evidence failed to prove that he actually murdered the victim or that he played a major role in the robbery that led to the murder.¹⁹³ Arizona law allowed the trial judge, sitting alone, to determine the existence of additional aggravating or mitigating factors that would warrant imposition of the death penalty.¹⁹⁴ After the sentencing hearing, the trial judge concluded that the *Enmund/Tison* factors were satisfied and sentenced Ring to death.¹⁹⁵

The Supreme Court invalidated this sentence, holding that “[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”¹⁹⁶ Shortly after *Ring*, the Arizona legislature

187. *Id.* at 648–49 (majority opinion).

188. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

189. *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that “*Apprendi*’s reasoning is irreconcilable with *Walton*’s holding”).

190. *Apprendi*, 530 U.S. at 490 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

191. *Id.* at 496.

192. *Ring*, 536 U.S. at 588–89.

193. *Id.* at 591–92.

194. *Id.* at 592–93.

195. *Id.* at 592–95.

196. *Id.* at 589; *see also id.* at 612 (Scalia, J., concurring) (“We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.”).

quickly revised the invalidated death penalty scheme.¹⁹⁷ The amended law dictates that a jury must make all required findings of fact before imposing a death sentence.¹⁹⁸ Because the Texas scheme, like the Arizona scheme at issue in *Ring*, does not require a jury to make the *Enmund/Tison* findings, the Texas scheme may also be constitutionally deficient under *Ring*.¹⁹⁹

2. *Effect of Apprendi and Ring in Texas.* While the Arizona death penalty scheme at issue in *Ring* differs from the Texas scheme, the difference is more in form than in substance. Rather than utilize a narrow definition of capital murder on the front end, as the Texas scheme does,²⁰⁰ the Arizona scheme at issue in *Ring* relied on the finding of at least one of several enumerated aggravating factors during the sentencing phase to determine whether a first-degree murder would be punishable by death.²⁰¹ However, the aggravating factors considered in the Arizona scheme are similar to the various types of capital murder described in the Texas statute.²⁰²

It is unclear how *Apprendi* and *Ring* will ultimately affect the Texas death penalty scheme. Two years after *Ring*, in *Blakely v. Washington*, the Court held “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose

197. Editorial, *Death Penalty: A Botched Fix by Legislature*, TUCSON CITIZEN, Aug. 6, 2002, at 4B (reporting that the governor called legislators into special session to amend the state’s death penalty law).

198. ARIZ. REV. STAT. ANN. § 13–703.01(P) (Supp. 2007) (“The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence.”).

199. See *supra* Part IV.A.2 (showing that the *Enmund/Tison* requirements are not addressed by the jury when a defendant is convicted under Section 7.02(b)).

200. See *supra* Part III.A (describing the Texas capital murder statute).

201. *Ring*, 536 U.S. at 592–93, 593 n.1.

202. Compare *id.*, with TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2007). Several of the enumerated aggravating circumstances in the Arizona scheme would also qualify the defendant for capital murder in Texas. For example, Arizona’s aggravating circumstances included prior conviction of an offense for which the death penalty or a life sentence could be imposed, offenses committed for compensation, offenses committed while in custody or while on authorized or unauthorized release, conviction of one or more other homicides committed during the commission of the offense, and murder of a police officer. Similarly, murders while incarcerated for murder or capital murder, murders for remuneration, murders of prison employees while incarcerated, murders during prison escapes, multiple murders during the same criminal transaction, and murders of police officers can qualify as capital murder in Texas. There are also some important differences between the two schemes. For example, Texas includes murders during the course of several enumerated felonies, as well as murder of firefighters, judges, and justices, while the Arizona statute in *Ring* did not. Additionally, the Arizona statute in *Ring* considered whether the offense was committed “in an especially heinous, cruel or depraved manner,” while Texas does not include such a factor.

solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”²⁰³ Because *Enmund* imposes “a substantive limit[] on sentencing,” restricting who may be put to death, a life sentence is the maximum sentence allowed by the jury verdict if *Enmund/Tison* is not met.²⁰⁴ In Texas, courts could interpret *Apprendi/Ring* to end the current practice of making *Enmund/Tison* findings at the appellate level, and to require the jury to find that the defendant either killed or intended to kill, as required by *Enmund*, or that the defendant was a major participant and acted with reckless indifference to life, as required by *Tison*.

