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Richard W. Garnett

Notre Dame Law School, rgarnett@nd.edu

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Depravity Thrice Removed: Using the “Heinous, Cruel, or Depraved” Factor To Aggravate Convictions of Nontriggermen Accomplices in Capital Cases

Richard W. Garnett

*Actus Non Facit Reum, Nisi Mens Sit Rea*¹

INTRODUCTION

On July 30, 1978, Raymond, Ricky, and Donald Tison broke their father, Gary Tison, and his cellmate, Randy Greenawalt, out of the Arizona State Prison.² Delayed by a flat tire, the fugitives flagged down a passing car belonging to the Lyons family. The Tisons and Greenawalt drove the Lyons out into the desert and forced them to get out of the car and stand in the headlights. Gary Tison then instructed his sons to go and get the Lyons some water and, after the brothers left, he and Greenawalt brutally executed the whole family. Not only were the Tison brothers surprised by the killing, they later claimed their father had promised no one would be hurt in the escape.³ Raymond and Ricky Tison were convicted of murdering the Lyons family and sentenced to death. Although the brothers intended neither the killings nor the particular manner in which they were committed, the trial court found, as an aggravating factor, that the killings were “especially heinous.”⁴

1. “An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal.” BLACK’S LAW DICTIONARY 36 (6th ed. 1990).

2. The facts of the Tison cases are related in *Tison v. Arizona*, 481 U.S. 137, 139-41 (1987); *State v. Tison*, 633 P.2d 335, 339-40 (Ariz. 1981); *State v. Tison*, 633 P.2d 355, 357-58 (Ariz. 1981).

3. *Tison*, 481 U.S. at 166-67 (Brennan, J., dissenting); *State v. Tison*, 690 P.2d 755, 763 (Ariz. 1984) (Feldman, J., concurring in part, dissenting in part).

4. *Tison*, 481 U.S. at 142. The precise wording in the Arizona statute is “especially heinous, cruel or depraved.” ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989). Some states use different, but functionally equivalent, terms. *See, e.g.*, FLA. STAT. ANN. ch. 921.141(5)(h) (Harrison 1991) (“heinous, atrocious, or cruel”); GA. CODE ANN. § 17-10-30(b)(7) (1990) (“outrageously or wantonly vile, horrible, or inhuman”); MODEL PENAL CODE § 210.6(3)(h) (Proposed Official Draft 1962) (“especially heinous, atrocious or cruel, manifesting exceptional depravity”). The trial court also found, as aggravating factors, that the brothers had “created a grave risk of death to others (not the victims)” and that the “murders had been committed for pecuniary gain.” *Tison*, 481 U.S. at 142. The Arizona Supreme Court reversed the “grave risk” finding, but upheld the other two. *Id.* at 143.

In *Tison v. Arizona*,⁵ the Tison brothers' appeal from their death sentences, the U.S. Supreme Court held that a nontriggerman convicted of first-degree felony murder could constitutionally be executed if he was a major participant in the crime and if he exhibited a reckless disregard for human life.⁶ This decision blurred the bright-line rule announced just five years earlier in *Enmund v. Florida*,⁷ which limited the death penalty to defendants who kill, attempt to kill, or at least intend to kill. *Tison* thus dramatically increased the exposure of nontriggermen to capital punishment, undercutting the death penalty's limited purpose of identifying and punishing only the most culpable killers.⁸

In theory, *Tison's* standard—"major participation with reckless disregard for human life"—should expose only a limited class of nontriggermen defendants to the death penalty. However, *Tison* is only part of the story; its standard does not come into play until a defendant is sentenced to death under the relevant state statute. In most states, defendants are death-eligible only if the sentencer finds one or more statutory aggravating factors.⁹ However, nearly all death penalty states use a vague and manipulable¹⁰ aggravating factor that singles out the murders or murderers that are somehow "worse"—more "heinous," "cruel," "atrocious," or "depraved"—than most.¹¹

5. 481 U.S. 137 (1987).

6. The term "nontriggerman," admittedly awkward and gender-specific, is the common label for a person who does not actually kill but is an accomplice to a felony in which a killing occurs. See, e.g., *Tison*, 481 U.S. at 175 (Brennan, J., dissenting) (using term "nontriggerman"); Douglas W. Schwartz, Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857 (1985) (same).

7. 458 U.S. 782 (1982).

8. See *Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976) (plurality opinion) ("Capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."). But see ALFRED CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 173, 199 (1961) ("For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."). For a helpful discussion of the theoretical issues surrounding the execution of nontriggermen, see generally Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17 (1979).

9. See, e.g., IDAHO CODE § 19-2515(g) (1987) (requiring that at least one aggravating circumstance be found beyond reasonable doubt before death penalty may be imposed); cf. ARIZ. REV. STAT. ANN. § 13-703(E) (1989) ("[T]he court . . . shall impose a sentence of death if [it] finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances [calling for] leniency.").

10. See Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 943 (1986) (discussing criticism of "especially heinous" aggravating factor); see also *Maynard v. Cartwright*, 486 U.S. 356 (1988) (striking down "especially heinous" circumstance for vagueness); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (invalidating "outrageously or wantonly vile" factor for vagueness).

11. See Rosen, *supra* note 10, at 943 (describing various terms used in "especially heinous" aggravating factors); *supra* note 4.

In cases involving nontriggermen, the use of this manner-specific, "heinous, cruel, or depraved" aggravating factor (hereinafter "HCD")¹² creates an intolerable, and unconstitutional, risk of arbitrary and capricious sentencing by imputing responsibility for the particularly horrific manner of killing to a defendant whose responsibility for the killing itself is attenuated. In fact, the nontriggerman convicted of felony murder is *three times removed* from the locus of blame: the killing is murder by reason of the felony murder rule, the defendant is responsible for the killing under accomplice liability principles, and he faces the executioner because of the manner in which another person killed. Such a defendant may be at the outer reaches of personal culpability, yet still face death.

Tison creates the risk that sentencers will apply the HCD factor to nontriggermen who are major participants in the felony and who were recklessly indifferent to human life, but who did not intend or imagine that their co-felons would chose to kill in a gruesome manner. The *Tison* finding is *necessary* but not *sufficient* for a death sentence, and should not be confused or conflated with the issue of the applicability of the HCD factor. The courts *are* confused, however, and *do* conflate these distinct questions.¹³ Until the confusion is resolved, peripheral defendants remain under the shadow of the capital sanction.

This Note explores the peculiar confluence of the constitutional standards governing the execution of nontriggermen with those controlling the operation and construction of statutory aggravating factors. It argues that the sentencer may not constitutionally apply the HCD factor to a nontriggerman who did not intend the particular "heinous, cruel, or depraved" manner of killing. Part I provides a broad overview of death penalty jurisprudence since *Furman v. Georgia*¹⁴ and reviews the constitutional standards governing the execution of nontriggermen. Part II examines aggravating factors in general and the HCD factor in particular. Part III analyzes states' efforts to apply the HCD factor to nontriggermen without meaningful direction from the U.S. Supreme Court. Part

12. This Note uses the phrase "heinous, cruel, or depraved" ("HCD") for all similar factors. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989); COLO. REV. STAT. ANN. § 16-11-103(6)(i) (West 1990); CONN. GEN. STAT. ANN. § 53a-46a(h)(4) (West 1985); 21 U.S.C.A. § 848(n)(12) (West Supp. 1993).

13. Compare *Ex parte Bankhead*, 585 So. 2d 112, 125 (Ala. 1991) (emphasizing the manner of killing, not defendant's actual participation) and *Haney v. State*, 603 So. 2d 368, 386 (Ala. Crim. App. 1991) (emphasizing actual pain and fear suffered by victim and not defendant's intent) with *Omelus v. State*, 584 So. 2d 563, 566 (Fla. 1991) (HCD factor should not be applied absent evidence defendant knew or foresaw the manner of killing) and *Williams v. State*, 622 So. 2d 456, 463-64 (Fla. 1993) (HCD factor should not be applied vicariously without proof that defendant intended manner of killing). For an example of similar confusion in the federal courts, compare *White v. Wainwright*, 809 F.2d 1478, 1485 (11th Cir. 1987) (holding that nontriggerman defendant was "sufficiently involved" in crime and thus application of HCD factor was constitutional) with *Hopkinson v. Shillinger*, 866 F.2d 1185, 1214-15 (10th Cir. 1989) (assuming that Constitution precludes application of aggravating factor without proof that defendant intended cruelty). The issue was presented to the U.S. Supreme Court in September 1993, but the Court denied certiorari. *Herrera v. Arizona*, 114 S. Ct. 398 (1993).

14. 408 U.S. 238 (1972) (per curiam).

IV argues that, even after *Tison*, the HCD factor should not be applied to a nontriggerman accomplice unless the state establishes a connection between the accomplice's state of mind and the triggerman's manner of killing. Without this connection, the factor cannot serve its purpose of identifying the most horrible crimes and criminals and unconstitutionally denies defendants an individualized determination of blameworthiness. Finally, Part V proposes a model HCD statute.

I. BACKGROUND: CONSTITUTIONALITY OF CAPITAL PUNISHMENT FOR NONTRIGGERMAN

The nontriggerman capital defendant is created by the co-operation of the felony murder rule and accomplice liability. Under *Tison*, nontriggermen who are convicted of felony murder and sentenced to death may be executed so long as they were major participants in the underlying crime and were recklessly indifferent to human life. Yet *Tison* did not relax the constitutional mandate against arbitrary administration of the death penalty. The use of the HCD aggravating factor is therefore unconstitutional in nontriggerman cases, because it allows states to impute the heinous manner of killing to an already vicariously liable defendant who may not have intended such a gruesome act.

A. *The Felony Murder Rule and Accomplice Liability*

The felony murder rule provides that if a person kills another in the perpetration or attempted perpetration of a felony, the killing is murder.¹⁵ The rule transfers a defendant's intent to commit the underlying felony to the—perhaps accidental—homicide.¹⁶ By creating a "constructive intent"¹⁷ to kill, the rule relieves the state of proving premeditation or malice. Under principles of accomplice liability,¹⁸ accomplices to a felony are liable for killings committed by a co-felon in the course of the crime.¹⁹ The "underlying

15. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.5(a)-(b) (2d ed. 1986). For an instructive judicial discussion of the felony murder rule, see *State v. Middlebrooks*, 840 S.W.2d 317, 336-38 (Tenn. 1992).

16. See Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 59 (1956) ("The accused [is] treated as if the particular type of malice required for murder existed. . . . The felony-murder rule is thus a rule for establishing the *mens rea* of murder . . .").

17. *State v. O'Blasney*, 297 N.W.2d 797, 798 (S.D. 1980).

18. "It may generally be said that one is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement or failed to perform a legal duty to prevent it (b) with the intent thereby to promote or facilitate commission of the crime." LAFAVE & SCOTT, *supra* note 15, § 6.7. See generally Morris, *supra* note 16 (discussing peculiar applications of rules of accomplice liability, including felony murder rule).

