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## *Research on the Death Penalty*

### **Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme**

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In its 5–4 decision in *Tison v. Arizona* (1987), the Supreme Court put forth disputable empirical assertions about where community sentiment stood on the death penalty for felony-murder accessories. The *Tison* majority claimed that the community would support the death sentence for an accessory where (1) major participation and (2) reckless indifference to human life were shown. Two experiments were run to test these empirical assertions, and the results indicate quite the opposite. By a wide majority, community sentiment rejects the death penalty for such an accessory and rejects equal treatment of principal and accessory. Even beyond the death penalty question, to the issue of conviction under the felony-murder rule per se, attributions of causal and moral responsibility showed the principle of proportionality reigning supreme. Implications for how the Supreme Court goes about doing social science are discussed.

**I**n two capital felony-murder cases, *Enmund v. Florida* (1982) and *Tison v. Arizona* (1987), the Supreme Court relied on questionable empirical evidence to gauge where community sentiment stood on the death penalty for accessory felony-murderers. Based on its “social science analysis,” the Court alleged that there was “a broad societal consensus” (*Tison* 1987:147) to support a death sentence in *Tison*-like circumstances but not so in *Enmund*-like circumstances. Based on two experiments, we challenge the Court’s assertions about societal sentiment. We show that the “equalist” position espoused in *Tison* (i.e., that accessories and principals should be punished equally) is not only counterintuitive to psychological theories of attribution and legal theories of proportionality but is unsupported on empirical grounds as well. Finally, and most broadly, the empirical

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evidence raises a challenge to the felony-murder rule itself, which is the basis for the imposition of guilt; this empirical challenge goes beyond the *Tison* and *Enmund* issues to the relationship between the level of intention and participation in a felony-murder, and the degree of culpability we are willing to impute.

### A Tale of Two Cases, Two Rules, and Too Many Doubts

Earl Enmund was the getaway driver, sitting in a car when his companions, Sampson and Jeanette Armstrong, attempted to rob a farmhouse in Florida. In the ensuing attempt, the Armstrongs shot and killed Thomas and Eunice Kersey. Enmund was charged with felony-murder. In Florida, the felony-murder rule permits an unintended death occurring during the commission of a felony (e.g., robbery) to be treated as first-degree murder. A second rule was also invoked under Florida jurisprudence, that of accessorial liability, which made accessories such as Enmund, and the triggerman, equally culpable. With the two rules conjoined, Enmund was found guilty of felony-murder and given the death sentence (*Enmund v. Florida* 1982).

In a second case, the Tison brothers, Ricky and Raymond, participated in breaking their father, Gary Tison, and his cellmate, Randy Greenawald, out of Arizona State Prison, without a shot being fired. Two days later, while driving a Lincoln, they had a flat tire; with no spare, their father instructed them to flag down a passing motorist in order to steal a car. The Lyons family stopped and was taken into the desert at gunpoint. John Lyons asked the Tisons to leave his family there with some water, and Gary Tison sent his sons to get some water. As the sons were returning, they heard the shots. All four members of the Lyons family were killed. Ricky and Raymond were found guilty and sentenced to death as accessory felony-murderers (*Tison v. Arizona* 1987).

The issue before the Court in *Enmund* and *Tison* concerns what circumstances would permit the imposition of the death penalty for accessory felony-murderers. In its 5–4 decision in *Enmund*, the Supreme Court reversed Enmund's death sentence:

Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. (*Enmund v. Florida* 1982:801)

With *Enmund* as backdrop, the 5–4 decision in *Tison* went the other way: “we simply hold that major participation in the felony committed, combined with reckless indifference to human

life, is sufficient to satisfy the *Enmund* culpability requirement” (*Tison* 1987:158). In resolving these cases differently, the Court made two distinctions which situated the Tisons closer to the triggerman: it distinguished the Tisons from the more peripheral *Enmund* in level of participation and in culpable mental state.

In *Enmund* and *Tison*, community sentiment was central, for in deciding if the Eighth Amendment’s prohibition “against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged” (*Weems v. United States* 1910:371, quoting Field, J., dissenting, in *O’Neil v. Vermont* 1892), the Court has increasingly committed itself to a social science analysis of that sentiment (*Coker v. Georgia* 1977), using legislative enactments and jury decisions as the “objective indicia.”<sup>1</sup> In *Enmund* (p. 794), the Court bolstered its moral arguments by citing “[s]ociety’s rejection of the death penalty for accomplice liability in felony murders.” The *Tison* Court (p. 157) cited empirical evidence which “powerfully suggests that our society does *not* reject the death penalty as grossly excessive under these circumstances.”