The federal district court in *Foster v. Dretke* followed this interpretation when it granted habeas relief on the basis that a jury had not determined the “major participation” requirement of the *Tison* rule.²⁰⁵ The court concluded that Foster’s conviction was unconstitutional because the jury had not determined all the necessary facts as required by *Apprendi/Ring*.²⁰⁶ Although the Fifth Circuit ultimately reversed this decision in *Foster v. Quarterman*, the court based its ruling on the non-retroactivity of *Apprendi*, *Ring*, and *Blakely* rather than finding them inapplicable to the *Enmund/Tison* findings generally.²⁰⁷

More recently, in *Gongora v. Quarterman*, the district court raised the issue of whether *Apprendi* and *Ring* required a jury finding of major participation under *Tison*, but did not rule on the question because the defendant did not raise it on appeal.²⁰⁸ Thus, it appears that the federal courts may be poised to interpret *Apprendi* and its progeny to require jury findings of the *Enmund/Tison* criteria in Texas death penalty cases. While this would be an improvement over the current system, it still would

203. *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

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

205. *Foster v. Dretke*, 2005 U.S. Dist. LEXIS 13862, at *82–83 (W.D. Tex. Mar. 3, 2005) (“The Supreme Court’s recent opinions in [*Apprendi*, *Blakely*, and *Ring*] make clear that only a jury can make the factual determinations necessary to impose a sentence of death on a criminal defendant.” (footnotes omitted)).

206. *Id.*

207. *Foster v. Quarterman*, 466 F.3d 359, 369–70 (5th Cir. 2006) (“Foster’s conviction became final, however, in April 2000 . . . before *Apprendi*, *Ring*, and *Blakely* were decided. None of those cases applies retroactively. . . . Therefore, they do not apply to this case.” (citations omitted)).

208. *Gongora v. Quarterman*, 498 F. Supp. 2d 919, 924–25, 925 n.5 (N.D. Tex. 2007). Instead, Gongora challenged the lack of a jury finding of the reckless indifference prong of *Tison*, and the court rejected his challenge based on the jury’s affirmative response to the anti-parties special issue. *Id.* But see *supra* Part IV.A.2 (discussing the Texas courts’ use of the anti-parties charge to satisfy the *Tison* reckless indifference requirement and the constitutional shortcomings of this approach).

not address the underlying problems of arbitrariness and excessiveness inherent in the *Tison* exception.

C. Risk of Arbitrary Punishments

Even if the Texas scheme ensured that all death sentences fulfilled the mandate of *Enmund/Tison*, the case-by-case analysis required by *Tison* would continue to create a substantial risk of arbitrary and capricious death sentencing.²⁰⁹

In his dissenting opinion in *McGautha v. California*, a pre-*Furman* case, which held that death penalty sentencing could permissibly be “committ[ed] to the untrammelled discretion of the jury,”²¹⁰ Justice Brennan gave this apt warning: “A vague statute may be applied one way to one person and a different way to another. Aside from the fact that this in itself would constitute a denial of equal protection, . . . the reasons underlying different applications to different individuals may in themselves be constitutionally impermissible.”²¹¹

Following *Furman*, the Court sought to limit arbitrary death penalty sentencing by requiring states to adequately guide the jury’s discretion. States must provide jurors with “clear and objective standards” upon which to base their decisions²¹² and must “genuinely narrow the class of persons eligible for the death penalty.”²¹³

The *Tison* standard does not adequately guide the jury’s decisionmaking. Reckless indifference and major participation do not constitute “clear and objective standards” as required by the Eighth Amendment. Instead, these standards require the jury to make “highly subjective evaluative judgment[s] with no common core of meaning.”²¹⁴

209. TEX. DEFENDER SERV., *supra* note 144, at 34 (arguing that the use of party liability theories in the Texas death penalty scheme lead to arbitrary sentencing and calling for their exclusion); *see also* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 20 (2006), available at <http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf> (arguing that the application of the *Tison* rule “permits execution based on vague, highly subjective judgments about culpability, again creating a danger of overbroad, random, arbitrary, and capricious application of the death penalty”).