19. See *Tison v. Arizona*, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting) ("The doctrine thus imposes liability on felons for killings committed by cofelons during a felony."); LAFAVE & SCOTT, *supra* note 15, § 7.5(c); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 663-68 (1984) (discussing felony murder and vicarious criminal liability). Accomplices have long been held accountable for the crimes of others. See *Queen v. Saunders & Archer*, 75 Eng. Rep. 706 (1575) (holding defendant

felonious intent [supplies] the required mens rea for the homicidal actus reus and [imposes] vicarious liability for the acts of another."²⁰

The felony murder rule has been characterized as a rule of strict accomplice liability: "[A] felon is held strictly liable for *all* killings committed by him or his accomplices in the course of the felony."²¹ This aspect of the rule often leads to perverse fact patterns. For instance, felons have been convicted of murder when the victim kills a co-felon or a third party,²² when a third party kills another during the felony,²³ and even when a co-felon kills himself.²⁴ Despite strange results and consistent criticism,²⁵ the felony murder rule persists in nearly every American jurisdiction²⁶ and its constitutionality has not been seriously challenged.²⁷

liable as accessory of killer for supplying poison). *See generally* LAFAYE & SCOTT, *supra* note 15, § 6.7-8; Francis B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 690-701 (1930) (discussing development of accessory and accomplice liability). However, the theoretical underpinnings of accomplice liability are unclear. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 94-99 (1985) (explaining and criticizing accomplice liability). It has been forcefully criticized for its departure from the criminal law's general concern with moral accountability and blameworthiness. *Id.* at 106; *see also* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988).

20. *State v. Middlebrooks*, 840 S.W.2d 317, 336 (Tenn. 1992).

21. *People v. Stamp*, 2 Cal. App. 3d 203, 210 (1969); *see also* *People v. Washington*, 402 P.2d 130, 133 (Cal. 1965) ("The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1578 (1978) (giving felony murder as example of vicarious criminal liability); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at the Constitutional Crossroads*, 70 CORNELL L. REV. 446, 459 (1985).

22. *See* *People v. Cabalero*, 87 P.2d 364 (Cal. Dist. Ct. App. 1939).

23. *See generally* Recent Development, *Criminal Law: Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496 (1965) (discussing California Supreme Court's attempts to restrict the scope of the felony murder rule).

24. *See* *Commonwealth v. Bolish*, 391 Pa. 550, 138 A.2d 447, *cert. denied*, 357 U.S. 931 (1958). For other strange applications and examples of the felony murder rule and accomplice liability, *see* Morris, *supra* note 16.

25. Oliver Wendell Holmes protested the felony murder rule's harshness, noting that "[i]f the object of the rule is to prevent . . . accidents, 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." OLIVER W. HOLMES, JR., *THE COMMON LAW* 58 (M. DeWolfe ed., 1963); *see also* *People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980) (calling rule "a historic survivor for which there is no logical or practical basis for existence in modern law" (citation omitted)); THOMAS B. MACAULAY ET AL., *A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS* 111 (Legal Classics Library 1987) (1837) ("To punish as a murderer every man who, while committing a heinous offense, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life."); 3 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 75 (London, Macmillan 1883) (calling rule a "monstrous doctrine"); MODEL PENAL CODE § 201.2 cmt. 4, at 37 (Tent. Draft No. 9, 1959) (noting that "principled argument in [the rule's] defense is hard to find").

26. Roth & Sundby, *supra* note 21, at 446 n.6 (listing states without felony murder rule).

27. *But see* George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 425 (1981) (suggesting equal protection and Sixth Amendment challenges); Roth & Sundby, *supra* note 21 (arguing that rule runs afoul of due process and Eighth Amendment guarantees); *State v. Herrera*, 850 P.2d 85, 94-95 (Ariz. 1993) (rejecting constitutional challenge).

B. *The Death Penalty for Nontriggermen*

1. *The Death Penalty*

While an accomplice may be convicted of a felony murder, it does not necessarily follow that he may be sentenced to death. In *Furman v. Georgia*,²⁸ after nearly two hundred years of tacit consent,²⁹ the Supreme Court abolished the death penalty because of the allegedly arbitrary and discriminatory manner in which death sentences were meted out.³⁰ The Court held that "the imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."³¹

The states responded quickly, enacting new statutes designed to cure the arbitrariness and discrimination criticized in *Furman*. Two types of capital statutes emerged: statutes *requiring* the death penalty for certain crimes,³² and statutes attempting to narrow and guide sentencers' discretion through specific aggravating and mitigating factors. In *Gregg v. Georgia*³³ and its companion

28. 408 U.S. 238 (1978) (per curiam).

29. The death penalty itself was not seriously challenged on constitutional grounds until *McGautha v. California*, 402 U.S. 183 (1971). The Court had required special procedural safeguards in some capital cases. See *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that indigent capital defendants, if incapable of making their own defense, are constitutionally entitled to counsel). Cases preceding *Furman* suggest increasing reservation about the death penalty and its administration. See, e.g., *Stein v. New York*, 346 U.S. 156, 196 (1953) ("When the penalty is death, we . . . are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."). In 1963, Justices Goldberg, Douglas, and Brennan argued that the Court should consider whether the death penalty could properly be imposed for rape. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari). For a discussion of the "conversation" launched by Justice Goldberg's dissent and its invitation to constitutional challenges to the death penalty, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1744-46 (1987).

30. Before *Furman*, sentencers generally had untrammelled discretion to impose the death penalty. This discretion had developed gradually as a response to the perceived problem of jury nullification under mandatory sentencing regimes. See Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). In *Furman*, the Court rejected existing capital sentencing procedures, not the death penalty itself. Although Justices Marshall and Brennan argued that the death penalty was cruel and unusual, *Furman*, 408 U.S. at 291 (Brennan, J., concurring) (capital punishment is "uniquely degrading to human dignity"); *id.* at 342-59, 364-65 (Marshall, J., concurring) (arguing that death penalty violates Eighth Amendment and noting pervasive discrimination against racial minorities, poor, and underprivileged), the other three members of the majority did not categorically reject the death penalty, but argued instead that the death penalty was unconstitutionally administered. *Id.* at 255-57 (Douglas, J., concurring) (death penalty only administered to poor and racial minorities); *id.* at 309-10 (Stewart, J., concurring) (death penalty imposed rarely and "freakishly"); *id.* at 313 (White, J., concurring) (no way to distinguish cases where death penalty is imposed from those where it is not).

31. *Furman*, 408 U.S. at 239-40. A similar challenge was raised a year earlier in *McGautha*. The Court concluded that "[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *McGautha*, 402 U.S. at 207.

32. Justice White's concurrence in *Furman* suggested that such statutes might be constitutional. 408 U.S. at 311.

33. 428 U.S. 153 (1976).

cases, the Court threw out the mandatory death penalty regimes, while approving the guided discretion statutes.

Gregg reiterated the constitutional requirement that, in capital cases, "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."³⁴ The guided discretion statutes, the Court found, appropriately pointed toward the specific circumstances of the crime and insured that "discretion . . . is controlled by clear and objective standards so as to produce non-discriminatory application."³⁵ After approving the guided discretion statutes in *Gregg*, the Court took on the task of policing the formulation and application of the various states' aggravating and mitigating factors.³⁶ An examination of this process reveals three of the Court's major concerns about capital sentencing: individualization, guided discretion, and proportionality.

First, the Court has consistently required that sentencers individualize defendants by considering evidence presented in mitigation.³⁷ States must permit the sentencer to make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."³⁸ Next, nearly all states' capital punishment statutes require the sentencer to consider a list of aggravating circumstances.³⁹ Under *Furman* and *Gregg*, aggravating

34. *Gregg*, 428 U.S. at 189; see also *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion) (rejecting mandatory capital statute and noting society's rejection of belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender" (citation omitted)); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion) (rejecting statute requiring death penalty for first-degree premeditated and felony murder as "unduly harsh and unworkably rigid").

35. *Gregg*, 428 U.S. at 198 (citation omitted).

36. Burt, *supra* note 29, at 1779 (noting Court's "incrementally progressive cabinining" of death penalty).

37. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that Texas jury instructions failed to allow jury to consider evidence of defendant's mental retardation); *Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986) (holding death sentence invalid where jury not allowed to consider relevant mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring that sentencers not only listen to, but also consider relevant mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that sentencer may almost never be precluded from considering any aspect of defendant's character or record in mitigation).

38. *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

39. Rosen, *supra* note 10, at 941-42 n.2 (32 states use aggravating factors). The relationship between aggravating and mitigating factors has also been called "dichotomous," *id.* at 952 n.53, in that aggravating factors limit discretion while the requirement of unfettered consideration of mitigating evidence arguably increases this discretion; see also Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148-55 (1980) (arguing that discretion found impermissible in *Furman* is required under *Lockett*); Carol M. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835 (1992) (arguing that permitting unlimited mitigating evidence undercuts guided discretion); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1160-90 (1991) (discussing Justice Scalia's critique of *Lockett*). At least three members of the current Supreme Court have criticized this tension. See *Walton v. Arizona*, 497 U.S. 639, 672 (1990) (Scalia, J., concurring) (*Woodson* and *Lockett* are irreconcilable with *Furman*); *Graham v. Collins*, 113 S. Ct. 892, 906-15 (1993) (Thomas, J., concurring) (noting tension between *Penry* and *Gregg*); *Callins v. Collins*, 114 S. Ct. 1127, 1129-30 (1994) (Feb. 22, 1994) (Blackmun, J., dissenting) (tension compels rejection of death penalty). But see *Walton*, 497 U.S. at 714-19 (Stevens, J., dissenting) (*Woodson-Lockett* requirements not in conflict with *Furman* in that aggravating factors limit class of death-eligible defendants).

factors must both adequately channel discretion and meaningfully distinguish those who may receive the death penalty from those who may not.⁴⁰ Aggravating factors thus play at least two distinct constitutionally required roles: They objectively limit the class of those who are death-eligible,⁴¹ and they reduce opportunities for passion or prejudice in sentencing.⁴² Finally, the Court has focused on the proportionality of the death penalty—limiting the class of capital defendants by reserving the death penalty for those convicted of the most serious crimes.⁴³ Thus, in *Coker v. Georgia*⁴⁴ the Court held that the death penalty, “unique in its severity and irrevocability,” was an “excessive penalty for the rapist who, as such, does not take human life.”⁴⁵ And in *Enmund v. Florida*,⁴⁶ the Court rejected the death penalty for a defendant “who does not himself kill, attempt to kill, or intend that a killing take place.”⁴⁷

2. Executing the Nontriggerman

In *Enmund v. Florida*,⁴⁸ the Supreme Court considered whether the state could execute a “wheelman” convicted of felony murder.⁴⁹ Earl Enmund was the driver during a robbery and remained in the car while one of his co-defendants unexpectedly killed an elderly couple.⁵⁰ The Florida Supreme

while consideration of mitigating evidence allows discretion within class).

40. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (noting that there is “no meaningful basis for distinguishing” cases where the death penalty is imposed from those where it is not).

41. “[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.” *Zant*, 462 U.S. at 878.

42. See Rosen, *supra* note 10, at 951-52; see also *infra* notes 64-72 and accompanying text.

43. But see *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (comparative proportionality review of individual death sentences within a state not constitutionally required).

44. 433 U.S. 584 (1977).

45. *Id.* at 598. Some states still authorize the death penalty for crimes other than murder, although “[t]he constitutionality of these provisions is doubtful.” Rosen, *supra* note 10, at 941 n.1.