The first doubt about these holdings stems from the Courts’ social science analyses. For while the Court charted an empirical course, its analyses quickly ran aground. In gauging legislative enactments—a task that involves categorizing and counting states and computing the correct percentages—majority and minority analyses in both *Enmund* and *Tison* revealed stem-to-stern differences, with each side criticizing the other’s curious methods of categorizing and counting states. As for gauging jury decision data, the Court in both cases noted that only 3 out of 739 death row inmates fit the *Enmund* or *Tison* situation, and concluded that this was “persuasive evidence that American juries considered the death sentence disproportional to felony-murder *simpliciter*” (*Tison* 1987:148; *Enmund* 1982:795). However, what the Court failed to note were the missing denominators—the number of such cases that were brought to trial (or the number of cases where conviction resulted)—and that without those denominators, legitimate conclusions could not be drawn about *differences* between felony- and non-felony-murderers, or between felony-murder accessories and principals, or between types of felony-murder accesso-

<sup>1</sup> This exclusive adherence to legislative enactments and jury decisions data has been championed by Justice Scalia. In his plurality opinion in *Stanford v. Kentucky* (1989), a juvenile death penalty case, Scalia rejects what he calls “socioscientific evidence” that concerns “the psychological and emotional development of 16- and 17-year-olds,” and he rejects what he calls “ethicoscientific evidence,” which concerns the moral responsibility of juveniles. Finally, he rejects “purely scientific evidence” as “not an available weapon” on the battlefield of the Eighth Amendment (*Stanford* 1989:377–78). As will shortly be clear, Justice Scalia would no doubt reject the data we will present; his defining rubric may be in doubt, but the dismissal would be clear.

ries. Thus, in both cases, doing a social science analysis proved easier than doing it accurately, by social science standards (Finkel 1990).

The second doubt emerging from the *Tison* holding is whether the Court's distinctions accord with those ordinary people make. In *Tison*, the Court upheld the accessorial liability rule, whereby the culpability of the triggerman is transferred undiminished to *Tison*-type accessories. The outcome of this rule—which we call “equalist justice”—appears counterintuitive to what psychological theories would predict about how people make moral judgments and distinctions. It also appears to conflict with what may be called the “proportionalist” position embedded in the Supreme Court's Eighth Amendment jurisprudence (e.g., *Solem v. Helm* 1983; *Coker v. Georgia* 1977; *Trop v. Dulles* 1958; *Weems v. United States* 1910), which would weigh each defendant's culpability individually.

## A Broader Challenge

There is a challenge that goes beyond the issues raised in *Enmund* and *Tison*, involving whether community sentiment supports the felony-murder rule per se, the legal underpinning on which the imposition of guilt rests. According to the rule, if in the course of a felony (e.g., armed robbery, kidnapping) a death occurs, even an unintended death, then the crime is felony-murder. There are doubts about whether this rule comports with (a) moral judgments people make, (b) psychological theory about attributions of responsibility, and (c) legal theory. Within legal theory, the felony-murder doctrine has been doubted and decried almost since its articulation (e.g., *People v. Aaron* 1980). One of the earliest legal treatise writers, Judge Stephen (1883), branded the doctrine “astonishing” (p. 57) and “monstrous” (p. 65). In current times, Justice Brennan called the felony-murder doctrine a “living fossil” (*Tison v. Arizona* 1987:159), while Judge Posner (1988:81) labeled it “a legal fiction that punishes a felon who is not a murderer as if he were one.” Despite the overwhelmingly negative commentary (e.g., Dressler 1979; Finkel 1990; Fletcher 1978; Columbia Law Review 1965; Harvard Law Review 1986; Roth & Sundby 1985), this “monstrous” doctrine not only lives but continues to produce convictions, and death sentences.

To the broad challenge regarding the felony-murder rule and the more specific challenge regarding accessorial liability, attribution theories (e.g., Heider 1958; Jones & Davis 1965; Kelley 1967) offer some insights and predictions. Heider states that “personal dispositions are more readily inferred from intentional actions” (Ross & Fletcher 1985:74) and that we infer intentionality when the actor appears to be (1) goal directed,

(2) the originator of the action, rather than a passive recipient, and (3) striving to achieve intended effects. Heider's theory predicts that the felony-murder triggerman would not be seen as blameworthy as the premeditated murderer, since the homicide is neither intended nor sought; the theory also predicts that the accomplices would be viewed as even less blameworthy, since they neither originated the deadly action nor exerted in that deadly direction.

Using the correspondent inference theory of Jones and Davis (1965), the predictions would be the same but even stronger. Jones and Davis claim that dispositional attributions are made *only* on the basis of intentional behaviors, and thus the unintended death in the prototypical felony-murder situation would not lead to strong condemnations. Moreover, an act is perceived as intentional when the perceiver believes the actor knew the behavior would produce the deadly consequences and believes the actor has control over the consequences. Yet, in the felony-murder accessory cases of *Enmund* and *Tison*, these defendants claimed that they did not know that killings would occur, and since they were not at the scene of the deaths, no control over the outcome was possible.