210. *McGautha v. California*, 402 U.S. 183, 207 (1971).

211. *Id.* at 259 n.9 (Brennan, J., dissenting) (citations omitted).

212. *Gregg v. Georgia*, 428 U.S. 153, 197–98 (1976) (citation omitted).

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

214. *Rosen*, *supra* note 88, at 1154 (“A court determining whether a defendant acted with reckless indifference to human life is undertaking a completely different task from a court determining intent to kill. Instead of deciding whether a simple historical fact is present, a court looking at reckless indifference to human life is essentially expressing a

In *Godfrey*, the Court invalidated an aggravating circumstance that conditioned death eligibility on whether the jury found the offense “outrageously or wantonly vile, horrible and inhuman.”²¹⁵ The Court found this standard too broad to restrain the jury’s discretion because “[a] person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’”²¹⁶ Similarly, sensible jurors could almost always reasonably conclude—especially with the benefit of hindsight—that a defendant’s willing participation in a crime during which an intentional killing occurred invariably demonstrates reckless indifference to human life.²¹⁷

For these reasons, *Tison*’s reckless indifference/major participation standard does not provide the jury with clear objective standards nor does it adequately narrow the class of defendants eligible for the death penalty when a defendant was convicted as a party to an offense. As a result, sentences imposed under these standards are at risk of being unconstitutionally arbitrary and capricious.

D. Risk of Excessive Punishments

In addition to prohibiting arbitrary sentencing, the Eighth Amendment also forbids excessive punishments.²¹⁸ Excessive punishment includes those that are “grossly out of proportion to the severity of the crime” as well as those that make “no measurable contribution to acceptable goals of punishment.”²¹⁹ The low level of culpability required for a death sentence under the Texas system renders the punishment excessive for defendants convicted solely under Section 7.02(b).

1. *Proportionality.* The Supreme Court has consistently and repeatedly urged that the states reserve the death penalty for “a narrow category of the most serious crimes.”²²⁰ While murders are often among the “most extreme of crimes” for which

moral judgment, a judgment of the culpability of, and not merely the purpose underlying, a defendant’s acts. . . . [T]his process reflects that the concept of reckless indifference is not a fact but a highly subjective evaluative judgment with no common core of meaning.”).

215. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

216. *Id.* at 428–29.

217. *See Rosen, supra* note 88, at 1129.

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

219. *Id.*

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

the Court has found the death penalty a suitable sanction,²²¹ this “most severe punishment”²²² is undoubtedly a disproportionate sanction for a defendant who did not murder, but was merely convicted as a party to murder. Indeed, the Texas capital murder statute reflects this principle by limiting the death penalty “to a small group of narrowly defined and particularly brutal offenses.”²²³

In *Coker v. Georgia*, the Court determined that the death penalty is a “grossly disproportionate” penalty for the crime of rape of an adult, noting that Georgia law did not even impose the death penalty for deliberate murder, absent additional aggravating circumstances.²²⁴ Similarly, Texas law does not impose the death penalty for deliberate murder unless the murder was committed within one of the aggravating circumstances enumerated in the capital murder statute.²²⁵ As such, it is “difficult to accept the notion” that the co-conspirator “should be punished more heavily than the deliberate killer as long as the [defendant] does not himself take the life of his victim.”²²⁶

For that reason, there is a substantial risk of unconstitutionally disproportionate punishment when defendants convicted under Section 7.02(b), who did not kill or intend to kill, receive the death penalty. Closely related to the question of proportionality is the issue of whether a punishment contributes “to acceptable goals of punishment,”²²⁷ which in the case of the death penalty, include retribution and deterrence.²²⁸

2. *Deterrence and Retribution.* The diminished culpability of a co-conspirator who does not kill or intend to kill undermines both the deterrent and retributive justifications for the death

221. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“[The death penalty] is an extreme sanction, suitable to the most extreme of crimes.”).

222. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

223. *Jurek v. Texas*, 428 U.S. 262, 270 (1976) (plurality opinion) (quoting *Jurek v. State*, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975)).

224. *Coker*, 433 U.S. at 592, 600; see also *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–51 (2008) (extending *Coker* by prohibiting the death penalty for the crime of rape of a child).

225. See TEX. PENAL CODE ANN. §§ 19.02, 19.03 (Vernon 2003 & Supp. 2007) (defining the offenses of murder and capital murder).

226. *Coker*, 433 U.S. at 600.

227. *Id.* at 592.

228. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). *But see id.* at 241 (Marshall, J., dissenting) (arguing that the death penalty is always “unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution”).

penalty. The retributive rationale finds support in the idea “that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”²²⁹ Following this premise, the Court has sought to limit the use of the death penalty, “the most extreme sanction available to the State,” to those “most deserving of execution” based on their individual culpability and the severity of their crime.²³⁰ The execution of a co-conspirator for a killing that he or she did not commit or intend to commit cannot legitimately serve the retributive goal of ensuring that defendants get what they deserve.²³¹ Texas recognizes this principle in its statutes by defining different degrees of murder with lesser punishments for those committed with less culpable mental states.²³²

The deterrence function of the death penalty is based on the idea that, for some murderers, the possibility of execution “may well enter into the cold calculus that precedes the decision to act.”²³³ The Court in *Enmund* thought it “likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.’”²³⁴ In the case of a defendant who does not actually kill or intend to kill the victim, the *Enmund* Court concluded that the threat of death is unlikely to serve its function as a deterrent.²³⁵ For the same reasons, the death penalty does not “measurably contribute” to either the deterrent or retributive goals when applied to defendants convicted merely as parties under Section 7.02(b), and therefore, “it ‘is nothing more than the purposeless and needless imposition

229. *Id.* at 184 (plurality opinion).

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

231. *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *see also* HOLMES, *supra* note 139, at 40 (“The desire for vengeance imports an opinion that its object is actually and personally to blame.”). *But see* *Gregg*, 428 U.S. at 240–41 (Marshall, J., dissenting) (arguing that retribution cannot be a legitimate goal of punishment because “the taking of life ‘because the wrongdoer deserves it’ surely must [violate the Eighth Amendment], for such a punishment has as its very basis the total denial of the wrongdoer’s dignity and worth”).

232. *See* TEX. PENAL CODE ANN. § 19.04 (Vernon 2003) (manslaughter); TEX. PENAL CODE ANN. § 19.05 (Vernon 2003) (criminally negligent homicide); *see also* TEX. PENAL CODE ANN. § 19.02(d) (Vernon 2003) (providing for a lesser penalty for murder under the influence of “sudden passion”).

233. *Gregg*, 428 U.S. at 186 (footnote omitted).

234. *Enmund*, 458 U.S. at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)). This conclusion was later cited approvingly in *Atkins*, 536 U.S. at 319.

235. *Enmund*, 458 U.S. at 798–99.

of pain and suffering,' and hence an unconstitutional punishment."²³⁶

V. REFORMING THE TEXAS SCHEME

The Texas legislature should amend the capital murder scheme in order to ensure that death sentences imposed comply with the Constitution and to protect the Eighth Amendment rights of defendants. The following Part proposes two approaches for reforming the system. The legislature should amend Section 7.02 to prohibit the use of conspiracy liability in death penalty cases. In the alternative, the legislature should amend the anti-parties special issue of Article 37.071 to require that juries explicitly address the requirements of *Enmund/Tison*.