46. 458 U.S. 782 (1982).

47. *Id.* at 797. But see *Tison v. Arizona*, 481 U.S. 137 (1987) (modifying *Enmund*’s intent requirement). The Court has been reluctant to prohibit the death penalty for certain classes of defendants. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (execution of defendants between 16 and 18 at time of crime not disproportionate punishment); *Penry v. Lynaugh*, 492 U.S. 302, 328-35 (1989) (execution of mentally retarded defendant not categorically disproportionate). But see *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that Constitution does not permit execution of insane defendant); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (executing defendants under 16 at time of crime forbidden by Eighth Amendment).

48. 458 U.S. 782 (1982).

49. The issue in *Enmund* was not whether one convicted of felony-murder could be executed, but rather, whether a nontriggerman convicted of that crime could receive the death penalty. It has not been seriously argued that a felony murder conviction—distinguished from premeditated murder—forecloses the death penalty. Until quite recently, English law had always punished homicides by death. In the United States, murder was first classified by degrees in Pennsylvania to limit the class of killers who could be executed. See generally Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

50. *Enmund*, 458 U.S. at 784.

Court affirmed the death sentence,⁵¹ noting that a "felon's liability for first degree murder extends to all of his co-felons who are personally present."⁵² Before the Supreme Court, Enmund argued that "in light of [his] lack of personal responsibility for [the] homicide, his sentence of death [was] unconstitutionally excessive and disproportionate under the Eighth and Fourteenth Amendments."⁵³ The Supreme Court reversed Enmund's conviction,⁵⁴ and Justice White wrote that the "imposition of the death penalty on one such as Enmund who . . . does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" is constitutionally prohibited.⁵⁵

Enmund appeared to promulgate a bright-line standard.⁵⁶ In *Tison v. Arizona*,⁵⁷ however, the Court dramatically abandoned the *Enmund* intent rule⁵⁸ and held that "major participation" in the felony, combined with "reckless indifference to human life," demonstrated culpability sufficient for execution.⁵⁹ After *Tison* nearly all defendants convicted of felony murder—killers and nontriggermen—may be executed. Unfortunately, the *Tison* Court provided little guidance on how to distinguish the nontriggermen

51. *Enmund v. State*, 399 So. 2d 1362, 1373 (Fla. 1981).

52. *Id.* at 1369 (citation omitted).

53. Brief for Petitioner, *Enmund v. Florida*, 50 U.S.L.W. 3739 (Mar. 16, 1982).

54. The *Enmund* Court did not write on a blank slate. In *Lockett*, several Justices suggested 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." *Lockett v. Ohio*, 438 U.S. 586, 624 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment of the court); *see also id.* at 613-14 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 619-21 (Marshall, J., concurring in the judgment).

55. *Enmund*, 458 U.S. at 797. "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of his criminal culpability' . . . Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to [his] personal responsibility and moral guilt." *Id.* at 800-01 (citations omitted).

56. *But see* Lilly Kling, Note, *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 AM. CRIM. L. REV. 463 (1988) (arguing that lack of specific guidelines means lower courts can reach whatever result they choose by manipulating facts of case or terms of standard). Even if the *Enmund* standard was clear, the Court soon dulled this standard's force. In *Cabana v. Bullock*, 474 U.S. 376 (1986), the Court acknowledged and accepted *Enmund's* intent requirement, but denied that it was an integral part of the sentencing process. Although no *Enmund* determination was made at Bullock's trial, the Court stated that "[a]t 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." *Cabana*, 474 U.S. at 386.

57. 481 U.S. 137 (1987).

58. *See supra* notes 2-8 and accompanying text. On direct appeal, the Arizona Supreme Court upheld the *Tison* brothers' convictions, noting that "[t]he deaths would not have occurred but for [the brothers'] assistance. That they did not specifically intend that the Lyonses . . . die, . . . or that they did not actually pull the triggers . . . is of little significance." *State v. Tison*, 633 P.2d 335, 354 (Ariz. 1981) (distinguishing *Tisons'* case from *Lockett*). On petition for postconviction relief, the Arizona Supreme Court recited the *Enmund* requirement and found that it was satisfied because the *Tison* brothers actively participated in the crime, were present at the killing, did nothing to prevent it, and continued in the escape after the murders. *State v. Tison*, 690 P.2d 747, 749 (Ariz. 1984); *see also* *State v. Tison*, 690 P.2d 755, 757 (Ariz. 1984) (noting that "intent to kill" includes anticipation that lethal force may be used).

59. *Tison*, 481 U.S. at 158. The Court examined the practices of state legislatures and juries and found "apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" *Id.* at 154; *see* Kling, *supra* note 56, at 478-82 (criticizing Court's proportionality analysis).

who should be executed from those who should not.⁶⁰ In fact, the Court seemed to shrug off the need for a clear standard: "We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here."⁶¹ *Tison's* failure to promulgate a clear and workable standard has opened doors previously locked by *Enmund*: States may now attempt to impute responsibility for the manner of killing to an accomplice who did not even intend that a killing take place. As discussed in Part III, the application of the HCD factor to nontriggermen, particularly those who are not personally involved in the killing, breathes life into the spectre of arbitrary sentencing supposedly exorcised in *Furman* and *Gregg*. *Tison* did not, however, absolve the states of their duty to ensure individualized capital sentencing, nor did it challenge the essential role played by statutory aggravating factors in fulfilling this duty.

II. UNRAVELING THE STANDARDLESS STANDARD—THE "HEINOUS, CRUEL, OR DEPRAVED" AGGRAVATING CIRCUMSTANCE

The increased death penalty exposure of nontriggermen, whose first line of defense from execution is *Tison's* vague and impressionistic standard, creates grave risks of arbitrary sentencing.⁶² These risks are reduced to the extent that states comply with the constitutional requirement, expounded in *Furman* and *Gregg*, that discretion be guided and channeled by clear and reviewable aggravating factors. The HCD factor, however, is so emotionally loaded and conceptually amorphous that it may fail as a check on arbitrary sentencing. The Supreme Court has therefore required states to clarify the terms commonly employed—"heinous," "cruel," "depraved"—and to provide sentencers with meaningful standards. It is not clear, however, that tautological rephrasings of unavoidably subjective and evocative concepts do anything to make these terms any more objective or rationally reviewable. The definitions given these terms are crucial, however, not only because reviewability, rationality, and meaningful limits on the class of death-eligible defendants are constitutionally required, but because some of these terms may be inapplicable to nontriggermen accomplices. Similarly, the underlying purpose of the HCD

60. Courts have been unable to apply the *Tison* standard consistently or fairly in nontriggerman murder cases and are essentially free to impose the death penalty on nontriggermen defendants if the facts deviate in any way from those in *Enmund*. See Kling, *supra* note 56, at 482-89 (discussing cases purporting to apply the *Tison* standard). As Justice Harlan commented in *McGautha*, specifically identifying "those characteristics of criminal homicides and their perpetrators which call for the death penalty, and . . . express[ing] these characteristics in language which can be fairly understood and applied by the sentencing authority, appear[s] to be . . . beyond present human ability." *McGautha v. California*, 402 U.S. 183, 204 (1971).

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

62. See *id.* at 184-85 (Brennan, J., dissenting) ("Arbitrariness continues so to infect both the procedure and substance of capital sentencing that any decision to impose the death penalty remains cruel and unusual.").

factor weighs against its use in nontriggerman cases. This Part examines the role, content, and function of aggravating factors in general and of the HCD factor in particular.

A. Aggravating Circumstances: What Are They For? What Must They Do?

A criticism of the HCD factor requires a clear theory of the purpose of aggravating factors in general. Aggravating factors 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.’”⁶³ An aggravating factor must *mean something*; it must be verifiable, reviewable, and contestable, and not merely the ad hoc emotional determination that the death penalty is necessary in a particular case.⁶⁴ An aggravating factor must, therefore, be definite enough to preclude the injection of subjective and illegitimate factors into the sentencing process, and not so broad or vague that it could apply to nearly every first degree murder.⁶⁵

The Constitution requires more of aggravating factors than just meaning and clarity. States must channel discretion, but not in a simplistic or discriminatory fashion. A factor based on race or sex, for example, while eminently clear and reviewable, would be unconstitutional.⁶⁶ The function of the aggravating factor is not merely to *shrink* the death-eligible class, but to *define* that class in a manner that “reasonably justif[ies] the imposition of a more severe sentence.”⁶⁷

In *Gregg*, the Court identified deterrence and retribution as the two primary justifications for the death penalty.⁶⁸ A death sentence not justified by these goals is merely the “gratuitous infliction of suffering” and is

63. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (citations omitted). For detailed analysis of the Court’s aggravating factors jurisprudence, most of which is beyond the scope of this Note, see Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317 (1984); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 328-35; Christian D. Marr, Note, *Criminal Law: An Evolutionary Analysis of the Role of Statutory Aggravating Factors in Contemporary Death Penalty Jurisprudence—From Furman to Blystone*, 32 WASHBURN L.J. 77 (1992).

64. See *Rosen*, *supra* note 10, at 953-54.

65. Aggravating factors are governed by due process vagueness doctrine, as well as by the Eighth Amendment’s prohibition on arbitrary punishment. *Id.* at 954-59; see *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand To make the warning fair, so far as possible the line should be clear.”).

66. “This Court has stated that a death sentence based upon consideration of ‘factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race, religion, or political affiliation of the defendant,’ would violate the Constitution.” *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

67. *Zant*, 462 U.S. at 877. This rule also prohibits aggravating a sentence on the basis of facts that should *mitigate* the sentence. See generally Joshua N. Sondheim, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409 (1990).

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

unconstitutional.⁶⁹ It follows that aggravating factors must narrow the class of death-eligible defendants in ways relevant to deterrence and retribution.⁷⁰ These defendants should be the most blameworthy, either because their crime stirs moral outrage or because it is a crime we think necessary and possible to deter, where lesser sanctions might not be adequate.⁷¹

B. *The "Heinous, Cruel, or Depraved" Aggravating Circumstance*

Most aggravating circumstances are relatively clear, understandable, precise, easily applicable, and objectively reviewable. For example, a killing may be aggravated due to the defendant's prior record of violent crime, the hiring of a contract killer, the death of multiple victims, and various objective characteristics—such as age—of the victim.⁷² However, twenty-four states employ an aggravating factor—the “heinous, cruel, or depraved” or “HCD” circumstance—that allows the death penalty in cases where the murder was, in some ineffably horrible way, worse than most.⁷³

The HCD factor has been continually attacked for its imprecision and ultimate arbitrariness.⁷⁴ As one commentator noted:

rather than channeling discretion, [the HCD factor] has broadened it; instead of limiting the opportunity for arbitrary, capricious, and discriminatory factors to enter the capital sentencing process, has expanded it; rather than providing a meaningful basis for distinguishing those few cases deserving the death penalty from those cases in which death should not be imposed, has allowed death to be imposed at the complete discretion of the sentencer.⁷⁵

To the average person, after all, *most* capital murders are “heinous, cruel, or depraved.” If the HCD factor cannot communicate anything extraordinary about a murder other than that it is “bad,” it clearly fails as a discretion-narrowing device.

In both *Gregg* and *Proffitt v. Florida*, the petitioners attacked the HCD factor as unconstitutional under *Furman*.⁷⁶ In both cases the Court agreed that the circumstance was problematic because *all* murders are arguably “heinous”

69. *Id.*

70. See Sondheim, *supra* note 67, at 442-45 (suggesting jury instructions on purpose of aggravating and mitigating factors and their relation to penological goals).

71. The *Gregg* Court noted that murder by a life prisoner was such a crime. 428 U.S. at 186.

72. See Rosen, *supra* note 10, at 942-43 n.6 (listing various types of aggravating factors).

73. Although states employ a variety of evocative terms, this Note uses “HCD” to denote all of the manner-specific aggravating circumstances. *Id.* at 943 n.7 (listing various states’ HCD formulations).

74. See *id.* at 944 n.9 (describing criticism of HCD factor); CHARLES BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 63-68 (1st ed. 1974) (HCD is “nonstandard” allowing virtually unlimited discretion).

75. Rosen, *supra* note 10, at 945.

76. *Gregg*, 428 U.S. at 201 n.51; *Proffitt v. Florida*, 428 U.S. 242, 254 n.11 (1976).

or “cruel” or involve “depravity of mind,” and placed the states on notice that the HCD factor contained a dangerous tendency toward arbitrariness, one that could infect the entire death-dealing process. The Court was satisfied, however, that neither Georgia nor Florida was applying the factor in an unconstitutionally vague manner and that both had construed the factor so as to limit it to truly horrible cases.⁷⁷

The Court faced Georgia’s HCD factor again in *Godfrey v. Georgia*.⁷⁸ The only aggravating factor found was that the killing was “outrageously or wantonly vile, horrible and inhuman,” despite the fact that Godfrey’s crime did not involve aggravated battery or torture.⁷⁹ The *Godfrey* plurality found this application of the HCD factor a departure from the narrow interpretation approved in *Gregg*.⁸⁰ Because there was no “principled way to distinguish [Godfrey’s] case, in which the death penalty was imposed, from the many cases in which it was not,”⁸¹ the Supreme Court reversed Godfrey’s death sentence. *Godfrey* did not announce any ground-breaking principles; it merely vindicated the Eighth Amendment guarantees against overly broad aggravating factors contained in *Furman*, *Proffitt*, and *Gregg*,⁸² and demanded that state appellate courts construe and give content to amorphous HCD formulations in a reviewable manner.

The “standardless standard” again came before the Court in *Maynard v. Cartwright*.⁸³ In *Maynard*, the Court invalidated Oklahoma’s “especially heinous, atrocious, or cruel” aggravating circumstance and held that Oklahoma was applying the factor in a vague and overbroad manner. The Oklahoma Supreme Court had considered the defendant’s state of mind, the method and manner of killing, and the sufferings of the victim and the survivor, but had done so in a general fashion, without specifying what—if anything—it was looking for to trigger the HCD factor.⁸⁴ The *Maynard* Court unanimously required states to impose clear, instructive, and non-arbitrary limiting

77. *Gregg*, 428 U.S. at 201 (Georgia had limited HCD circumstance to “horrifying torture murders” and had not adopted an “open-ended construction”); *Proffitt*, 428 U.S. at 255-56 (Florida had limited HCD factor to “the conscienceless or pitiless crime which is unnecessarily torturous to the victim”) (citation omitted).

78. 446 U.S. 420 (1980) (plurality opinion).

79. *Id.* at 426. Godfrey, apparently after years of frustrated deliberation, shot his wife and mother-in-law, struck his young daughter with his gun barrel, and then turned himself in to the police. *Godfrey v. State*, 253 S.E.2d 710 (Ga. 1979).

80. *Godfrey*, 446 U.S. at 429-33. Earlier Georgia opinions had limited the HCD circumstance to cases exhibiting “depravity of mind,” meaning a mental state that led the murderer to torture or batter his victim. The word “torture” was construed with “aggravated battery” to require evidence of “serious physical abuse of the victim before death.” *Id.* at 431-32.

81. *Id.* at 433.

82. See Rosen, *supra* note 10, at 964. Compare *Godfrey v. Georgia* with *Barclay v. Florida*, 463 U.S. 939 (1983) (finding that murder was “especially heinous, atrocious, or cruel” not irrational under *Godfrey* and supported by facts of case).

83. 486 U.S. 356 (1988).

84. *Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987).

constructions on the HCD circumstance.⁸⁵ The Court refrained, however, from promulgating an interpretation of its own, such as a requirement that there be serious physical abuse.⁸⁶

Finally, in *Walton v. Arizona*,⁸⁷ the Court again rejected constitutional challenges to the HCD factor. While acknowledging that Arizona's "especially heinous, cruel or depraved" aggravating circumstance⁸⁸ was facially vague, the Court insisted that "the Arizona Supreme Court has sought to give substance to the operative terms, and . . . its construction meets constitutional requirements."⁸⁹ The result in *Walton* thus looks much like the results in *Gregg* and *Proffitt*: States may administer facially unconstitutional aggravating factors if the Court believes that they are applying them constitutionally. Unfortunately, the method the Court has chosen for policing the HCD factor—that of inspecting state constructions and practice, rather than requiring statutory clarity—invites confusion.⁹⁰

C. State Constructions of the "Heinous, Cruel, or Depraved" Aggravating Factor

The *Gregg-Godfrey-Maynard-Walton* line defers to the states' constructions of the HCD terms. Some states include objective elements, such as serious physical abuse or torture,⁹¹ in their statutes. Others provide

85. See generally Terrill Pollman, *Maynard v. Cartwright: Channeling Arizona's Use of the Heinous, Cruel, or Depraved Aggravating Circumstance To Impose the Death Penalty*, 32 ARIZ. L. REV. 193, 199-202 (1990) (discussing *Maynard* opinions and their implications for Arizona's HCD factor).

86. See *Godfrey*, 446 U.S. at 431 (noting that Georgia had limited HCD factor with "serious physical abuse" requirement).

87. 497 U.S. 639 (1990). The Court noted that the limiting constructions adopted by Arizona, for example, that "especially cruel" means when the "perpetrator inflicts mental anguish or physical abuse before the victim's death," were similar to the constructions approved in *Maynard* and *Proffitt*. *Id.* at 654-55.

88. ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989).

89. 497 U.S. at 654.

90. The Court has faced a barrage of cases complaining of vague HCD statutes. See, e.g., *Richmond v. Lewis*, 113 S. Ct. 528 (1992) (holding that at time of sentencing HCD factor was unconstitutionally vague and was not "reweighed" on appeal); *Espinosa v. Florida*, 112 S. Ct. 2926 (1992) (weighing unconstitutionally vague HCD factor requires reversal); *Shell v. Mississippi*, 498 U.S. 1 (1990) (*per curiam*) (Mississippi's limiting instruction on HCD factor was inadequate); *Lewis v. Jeffers*, 497 U.S. 764 (1990) (holding Arizona's HCD factor not unconstitutionally vague as interpreted or as applied to petitioner individually). Professor Rosen reviewed the applications of the HCD circumstance in the eleven states that have rejected "serious physical abuse" or other objective standards and concluded that these states are unable to apply the standard in a consistent and fair way. Rosen, *supra* note 10, at 965-988. For a list of cases where a killing has been found "heinous," see Thomas M. Fleming, Annotation, *Sufficiency of Evidence, For Purposes of Death Penalty, To Establish Statutory Aggravating Circumstance That Murder Was Heinous, Cruel, Depraved, or the Like—Post-Gregg Cases*, 63 A.L.R.4TH 478 (1988) [hereinafter Annotation, *Sufficiency of Evidence*] (categorizing cases into instances of stabbing, bludgeoning, suffocating, burning, drowning, poisoning, etc.).

91. See, e.g., DEL. CODE ANN. tit. 11, § 4209(e)(1) (1987) (including "use of an explosive device or poison" as indicative of HCD); ILL. ANN. STAT. ch. 38, para. 9-1(b)(7) (Smith-Hurd 1979 & Supp. 1992) (requiring that victim be under 12); N.H. REV. STAT. ANN. § 630:5(VII)(h) (Supp. 1993) (requiring "torture or serious physical abuse to the victim"); TENN. CODE ANN. § 39-13-204(i)(5) (1991) (requiring "torture or serious physical abuse beyond that necessary to produce death"); UTAH CODE ANN. § 76-5-202(1)(q)

"definitions" of ambiguous terms like "cruel" and "depraved."⁹² More often, however, the task of giving content to these troublesome terms falls on the state supreme courts.

In *Gregg* and *Proffitt*, the HCD factor passed muster because—although vague—the Court found that the Florida and Georgia courts had limited its application to "horrificing torture-murder[s]"⁹³ and "conscienceless or pitiless" crimes.⁹⁴ Other state courts were similarly forced to limit their states' HCD factors. The Arizona Supreme Court simply turned to the dictionary, looked up the terms "heinous," "cruel," and "depraved," and determined that these words "have meanings that are clear to a person of average intelligence and understanding."⁹⁵ Other courts took similar approaches, defining, for example, "heinous" as "extremely wicked or shockingly evil;" "atrocious" as "outrageously wicked and vile;" and "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."⁹⁶ If any pattern has developed, it is that "cruel" tends to focus on the victim's suffering,⁹⁷ while "depraved" and "heinous" generally reflect the killer's perversion or debased state of mind.⁹⁸

A clear understanding of the function of and defects plaguing the HCD factor is essential to evaluating its use in nontriggerman cases. After *Tison*, marginally culpable nontriggermen, who had formerly been insulated from the death penalty by *Enmund*'s intent requirement, rely crucially on the discretion-narrowing function of state capital sentencing statutes. Recall that nontriggermen convicted of felony murder are "pushed" the first two steps toward the death penalty, thanks to the felony murder rule and principles of accomplice liability. The content and construction of aggravating factors must therefore be carefully scrutinized in nontriggerman cases to ensure that only

(1990) (requiring "physical torture, serious physical abuse, or serious bodily injury of the victim before death"). The death penalty provision in the Continuing Criminal Enterprise Statute also requires "torture or serious physical abuse to the victim." 21 U.S.C.A. § 848(n)(12) (West Supp. 1993).

92. See, e.g., ARK. CODE ANN. § 5-4-604(8)(A-C) (Michie 1993) (defining "cruel" and "depraved"); COLO. REV. STAT. ANN. § 16-11-103(6.5)(a)-(c) (West 1990) (defining "cruel," "heinous," and "depraved"). See generally Rosen, *supra* note 10, at 943-45.

93. *Gregg*, 428 U.S. at 201.

94. *Proffitt*, 428 U.S. at 255. On Florida's HCD circumstance, see generally Michael Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984).

95. *State v. Knapp*, 562 P.2d 704, 716 (Ariz. 1977), *cert. denied*, 435 U.S. 908 (1978); see also *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983), *cert. denied*, 461 U.S. 971 (1983).

96. *Eddings v. State*, 616 P.2d 1159, 1167-68 (Okla. Crim. App. 1980), *rev'd in part*, 455 U.S. 104 (1982). See generally Rosen, *supra* note 10, at 965-87 (examining various states' approaches in detail).