A. Amending Article 37.071

Under the current anti-parties charge, a jury may sentence a defendant to death for an offense committed by another that the defendant merely anticipated.²³⁷ This level of culpability falls below the reckless indifference to life standard that *Tison* requires.²³⁸ Attempts to rectify this deficiency at the appellate level are potentially inadequate, and further, *Apprendi/Ring* may even require a jury determination of culpability before sentencing a defendant to death.²³⁹

In order to ensure that *Enmund/Tison* and *Apprendi/Ring* are satisfied, the legislature should amend the anti-parties special issue by replacing the phrase "or anticipated that a human life would be taken"²⁴⁰ with "or whether the defendant was a major participant in the conduct which led to the death of the deceased and acted with reckless indifference to human life."²⁴¹ This modification would require the jury to find beyond a reasonable doubt that the defendant at least possessed the degree of culpability required by *Tison* before sentencing the defendant to death. This modification would ensure that Texas does not execute defendants who do not meet the *Enmund/Tison*

236. *Id.* at 798 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

237. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (Vernon 2006).

238. *See supra* Part IV.A.2 (showing that *Tison* requires a higher level of culpability than the anti-parties special issue).

239. *See supra* Part IV.B (arguing that *Enmund/Tison* findings made by an appellate court are inadequate and that *Apprendi/Ring* may require a jury determination of the *Enmund/Tison* criteria).

240. TEX. CRIM. CODE ANN. art. 37.071, § 2(b)(2) (Vernon 2006).

241. This proposed language is adapted directly from the *Tison* requirements.

requirements; however, it does not address the risks of unconstitutional executions inherent in the *Tison* standards.²⁴²

B. Amending Section 7.02(b)

While the above approach would reduce the risk of unconstitutional death sentences, there is still a risk of arbitrary sentencing due to the vague standards *Tison* created.²⁴³ In addition, when a defendant did not kill or intend to kill, use of the death penalty risks imposing a disproportionate punishment that does not measurably serve the goals of retribution and deterrence.²⁴⁴ For these reasons, Texas should amend Section 7.02(b) to prohibit its use in death penalty cases.

This modification is unlikely to undermine the social purposes used to justify the death penalty. This approach would only affect co-conspirators who did not intend to kill. Primary actors would continue to be directly liable under Section 19.03.²⁴⁵ Accomplices who act intentionally to promote or assist in the commission of offenses could still be convicted under Section 7.02(a)(2).²⁴⁶

The only defendants who would no longer be eligible for the death penalty under this proposed modification are those who did not kill or intend to kill. Such defendants are already constitutionally ineligible under *Enmund* unless they meet the reckless indifference/major participation requirements of *Tison*. Excluding defendants who might otherwise be eligible under *Tison* is justified by the rationale of *Enmund* as well as by the Texas Penal Code.

According to *Enmund*, the death penalty is unlikely to deter defendants who do not intend to kill, and the low level of culpability of such defendants undermines the retributive goal of seeing that criminals get what they deserve.²⁴⁷ Additionally, this change would not frustrate the state's interest in punishing those "nonintentional murderers" described by the *Tison* Court, who

242. See *supra* Part IV.C and IV.D (addressing the risks of arbitrary and excessive punishments when defendants who did not kill or intend to kill are sentenced to death); see also *supra* Part II.D.3 (questioning the continuing validity of the *Tison* exception).

243. See *supra* Part IV.C (discussing the risk of arbitrary punishments inherent in the *Tison* standard).

244. See *supra* Part IV.D (arguing that the death penalty is an excessive punishment for defendants who did not kill or intend to kill).

245. TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2007).

246. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003).