97. See, e.g., *State v. Gillies*, 691 P.2d 655, 660 (Ariz. 1984); *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (approving Arizona's construction of "cruel" as "when the perpetrator inflicts mental anguish or physical abuse before the victim's death"); see also COLO. REV. STAT. ANN. § 16-11-103(6.5)(a) (West 1989) ("cruel" means intentional infliction of physical or psychological torture, and includes the pitiless infliction of pain or suffering).

98. *Walton*, 497 U.S. at 646 ("depraved" is when "the perpetrator relishes the murder, evidencing debasement or perversion"); see also ARK. CODE ANN. § 5-4-604(8)(C) (Michie 1993); *State v. Harding*, 670 P.2d 383, 400 (Ariz. 1983) (debasement of corpse shows depravity).

the most culpable and blameworthy defendants are executed.⁹⁹ The *Tison* holding that nontriggermen may be executed whether or not they intended to kill should not be confused or conflated with the constitutionally required narrowing function performed by aggravating factors.

III. APPLYING THE "HEINOUS, CRUEL, OR DEPRAVED" FACTOR TO NONTRIGGERMEN IN FELONY MURDER CASES

This Part surveys and analyzes various applications of the HCD aggravating factor to nontriggermen. Even before *Tison* enlarged the class of potentially death-eligible nontriggermen, courts faced the problem of applying the HCD factor to defendants who had not actually killed. Under the *Enmund* standard, however, sentencers had to find an aggravating factor *and* that a defendant intended to kill. When the class of capital defendants was limited to those who met *Enmund*'s intent standard, nontriggermen were less likely to be in the class. Even if they were included, the application of the HCD factor was usually not problematic. If a defendant intends to kill, it seems more likely that he intends the manner of killing than if he is merely "recklessly indifferent" to the taking of human life. After *Tison*, the intent-to-kill requirement no longer acts as a check on the application of the HCD factor to nontriggermen. *Tison* notwithstanding, a nontriggerman is guaranteed individualized, guided, and proportional sentencing by the constitutional requirement that the death penalty be non-arbitrarily administered. Thus, *especially* after *Tison*, the states' use of the manner-specific aggravating circumstance requires careful scrutiny in order to ensure that only the most culpable defendants are given the death sentence. As this Part demonstrates, states often apply the HCD factor to defendants who did not intend the manner of killing, or whose personal culpability is not clearly established. In these cases, the use of the HCD factor is unconstitutional because it narrows and defines the class of death-eligible defendants in a way unrelated to the defendants' individual blameworthiness.

A. *When the Defendant Participates, but Does Not Kill*

When the defendant actively participates in all the activities and actions upon which the HCD finding is based, but for whatever reason does not administer the last lethal blow, courts routinely apply the HCD factor to that defendant. For example, in *Brown v. State*,¹⁰⁰ the defendant was clearly not the triggerman, but the Georgia Supreme Court found that he "was present and actively participated in all aspects of the crime," including the psychological

99. Felony murder defendants often enter the penalty phase with an "automatic" aggravating factor: that the killing was committed in the course of a dangerous felony. See Weisberg, *supra* note 63, at 330-33 (discussing problem of "double counting" in felony murder cases).

100. *Brown v. State*, 275 S.E.2d 52 (Ga. 1981).

torture and taunting of the victim.¹⁰¹ These "events" were the basis for the finding that the crime was "outrageously or wantonly vile."¹⁰² Similarly, in *Leatherwood v. State*,¹⁰³ the defendant participated in planning the underlying crime, and attempted—unsuccessfully—to strangle the victim. He finally gave up and told his accomplice to stab the victim while he subdued him.¹⁰⁴ The court upheld the application of the HCD factor without questioning whether it should be used against the accomplice-defendant.¹⁰⁵

In these and similar cases,¹⁰⁶ it seems clear that the courts view an accomplice's participation in the predicate events or actions underlying the HCD finding as the justification for the application of the aggravating factor. At first glance, these are easy cases; the defendant participated directly in the "cruelty." However, *participating* in acts which are—ex post—viewed as "heinous" or "cruel" because, as it turned out, they preceded or coincided with a killing is not the same thing as *intending* a "heinous" or "cruel" killing. For example, no matter how gruesome a rape, robbery, or kidnapping may be, a convicted rapist or kidnapper may not be executed unless someone dies. Defendants in these cases can intend great cruelty without being executed; they are insulated from the death penalty, no matter how vicious their crimes, as long as no one dies.

In nontriggerman cases, however, a defendant who participates in a "cruel" felony resulting in a killing may cross two hurdles to death row at once: the "heinousness" of his participation in the underlying felony is transferred to the

101. *Id.* at 58.

102. *Id.*; see also *Brown v. Francis*, 326 S.E.2d 735, 737 (Ga. 1985) (taunting of victim).

103. 435 So. 2d 645 (Miss. 1983).

104. *Id.* at 656.

105. *Id.* at 656-57.

106. See, e.g., *State v. Willie*, 436 So. 2d 553, 557 (La. 1983) (HCD appropriate where principal aids and abets first degree murder and had specific intent to kill or inflict great bodily harm). For more on Willie's case, see HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993). See also *State v. West*, 767 S.W.2d 387, 389, 397 (Tenn. 1989) (defendant participated in rape and did not stop torture and killing); *Mann v. State*, 749 P.2d 1151, 1155, 1160 (Okla. Crim. App. 1988) (HCD found because defendant was one of four who kidnapped victim); *DuBoise v. State*, 520 So. 2d 260, 265-66 (Fla. 1988) (defendant exhibited reckless indifference to life of victim and participated in robbery and sexual battery); *Craig v. State*, 510 So. 2d 857, 870 (Fla. 1987) (HCD found at trial because defendant directed accomplice to shoot victim); *Johnson v. State*, 477 So. 2d 196, 199-206 (Miss. 1986) (defendant was active participant and at least instructed triggerman to shoot victim); *Copeland v. State*, 457 So. 2d 1012, 1019 (Fla. 1984) (HCD found because defendant had participated in rape and kidnapping); *State v. Laws*, 661 S.W.2d 526, 533 (Mo. 1983) (HCD found because defendant was willing participant in killings—acted as lookout, tied and threatened victims); *Ruffin v. State*, 420 So. 2d 591 (Fla. 1982) (defendant was present, participated in rape, knew accomplice was going to kill victim, and did nothing to stop him); *People v. Ruiz*, 447 N.E.2d 148, 157-58 (Ill. 1982) (defendant was present and actively participated); *White v. State*, 403 So. 2d 331, 339 (Fla. 1981) (defendant did nothing to stop execution-style murders, was major participant in robbery, and helped "subdue" and "intimidate" the victims); *Bullock v. State*, 391 So. 2d 601, 604, 612, 614 (Miss. 1981) (HCD found when defendant held victim while accomplice killed); *Davis v. State*, 271 S.E.2d 828, 830 (Ga. 1980) (Davis and co-felon tortured and killed victim as part of robbery scheme); *Johnson v. State*, 250 S.E.2d 394, 399-400 (Ga. 1978) (nontriggerman participated in rape and stood by during killing); *Spragins v. State*, 243 S.E.2d 20 (Ga. 1978) (defendant was active participant in rape and killing); *Stanley v. State*, 241 S.E.2d 173, 175-80 (Ga. 1977) (defendant was active participant in kidnapping, beating, and burying victim alive).

killing, triggering the HCD factor and making him death-eligible; and *Tison* in turn permits his execution. Perhaps intent to kill "heinously" inheres in participation in a "heinous" felony. It appears, however, that the courts are imposing a form of strict liability on nontriggermen: those who commit "heinous" felonies may shoulder responsibility not only for others' killings but for "heinous" killings. What if the defendant intended a "cruel" rape and robbery, but never imagined his partner would kill? He did not intend a capital crime, but his cohort's indiscretion may send him to death row. Regardless of how depraved the nontriggerman accomplice may be, it is troubling that his execution depends to such an extent on the actions of another. The imputation of one defendant's "heinous, cruel, or depraved" intent to another defendant violates the constitutional requirement of individualized sentencing just as blatantly as would the total preclusion of mitigating evidence; in each case, the sentencer punishes without personalizing the defendant.

B. *When It Is Unclear What—if Anything—the Defendant Did*

In another group of cases, both the killer's identity and the defendant's exact role in the crime are unclear. The courts then treat the defendants as a single crime-committing unit and analyze the crime itself to see if the HCD factor applies. In these cases, the application of the HCD factor is more suspect than in the previous group because the courts do not know if the defendant participated in the specific events or acts supporting the HCD finding. The courts place the burden of incomplete factfinding on the defendants, a burden that is particularly harsh for nontriggermen.

Of course, if the uncertainty concerns only the identity of the actual killer, and not of those who participated in the acts or events justifying the HCD factor, this type of case is really no different from those discussed above. After *Tison*, the identity of the felon who, in the end, administered the fatal blow is of little consequence to the question of who may be executed for capital murder. For example, in *Hall v. State*, the court noted that while either Hall or his accomplice killed, both participated in planning the robbery and in kidnapping and raping the victim.¹⁰⁷ The crime was "atrocious" by virtue of the rape and kidnapping—not because of anything about the killing itself—and thus the HCD factor could properly be applied to both defendants.¹⁰⁸ Similarly, in *State v. Gillies*,¹⁰⁹ two defendants kidnapped and brutalized their victim, smashing her head with rocks and pushing her off a cliff. The court applied the HCD factor and sentenced Gillies to death; it was "immaterial who

107. *Hall v. State*, 403 So. 2d 1321, 1323 (Fla. 1981).

108. *Id.* at 1325.

109. 662 P.2d 1007 (Ariz. 1983).

actually struck the blow” because the defendant took an active and deliberate part in the heinous aspects of the crime.¹¹⁰

In these and like cases,¹¹¹ the courts apply the HCD factor regardless of the defendant’s—perhaps unknown—role in the killing, as long as their participation in the crime itself indicates a mental state sufficient for execution under *Enmund* or *Tison*. This approach is mistaken, and conflates two distinct questions. Major participation coupled with “reckless indifference” means that the defendant may be executed *if aggravating circumstances are present*. These factors will likely support, *but should not be equated with*, a finding that the HCD circumstance applies to the nontriggerman accomplice in a given case. If the court does not know what happened, the nontriggerman should not pay the heavy price of uncertainty.

C. When the Defendant Is Not Present

In a third group of cases, perhaps similar to *Enmund*, the defendant is not physically present during the act of killing. One subclass of these cases is the murder for hire. The nontriggerman is absent, not because he is uninvolved or does not intend to kill, but because that is how he planned the crime. In these cases, the courts are split on how and whether to apply the HCD factor to the absent contractor.

When it is clear the defendant intended the manner of killing found “heinous,” “cruel,” or “atrocious,” the factor is generally—and correctly—applied. In *Hopkinson v. State*,¹¹² the defendant plotted, in great detail, the brutal murder of an attorney representing business adversaries in a

110. *Id.* at 1021.

111. *See, e.g.*, *Johnson v. Zant*, 295 S.E.2d 63, 68 (Ga. 1982) (defendant participated in rape, was active and present during whole crime, and intended to use lethal force); *State v. Richmond*, 666 P.2d 57, 63-64 (Ariz. 1983) (HCD appropriate, although it was not clear who drove car that killed victim, because defendant was leader and participated in beating); *State v. Newlon*, 627 S.W.2d 606, 622 (Mo. 1982) (HCD proper because accomplice defendant planned and orchestrated crime); *State v. Clark*, 387 So.2d 1124, 1134-36 (La. 1980) (HCD was appropriate because victim was “butchered” although defendant’s role not clear); *Smith v. State*, 659 P.2d 330, 337 (Okla. 1983) (HCD appropriate because defendant was present throughout crime and either he or co-felon burned victim to death); *State v. Kirkpatrick*, 443 So. 2d 546, 553 (La. 1983) (defendant participated in beating and stabbing); *Commonwealth v. Chester*, 587 A.2d 1367, 1381, 1385 (Pa. 1991) (HCD appropriate because defendant played major role in crime); *Bankhead v. State*, 585 So. 2d 97, 104-05, 111 (Ala. Crim. App. 1990) (HCD found though not clear who killed); *State v. Reese*, 353 S.E.2d 352, 373-74 (N.C. 1987) (same); *State v. Wingo*, 457 So. 2d 1159, 1164-65 (La. 1984) (jury could conclude that defendant participated in crime, though his role was unclear); *Cave v. State*, 476 So. 2d 180, 187-88 (Fla. 1985) (defendant was present during killing); *State v. McCall*, 770 P.2d 1165, 1172 (Ariz. 1989) (defendant was hired killer and major participant who met *Enmund*’s “reckless disregard for human life” standard); *State v. Robinson*, 796 P.2d 853, 862-64 (Ariz. 1990) (defendant was present and brought loaded gun to crime); *Fox v. State*, 779 P.2d 562, 576 (Okla. Crim. App. 1989) (defendant one of two felons in robbery-murder). *But see* *State v. Newlon*, 627 S.W.2d at 626-28 (Seiler, J., concurring in part, dissenting in part) (HCD requires separate subjective finding that accomplice had a hand in manner of killing); *State v. Clark*, 387 So.2d 1124, 1136 (Calogero, J., dissenting) (HCD inappropriate when uncertain defendant conspired to commit killing).

112. 664 P.2d 43 (Wyo. 1983).

water rights dispute. The evidence clearly proved that Hopkinson intended the victim's suffering.¹¹³ The Wyoming court insisted that "[t]he moral guilt and personal responsibility of one who commands another to commit murder justifies the death penalty."¹¹⁴ When Hopkinson challenged the application of the HCD factor to an absent contractor, the Tenth Circuit assumed *arguendo* that "the Eighth Amendment forbids imposing the death penalty against a mere accomplice as punishment for the cruel nature of a killing, without proof beyond a reasonable doubt that the accomplice intended the killing be cruel."¹¹⁵ However, the court agreed that the defendant clearly *had* intended cruelty, albeit via a hired thug, and thereby avoided the constitutional challenge.¹¹⁶

In another notorious murder-for-hire case, the Alabama Court of Criminal Appeals rejected a similar challenge. In *Haney v. State*, the court explicitly held that the defendant's intent was irrelevant to the application of the HCD circumstance.¹¹⁷ Haney had hired a killer to murder her husband.¹¹⁸ The court emphasized that she had set in motion the crime through which her husband met his horrific end, and asserted that she was responsible for the killing as well as for the manner in which it occurred, regardless of whether she intended the particular manner of death.¹¹⁹ And in *State v. Groseclose*, a Tennessee court found that the defendant had carefully plotted the murder of his wife and hired a killer to carry out his plan.¹²⁰ Groseclose's absence created no bar to the death penalty or to the HCD factor: The killing was "atrocious" and Groseclose clearly intended the murder, if not the manner in which it was committed.¹²¹

In murder-for-hire cases, then, courts take two distinct approaches to the HCD aggravating factor. A court may find that the killing was intended—as it is by definition in such a case—and therefore impute the manner of killing chosen by the contractee to the contractor, regardless of his intent. The Alabama court took this approach in *Haney*.¹²² On the other hand, the *Hopkinson* decisions require that the contracting defendant intend the manner of killing chosen by the actual killer before the HCD factor may be applied. This is the correct approach. In cases where courts base the HCD factor on the

113. *Hopkinson v. Shillinger*, 645 F. Supp. 374, 401-02 (D. Wyo. 1986) (jury found that defendant ordered torture).

114. *Hopkinson*, 664 P.2d at 74.

115. *Hopkinson v. Shillinger*, 866 F.2d 1185, 1214 (10th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990).

116. *Id.* at 1216.

117. 603 So. 2d 368, 386 (Ala. Crim. App. 1991).

118. *Id.*

119. *Id.*

120. 615 S.W.2d 142 (Tenn. 1981)

121. *Id.* at 148.

122. *See also State v. Porterfield*, 746 S.W.2d 441, 448 (Tenn. 1988) (HCD applied to defendant who hired someone to kill her husband).

defendant's participation in the "heinous, cruel, or depraved" events, the defendant's personal involvement serves as a "hook"—a surrogate for explicit intent—upon which to hang the HCD finding. In a murder-for-hire case, where the nontriggerman is absent, this "hook" is not available, and so the defendant's intent is crucial to his sentence.

Of course, the absent defendant may not be a contract killer. Instead, he may have attempted to withdraw from the crime, or he may have been a mere "lookout" or getaway car driver—again, as in *Enmund*. Or the defendant simply may have stood by during the killing, not participating in the acts justifying the HCD factor, but not actively withdrawing or doing anything to prevent the killings either.¹²³ In these cases, it is difficult to know if the defendant intends the particular manner of killing. This intent should not be presumed, however, from the defendant's omission, or even from his participation in non-"cruel" aspects of the underlying felony.

D. *Contrasting Two State Approaches*

In most cases where the HCD factor was applied to nontriggermen murder defendants, its application to the particular defendant has not been challenged. In jurisdictions where it has, the courts are divided. In Florida, the courts do not vicariously apply the HCD factor to a nontriggerman unless it is clear he intended the manner of killing. For example, in *Omelus v. State*, the court stated that a hired killer's crime could not be aggravated based on the method of killing chosen by his contractee unless the defendant intended this particular method.¹²⁴ Although this position seems well entrenched,¹²⁵ it is only recently secure.¹²⁶ Importantly, Florida's position on this matter is not based explicitly on the U.S. Constitution, but on more general notions of criminal responsibility.

Alabama has taken precisely the opposite approach, insisting that the HCD factor concerns the crime itself, not the state of mind or roles played by particular defendants. In *Ex parte Bankhead*, the Alabama Supreme Court

123. See *White v. Wainwright*, 809 F.2d 1478 (11th Cir. 1987) (HCD applied although evidence suggested defendant verbally opposed killings); *People v. Hines*, 518 N.E.2d 1362, 1371-72 (Ill. App. Ct. 1988) (evidence suggested that defendant should have known brutal murder was taking place); see also *Tison v. Arizona*, 481 U.S. 137, 141 (1987) (noting that neither of the Tison brothers "made an effort to help the victims").

124. 584 So. 2d 563, 566 (Fla. 1991).

125. See *Williams v. State*, 622 So. 2d 456, 463 (Fla. 1993); *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993).

126. Judge Grimes, dissenting in *Omelus*, asked why, "[i]f a person contracts for another to commit murder and the murder is committed in a heinous, atrocious, or cruel manner . . . the [HCD] aggravating factor . . . cannot be imposed . . . The one who instigated the evil act should suffer the consequences wrought by his agent." *Omelus*, 584 So. 2d at 567 (Grimes, J., concurring in part, dissenting in part). Previous Florida cases applied the HCD factor vicariously. See *DuBoise v. State*, 520 So. 2d 260, 265-66 (Fla. 1988); *Craig v. State*, 510 So. 2d 857, 868 (Fla. 1987); *Copeland v. State*, 457 So. 2d 1012, 1019 (Fla. 1984).

explicitly rejected the claim that jury instructions should have restricted the HCD factor to Bankhead's personal conduct.¹²⁷ Bankhead claimed that this failure "subverted the mandate for individualized capital sentencing."¹²⁸ The court held that the HCD factor looks to the "manner of the killing," and not to "actual participation."¹²⁹ The time for the latter inquiry is past once the jury finds the defendant guilty of a capital offense.¹³⁰ Alabama's position, however, indicates a misunderstanding about the function of aggravating circumstances. One who is convicted of a capital offense is still protected from the death penalty by the hurdle of aggravating factors. It is therefore mistaken to rebuff a challenge to the application of an aggravating factor on the ground that the defendant has been convicted of a capital offense; the challenge is all the more urgent precisely for this reason.

E. *The Supreme Court's Reluctance To Clarify the HCD Factor's Applicability in Nontriggerman Cases*

Despite the problems inherent in the HCD circumstance—vagueness, manipulability, subjectivity—the Supreme Court has repeatedly declined to set standards for its application to nontriggermen. The Court missed the opportunity when the Tison brothers—both nontriggermen—claimed that Arizona had unconstitutionally applied the HCD factor in their case.¹³¹ Specifically, the Tisons contended that "*Enmund* now precludes state courts from relying on the 'manner' in which the killings were carried out by the *actual killers* in non-triggerman cases. What must be considered in a non-killer case are the individualized roles played by the non-killers."¹³² Although the Court decided the case by focusing on the intent standard, and not on the applicability of the HCD factor, the four dissenters were quick to note that the majority had

expressed no view on the constitutionality of Arizona's decision to attribute to petitioners as an aggravating factor the manner in which other individuals carried out the killings. On its face, however, that decision would seem to violate the core Eighth Amendment requirement that capital punishment be based on an "individualized consideration" of the defendant's culpability. It therefore remains open to the state courts to consider whether Arizona's aggravating factors were interpreted and applied so broadly as to violate the Constitution.¹³³

127. 585 So. 2d 112 (Ala. 1991).

128. *Id.* at 124.

129. *Id.* at 125.

130. *Id.*

131. Brief for Petitioners at 31-42, *Tison v. Arizona*, 481 U.S. 137 (1987) (No. 84-6075).

132. *Id.* at 41.

133. *Tison*, 481 U.S. at 160 n.3 (Brennan, J., dissenting) (citations omitted).

Nonetheless, the Court has repeatedly declined to take up this claim.¹³⁴ It should resolve this issue, long left open, and put to rest the uncertainty plaguing the lower courts.

IV. TO IDENTIFY A MONSTER: A STANDARD OF INDIVIDUAL CULPABILITY FOR NONTRIGGERMEN ACCOMPLICES

Aggravating factors, properly applied, should and can insure that only the most blameworthy defendants are sentenced to death. The HCD factor must be carefully limited and purged of any elements of strict liability.¹³⁵ Our concern for the “fundamental respect for humanity underlying the Eighth Amendment”¹³⁶ dictates that the HCD factor should not be applied to a nontriggerman unless he intended the *particular manner* of killing found to be “heinous,” “atrocious,” or “cruel.” This Part suggests three additional reasons courts should follow this course: (1) the Constitution requires that the death sentence be a response to a defendant’s individual moral blameworthiness; (2) the purpose of the HCD factor is to identify the most culpable capital defendants; and (3) the limiting constructions the Court has required for the states’ various HCD statutes require that the sentencer focus on the defendant’s own actions or intent.