247. See *supra* Part II.C.1 (analyzing the *Enmund* Court's rationale).

“may be among the most dangerous and inhuman of all.”²⁴⁸ As examples of such murderers, the *Tison* Court described someone who, indifferent to whether or not the victim died, tortured their victim or shot them during a robbery.²⁴⁹

Texas, however, has already determined that these types of killings do not warrant the death penalty. Under the penal code, a defendant who tortures a victim to death without intending to kill has committed noncapital murder.²⁵⁰ Likewise, a defendant who unintentionally kills during the course of a felony has committed felony murder and not capital murder.²⁵¹ Therefore, the elimination of conspiracy liability as a basis for capital murder convictions would only disqualify from the death penalty a narrow group of defendants, for whom a death sentence is either plainly unconstitutional under *Enmund* or constitutionally suspect under *Tison*.

If the Texas legislature does not act, courts should require the jury to make *Enmund/Tison* findings at the trial court level. If the jury does not make such findings, appellate courts should commute the death sentences of defendants convicted solely as parties under Section 7.02(b).

VI. CONCLUSION

The death penalty is an excessive and therefore unconstitutional punishment for defendants convicted solely as parties under Section 7.02(b). Section 7.02(b) allows for capital murder convictions when a co-conspirator commits an offense that merely “should have been anticipated” by the defendant.²⁵² Article 37.071 adds an additional layer of protection for the defendant at the sentencing phase, requiring a finding that the defendant at least “anticipated that a human life would be taken.”²⁵³ Nevertheless, this anti-parties charge does not adequately ensure that only the worst offenders receive death

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

249. *See supra* note 78 (quoting from the *Tison* Court’s examples of unintentional murders that are dangerous and inhumane).

250. *See* TEX. PENAL CODE ANN. § 19.02(b)(2) (Vernon 2003) (defining murder to include a defendant who “intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual”).

251. TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003). However, if the defendant commits an intentional murder during one of several enumerated felonies, such as robbery, then he or she commits capital murder. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2007) (defining capital murder).

252. *See supra* Part III.B (explaining the mechanics of 7.02(b)).

253. TEX. CODE CRIM. PROC. ANN. art 37.071, § 2(b)(2) (Vernon 2006).

sentences and that those sentences are proportional to each defendant's individual culpability.²⁵⁴

Additionally, the Eighth Amendment prohibits the execution of a defendant who did not kill or intend to kill unless the defendant showed reckless indifference to life and was a major participant in the accompanying crime.²⁵⁵ Neither Section 7.02(b) nor Article 37.071 demand this level of culpability.²⁵⁶ Furthermore, the Texas scheme does not require a jury to examine these standards as required by *Apprendi/Ring*.²⁵⁷ Moreover, even if a jury finds that a defendant meets the *Tison* requirements, *Tison* imposes vague, subjective criteria that create a substantial risk of unconstitutionally arbitrary and excessive punishments.²⁵⁸

In short, Texas should not execute defendants for murders they did not commit solely based on their associations with the actual killers. While the actions of defendants like Sandra Lockett, Earl Enmund, and Kenneth Foster are certainly not innocent, their offenses are not among the "most extreme of crimes"²⁵⁹ for which the death penalty should be reserved.

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254. See *supra* Part IV.A.2 (arguing that, according to *Tison*, merely anticipating that a life will be taken does not satisfy the culpability requirement of *Enmund*).

255. See *supra* Part II.C (discussing the Court's interpretation of the Eighth Amendment in *Enmund* and *Tison*).

256. See *supra* Part IV (arguing that because Section 7.02(b) only requires that the defendant should have anticipated the killing, and because Article 37.071 only requires that the defendant anticipated the killing, neither rule adequately satisfies the reckless indifference to life requirement of *Tison*).

257. See *supra* Part IV.B (arguing that *Apprendi/Ring* requires juries to find the *Enmund/Tison* criteria).

258. See *supra* Part IV.C (arguing that the *Tison* exception to *Enmund* leads to an unacceptable risk of arbitrary punishment); *supra* Part IV.D (arguing that the death penalty is likely a disproportionate punishment for defendants convicted merely as parties under Section 7.02(b)).

259. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).