A. Individualized Capital Sentencing and the Blameworthiness of the Nontriggerman

“[I]ndividualized consideration . . . in imposing the death sentence” is a constitutional requirement.¹³⁷ Recall that in *Woodson* the Court struck down North Carolina’s mandatory death penalty not because the class was insufficiently narrow, but because consideration of the “character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death.”¹³⁸ The Supreme Court has consistently guarded this requirement in

134. See, e.g., *White v. Dugger*, 483 U.S. 1045, 1049 (1987) (Brennan, J., dissenting from denial of certiorari) (“*Tison* . . . left open the issue whether a court may constitutionally attribute to a defendant as an aggravating factor the manner in which other individuals carried out the killings.”); *Newlon v. Missouri*, 459 U.S. 884, 887 (1982) (Marshall, J., dissenting from denial of certiorari) (“It is irrational to sentence an accomplice to death on the ground that the principal’s conduct evidenced ‘depravity of mind.’”); *Herrera v. Arizona*, 114 S. Ct. 398 (1993).

135. Strict liability in criminal law does not violate due process, *United States v. Balint*, 258 U.S. 250, 252-53 (1922), but it has long been frowned upon. See, e.g., *Morissette v. United States*, 342 U.S. 246, 250-252 (1952); Saltzman, *supra* note 21 (criticizing strict liability in criminal law).

136. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

137. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

138. *Woodson*, 428 U.S. at 304-05 (stating that individualization is required to insure that “death is the appropriate punishment in a specific case”); see also *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek v. Texas*, 428 U.S. 262, 271-72 (1976).

capital cases, most forcefully in the line of decisions relating to the presentation of mitigating circumstances.¹³⁹

Individualization is not only the purpose of mitigating factors, but also a requirement for the "process of inflicting the penalty of death." The *entire* process, not just the presentation of mitigating evidence, must ensure the identification of the most culpable and blameworthy defendants. Thus, the death penalty must be proportionate not only to the offense generally, but to the particular crime of the *individual* offender.¹⁴⁰ In *Lockett*, Justice Blackmun suggested that the individualization requirement demanded unfettered consideration not merely of aspects of the defendant's background and character, but of his or her role in the crime itself.¹⁴¹ Justice Marshall added that imposing the death penalty in nontriggermen felony murder cases was "freakish" since "[w]hether a death results in the course of a felony . . . turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants."¹⁴²

But the defendants' culpability *must* be distinguished. As Justice Marshall insisted in *Newlon v. Missouri*,¹⁴³ "[i]t is irrational to sentence an accomplice to death on the ground that the principal's conduct evidenced 'depravity of mind.' The State must prove that the accomplice himself deserves the death penalty" ¹⁴⁴ *Tison* moots Justice Marshall's concern about the execution of nontriggermen, but his reasoning transposes nicely to the issue at hand: Using the "heinousness" of another's act of killing similarly "turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants." And it should be axiomatic—at least in capital cases—that "our collective conscience does not allow punishment where it cannot impose blame."¹⁴⁵ Thus, although *Lockett* stands for the proposition that a defendant may present a wide range of mitigating evidence, we should not lose sight of its underlying and animating concern with individualized culpability.

The *Enmund* Court was true to the heart of *Lockett*, insisting that "the focus must be on [Enmund's] culpability, not on that of those who committed the robbery and shot the victims."¹⁴⁶ The Court noted that retribution, commonly proffered as a justification for the death penalty, must be attached

139. See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

140. See Gregory M. Stein, Note, *Distinguishing Among Murders When Assessing the Proportionality of the Death Penalty*, 85 COLUM. L. REV. 1786 (1985).

141. *Lockett*, 438 U.S. at 613-17 (Blackmun, J., concurring in part and concurring in the judgment).

142. *Id.* at 620 (Marshall, J., concurring in the judgment). Justice White agreed with Justice Marshall, and argued that the death penalty violates the Eighth Amendment if imposed on a defendant who did not intend to kill. *Id.* at 624 (White, J., concurring in part, dissenting in part).

143. 459 U.S. 884 (1982).

144. *Id.* at 887.

145. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) (quoting *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945)).

146. *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

to culpability, which is inseparable from a defendant's intention.¹⁴⁷ The majority opinion is steeped in the language of "just deserts," and of tailoring responsibility to "moral guilt."¹⁴⁸ Moreover, although *Tison* obscured the bright-line rule against executing nontriggermen who do not intend to kill, it did not question the need to tie punishment to personal responsibility. Rather, the *Tison* Court noted that a focus on intent may not actually capture the most culpable of murderers; that "some nonintentional murders may be among the most dangerous and inhumane of all," and "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'"¹⁴⁹ Whether the Court elevated the culpability of "reckless indifference" or lowered the standard of culpability required for the death penalty, it still claimed to be attuned to the individual's blameworthiness.¹⁵⁰

Because the process of inflicting death must focus on an individual's personal blameworthiness, it follows that aggravating factors—the true gates to death row—must also operate with an eye toward individual culpability. Even after *Tison*, one cannot be executed simply for being convicted as an accomplice to murder; one must still exhibit a particular mental state, albeit a lesser one than before. This mental state does not automatically warrant the death penalty; it simply puts the defendant one step closer, into the class whose members may, if aggravating factors are present, be executed. At *both* stages—the *Tison* determination and the consideration of possible aggravating factors—the emphasis must remain on the defendant's own moral guilt.

B. *The Purpose of the HCD Factor and the Blameworthiness of the Nontriggerman*

Aggravating factors narrow the class of death-eligible defendants and guide the sentencer's discretion by identifying "special indicia of blameworthiness." As noted above, they must do so while promoting the penological goals behind the death penalty—retribution and deterrence. But the HCD factor cannot serve the goal of deterrence. The depravity of mind and evil at the core of being that the HCD factor is designed to identify are not deterrable. While it is plausible that other aggravating factors, such as those enhancing the punishment for the killing of a police officer or murder by a prisoner,¹⁵¹ could filter through the

147. *Id.* at 800.

148. *Id.* at 801.

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

150. The Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158. Importantly, even under *Tison*'s new standard, a major participant who exhibits "reckless disregard" for life cannot be executed unless someone dies. This crucial element—an actual homicide—may be completely out of the nontriggerman defendant's control.

151. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(F)(7) (1989) (defendant in official custody); FLA. STAT. ANN. ch. 921.141(5)(j) (Harrison 1991) (victim a police officer); see also MODEL PENAL CODE § 210.6(3)(a), (f) (Proposed Official Draft 1962).

consciousness of a prospective killer in a way that might make him think twice, the "heinousness" factor does not target the criminal's reasoning, but rather his conscience, the mysterious seat of his *mens rea*, his soul.

The HCD factor vividly captures the sense that the death penalty ought to be imposed on those whose crimes reflect a "consciousness materially more 'depraved' than that of any person guilty of murder."¹⁵² This seems an entirely legitimate basis for distinguishing among homicides. In fact, if any people are to be executed, it seems the best way to select them. However, it is best *only if one's purpose is retribution*. Thus, the purpose of the HCD factors to select out the most repugnant of killers, C.S. Lewis's "Un-Man,"¹⁵³ and to identify the "special case . . . so indicative of utter depravity that imposition of the ultimate sanction should be considered."¹⁵⁴ It is the "boundless outrage" aroused by the most heinous crimes that "generates demands for boundless retribution."¹⁵⁵

Society exacts retribution from *criminals* and not merely for crimes. "Let the punishment fit the crime" is a common utilitarian maxim, but it is a poor guide for the HCD aggravating factor if by "crime" we only mean "result." Crime, instead, calls for condemnation of the actor; "[t]his is too fundamental to be compromised."¹⁵⁶ Accordingly, the HCD factor should be used to pick out the "worst" defendants, and not simply the worst results. If we determine that accomplices are responsible for the crimes of their co-defendants, we should, at least in the preliminary stage, limit this responsibility to the result: the death of a person. This responsibility makes them potentially death eligible. It should be a separate question, however, whether they are responsible for the depravity of their co-felon, as manifested in the manner of killing. In many cases, the answer is clear: When the accomplice to the killing participates in and relishes the grisly prologue that is the basis for the HCD finding, the factor is appropriate. However, when the defendant is absent from the scene of the murder, or is a mere observer, the sentencer should insure that the basis for the HCD finding—and the evil it seeks to identify—is truly present in the nontriggerman accomplice.

To be constitutional, the HCD factor must promote the goal of retribution. Retribution most appropriately attaches to those who are morally culpable, and human agents are culpable based on their intent and their choices. As the Court stated in *Morissette v. United States*, the role of intent in the criminal law "is as universal and persistent . . . as belief in freedom of the human will and a

152. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

153. C.S. LEWIS, *PERELANDRA* 124-25, 139-41 (1943).

154. MODEL PENAL CODE § 210.6, cmt. 6 at 137 (Official Draft and Revised Comment Part II 1980).

155. SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 289 (1983).

156. MODEL PENAL CODE § 2.05, cmt. 1 (Tentative Draft No. 4, 1955). That the death penalty is aimed at the criminal and not simply the result is shown by the strong emphasis in statutory mitigating factors on the character and culpability of the individual. See Steiker & Steiker, *supra* note 39.

consequent ability and duty of the normal individual to choose between good and evil.”¹⁵⁷ The belief in free will and the consequent duty to choose rightly—and not “heinously” or “cruelly”—drives our criminal law to punish “the vicious will.”¹⁵⁸ If it is the vicious will that cries out for retribution, and not merely the unhappy result,¹⁵⁹ it follows that an aggravating factor bent on identifying criminals for retribution should look to the viciousness of *their* wills, and not to that of their cohorts’, however vile these associates may be.¹⁶⁰ To the extent the HCD factor turns away from the intent of the nontriggerman himself, hurling him instead into the class of the most blameworthy because of the cruel acts of others, the factor unconstitutionally narrows the class of death-eligible defendants in a way unrelated to penological goals.

C. *The Constructions of the HCD Factor and the Blameworthiness of the Nontriggerman*

On their face, most statutory HCD factors unconstitutionally fail to guide and channel sentencers’ discretion. Courts must therefore provide sentencers with clear and narrow constructions of the factors to constrain the arbitrariness, vagueness, and subjectivity that often corrupts the HCD factor. Generally, the interpretations of the HCD circumstance look to three factors: the suffering of the victim, the state of mind of the killer, and society’s reaction to the crime.¹⁶¹

1. “Cruelty” and Other Victim-Specific Terms

Most constructions of the HCD factor authorize the death penalty if the victim’s suffering was particularly acute. There is no further requirement that the sentencer examine the mental state of the killer or—more importantly—of the nontriggerman accomplice.¹⁶² This approach, however, is misguided. A simplistic focus on what happened to the victim—did he suffer? was she mutilated?—is directly analogous to a simplistic focus on the fact that a human

157. 342 U.S. 246, 250 (1952).

158. *Id.* at 250 n.4 (quoting Roscoe Pound, *Introduction to SAYRE, CASES ON CRIMINAL LAW* (1927)).

159. The HCD factor “focuses on the state of mind of the killer . . . not on the appearance of the corpse.” *State v. Richmond*, 666 P.2d 57, 68 (Ariz. 1983) (Cameron, J., specially concurring) (citations omitted).

160. See *Newlon v. Missouri*, 459 U.S. 884, 887 (1982) (Marshall, J., dissenting) (“The State must prove that the accomplice himself deserves the death penalty, and it cannot do so simply by attributing to him the conduct and mental state of the principal.”).

161. Annotation, *Sufficiency of Evidence*, *supra* note 90, at 491-92.

162. *Commonwealth v. Nelson*, 523 A.2d 728, 739 (Pa. 1987) (McDermott, J., concurring in part, dissenting in part) (“If the means employed inflict pain . . . the killer ought not be heard to say that the pain was a mere by-product of his killing.”). This is the approach the Alabama Supreme Court took in *Ex parte Bankhead*, where the court held that “the emphasis is on the manner of killing, not on the defendant’s actual participation.” 585 So. 2d 112, 125 (Ala. 1991).

being died. Neither approach answers the more significant question of the defendant's *individual culpability*. Having observed a brutal event, we still need to know how blameworthy the defendant is, and having identified certain characteristics of that event—suffering before death, mental anguish, mutilation—as calling for the death penalty, we should ensure that our revulsion is directed at its proper object.

When applying the term “cruel,” courts must therefore determine whether the defendant should be blamed for the victim's inordinate suffering. Recall that in cases when the courts applied the HCD factor to nontriggermen who participated fully in the gory events leading up to the killing, this participation supplied the intent to cause the suffering upon which the HCD finding was premised. In cases of actual killers, some courts have required a finding as to the killer's intent to inflict “cruelty.”¹⁶³ In *State v. Kiles*,¹⁶⁴ for example, the Arizona Supreme Court considered the applicability of the HCD factor to a defendant who had beaten his girlfriend and her children—one a nine-month old baby—to death. Kiles claimed that since his murder conviction was based on his having “knowingly,” rather than “intentionally” killed, the HCD factor was inapplicable. The court rejected this theory, noting in passing that to find “cruelty” a trial court “must determine that a defendant *either intended to inflict mental anguish or physical pain upon a victim or ‘reasonably fore[saw] . . . a substantial likelihood’ that his actions would have that effect . . . [C]ruelty may be found when a defendant intends to inflict mental anguish or physical pain.”*¹⁶⁵ Kiles lost because he *did* intend cruelty, even if he “only” knowingly killed. The reasoning in *Kiles* mirrors the reasoning in the murder-for-hire cases discussed above.¹⁶⁶ Courts have upheld the HCD factor when given evidence that the cruelty was intended, as in *Hopkinson*, but struck down the factor when there was no way for the contractor to foresee the method of killing, as in *Williams*.

In the case of a nontriggerman defendant, “victim-specific” terms such as “cruelty” in HCD factors require careful scrutiny. The victim's suffering creates the possibility of a capital case, but the law should direct the sentencer's attention toward the locus of blame for that suffering. If considered in isolation from its cause, the victim's suffering may superficially narrow the class of death-eligible defendants, but in a way that ignores the culpability of a particular defendant. As a result, the defendant may be punished disproportionately to his blameworthiness.

163. See *Bonifay v. State*, 626 So. 2d 1310, 1313 (Fla. 1993) (HCD not applicable where defendant did not intend high degree of pain and torture); *Commonwealth v. Daniels*, 612 A.2d 395, 400 (Pa. 1992) (per curiam) (HCD requires specific intent to torture); *Nelson*, 523 A.2d at 737 (same); *Richmond*, 666 P.2d at 67-68 (Cameron, J., specially concurring) (HCD inappropriate where no showing that defendant intended mutilation).

164. 857 P.2d 1212 (Ariz. 1993).

165. *Id.* at 1221 (citations omitted).

166. See *supra* notes 112-22 and accompanying text.

2. “Depravity” and the Consciousness of the Killer

The other species of HCD terms focus on the defendant’s consciousness and personal evil-mindedness. For example, in both *Walton* and *Lewis v. Jeffers* the Court approved the construction of “depraved” as when “the perpetrator ‘relishes the murder, evidencing debasement or perversion,’ or ‘shows an indifference to the suffering of the victim and evidences a sense of pleasure’ in the killing.”¹⁶⁷ Terms that focus on the defendant’s state of mind are inherently intent-based and rooted in the defendant’s own vicious will. If a state chooses to punish most harshly those defendants who “relish” the crime or who evidence “perversion,” logic argues against applying the terms embodying this choice to the nontriggerman accomplice of the perverted relisher. Such applications not only fail to serve the purpose of retribution but also explode the limiting constructions of the HCD factor and confuse sentencers. Whose depravity are they to examine?

In cases where the accomplice is a willing and perhaps enthusiastic participant in the pre-killing torment of a victim, the HCD factor seems perfectly applicable; it is fair and accurate to describe the accomplice as “depraved.” In fact, one can readily imagine cases in which the nontriggerman accomplice is *more* depraved than the actual killer. If a brutal nontriggerman, after abusing the victim, hands the gun to his accomplice and tells him to kill, the shooter/nonshooter distinction seems irrelevant. If, as in *Hopkinson*, the killer plots a gruesome contract killing, and hires a relatively disinterested and dispassionate thug to do the dirty business, the HCD factor may be more appropriately applied to the contractor.

V. A STEP TOWARD A SOLUTION

States can preserve their HCD factors from constitutional attack by explicitly clarifying and defining the subjective terms, or by including objectively verifiable “indicia of blameworthiness,” such as severe physical abuse. These preserving moves, if they focus on intent, may have the incidental but salutary effect of removing nontriggermen from their scope. This Note proposes the following Model Manner-Specific Aggravating Factor¹⁶⁸ to remedy the problems identified in this Note, thus protecting nontriggermen whom *Tison* exposes to the death penalty from bearing the burden of a co-felon’s excessive brutality:

167. *Walton v. Arizona*, 497 U.S. 639, 655 (1990) (quoting *State v. Walton*, 769 P.2d 1017, 1033 (Ariz. 1989)); *Lewis v. Jeffers*, 497 U.S. 764, 777-79 (1990) (quoting *Walton*, 497 U.S. at 655).

168. The better course may be to eliminate the use of manner-specific or depravity-centered aggravating factors, or to abandon the capital sanction altogether. See generally BLACK, *supra* note 74; HUGH A. BEDEAU, THE CASE AGAINST THE DEATH PENALTY (1992); PREJEAN, *supra* note 106.

1. Aggravating Circumstances

(A) Before imposing the death sentence, the sentencer¹⁶⁹ must find that the evidence establishes beyond a reasonable doubt the existence of at least one aggravating circumstance.

(B) Aggravating circumstances shall be limited to the following:

...
(x) The capital murder was especially heinous, and was committed in a cruel and/or depraved manner.

(1) For purposes of this subdivision, a capital murder is "cruel" when, as part of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, the *defendant* inflicts mental anguish, serious physical abuse, or torture prior to the victim's death.¹⁷⁰

(a) Mental anguish is defined as the victim's uncertainty as to his or her ultimate fate;

(b) Serious physical abuse is defined as physical abuse that, considered alone, would create a serious risk of death, cause protracted impairment of health, or result in loss or protracted impairment of any bodily member or organ;¹⁷¹

(c) Torture is defined as the infliction of extreme physical pain or mental torment for a significant period of time prior to the victim's death.

(2) For purposes of this subdivision, a capital murder is "depraved" when the *defendant* relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim, or evidences pleasure or gratification in the murder.

(3) For purposes of this subdivision, a capital murder is "especially heinous" if the *defendant's* conduct in committing the murder is, in the eyes of society, shockingly and outrageously evil.¹⁷²

(4) The sentencer shall not find the aggravating circumstance under this subsection unless it determines beyond a reasonable doubt that the capital murder was "especially heinous," and that the *defendant's* conduct, as accomplice or principal, was either "cruel" or "depraved."

...

The proposed aggravating factor limits the kind of suffering that will trigger the "cruelty" finding and the sort of mental state that will be deemed "depraved." By requiring not only that the crime be "especially heinous" in the eyes of society, but also that the defendant's own conduct be "cruel" or "depraved," the factor should protect minor participants in gruesome crimes from public outrage at the character of the crime itself. Finally, while the

169. This Note expresses no opinion on the relative merits of judge and jury sentencing.

170. See ARK. CODE ANN. § 5-4-604(8)(B) (Michie 1993); COLO. REV. STAT. ANN. § 16-11-103(6.5)(a-c) (West 1990) (defining "heinous," "cruel," and "depraved").

171. See ARK. CODE ANN. § 5-4-604(8)(B) (Michie 1993).

172. Cf. *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983).

proposed factor does not exclude nontriggermen from consideration, it insures that such defendants, whose liability for the killing is already vicarious, will not be punished for the depravity or cruelty of their co-felons.¹⁷³ The overall aim of the proposed factor is to focus the attention of the sentencer on the conduct and intent—and therefore culpability—of the individual defendant.

CONCLUSION

Tison v. Arizona extends the reach of the capital sanction to accomplices and other non-killers and thus severely undermines the Constitution's requirement that capital punishment be proportional and individualized. The increased exposure of nontriggermen to the death penalty demands increased scrutiny in the application of statutory aggravating factors to insure that these factors focus sentencers' attention on the individual defendant's culpability in a manner that advances the penological purposes behind the death penalty.

Unfortunately, the "heinous, cruel, or depraved" aggravating factor is too often applied to nontriggermen defendants in a manner that focuses on the crime in the abstract, and not on the defendants' personal blameworthiness. As public frustration at the apparently unending stream of horrific crimes mounts, the need to control our desire to punish, vilify, and alienate as irreparably "other"¹⁷⁴ is all the more pressing. And, as Justice Brennan warned, "[t]he urge to employ the felony-murder doctrine against accomplices is undoubtably strong when the killings stir public passion and the actual murderer is beyond human grasp."¹⁷⁵ An insistence on narrow and intent-focused aggravating circumstances in the administration of the death penalty serves us in the same manner as did Odysseus' lashing of himself to the wheel, as an exercise in self-paternalism and constitutionalism.

Justice Marshall wrote in *Furman*, "[a]t times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves."¹⁷⁶ In a free society, we "recognize . . . [our] inherent weaknesses and seek to compensate for them by means of a Constitution."¹⁷⁷ While we often judge each other by the company we keep, we should adopt a different standard in choosing those we execute.

173. Nontriggermen defendants may also be protected by statutory mitigating factors encouraging the sentencer to take into account the defendant's minor role in the crime. *See, e.g.*, ALA. CODE § 13A-5-51(4) (1982); ARIZ. REV. STAT. ANN. § 13-703(G)(3) (1989 & Supp. 1993); FLA. STAT. ANN. § 921.141(6)(d) (Harrison Supp. 1991); Steiker & Steiker, *supra* note 39, at 850 n.73 (listing states with minor participant mitigating factor). Note that the "minor participant" mitigating factor does not sufficiently protect those nontriggermen who should not even be *considered* for the death penalty.

174. *See* Robert A. Burt, *Democracy, Equality, and the Death Penalty*, 36 NOMOS 80 (1994); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

175. *Tison v. Arizona*, 481 U.S. 137, 184 (1987) (Brennan, J., dissenting).

176. *Furman v. Georgia*, 408 U.S. 238, 344-45 (1978) (Marshall, J., concurring) (footnote omitted).

177. *Id.* at 345.