### Assessing Accessories and Principals

Between these two cases, the Supreme Court drew a questionable bright line between types of accessories: for the *Enmund* type, who had low levels of participation and culpability, the death sentence violated the cruel and unusual punishment clause; for the *Tison* type, who was a more major participant and had a more culpable mental state, the death sentence did not violate the Eighth Amendment prohibition. The Court asserted that these distinctions were in accord with community sentiment, yet that bright line was drawn from woefully weak empirical evidence.

How can we test the Supreme Court's assertions and more accurately gauge where community sentiment stands on capital felony-murder for principals and types of accessories? We would argue that the experimental method, which allows for specificity, control, and causal conclusions, is the best method.<sup>2</sup> Using such a method, Finkel and Duff (1991) did two mock juror experiments to test the Supreme Court's assertions. Their subjects<sup>3</sup> rendered verdicts and sentences in one of ten differ-

<sup>2</sup> A public opinion poll survey, we submit, would not be a better approach. An overly broad stimulus question (Fox et al. 1990–91), such as "Are you in favor of the death penalty for felony-murder accessories, or not?"—a question regarding a little known and poorly understood topic—is not likely to yield the thoughtful, considered judgments we are after.

<sup>3</sup> They used approximately 500 subjects, with 75% being "death qualified" (DQs): that is, based on standard *voir dire* questions used to eliminate those whose

ent felony-murder cases, all involving armed robbery as the underlying felony. In each case there were four defendants, a getaway driver (A), a lookout (B), a sidekick (C), and a triggerman (D), who could be ordinally arrayed in terms of participation and culpability. The results for felony-murder verdicts and death sentences clearly favored proportionality over the equalist position. For example, in their second experiment, the guilty percentages for the felony-murder charge for the four defendants were 18% (getaway driver), 26% (lookout), 54% (sidekick), and 77% (triggerman), and the death sentence percentages were 0% (getaway driver), 0% (lookout), 3.8% (sidekick), and 12.5% (triggerman).

Finkel and Duff also explored the reasons behind those verdicts and sentences. In a second part of their work, subjects playing the part of a Supreme Court justice were asked to “reverse and remand” or “let stand” a judgment imposing the death penalty on each defendant and to give their reasons for the decisions, either writing out their own reasons or selecting from a list of reasons drawn from Supreme Court opinions.<sup>4</sup> Overall, the “reverse and remand” judgments exceeded the “let stand” judgments by a ratio of 4:1, with the proportional effect quite evident. The two main reasons for reversing and remanding were the belief that a felony-murder conviction is disproportionate for minor accessories, and the belief that the death penalty is disproportionate for felony-murder. These results, along with the mock juror findings, appeared to conflict with the claims put forth by the *Tison* majority about societal sentiment.

## Rationale for New Experiments

*Tison* stated more clearly than any prior case when the death penalty is justified for an accessory felony-murderer who falls in this midway position. The research reported in this article is the first to examine empirically the assumptions that underlie the *Tison* holding. In the first of two experiments, we gave mock jurors and mock justices a fact pattern similar to *Tison*, with a variety of controls, to see if community sentiment supports the convictions and death sentences for the *Tison*-like accessory, as the majority in *Tison* predicts. As *Tison* asserted that major participation and reckless indifference make the dif-

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attitudes on the death penalty would prohibit them from being sitting jurors on a capital case, 75% of the subjects were qualified to serve on a capital jury.

<sup>4</sup> There were eight “reverse and remand” and eight “let stand” reasons. These reasons were drawn from opinions in *Lockett v. Ohio* (1978), *Enmund v. Florida* (1982), and *Tison v. Arizona* (1987), three capital felony-murder cases decided by the Supreme Court. Actual quotes were used, without identifying the case or the particular justice who authored it.

ference, we further test this claim by creating and adding another Tison brother to the fact pattern, one who (*a*) was an even more major participant, (*b*) was more reckless, and (*c*) was at the scene of the killing and who could have intervened but did not.

We find by means of the first experiment (experiment I) that the mock jurors and mock justices do not behave as the Court expects. Nevertheless, many juries have convicted felony-murder triggermen and accessories and imposed the death penalty. Thus, a further question arises. If the Supreme Court did not correctly identify the criteria jurors believe necessary to justify the death penalty, what additional facts might have persuaded jurors to impose the death penalty? The second experiment (experiment II) employs a variety of suggestions made by litigators and defendants themselves to examine this question.

## Method

### Subjects

One group of subjects was composed of undergraduate students drawn from an abnormal psychology course at an eastern university, all of whom volunteered for the study. There were 101 student subjects (65 females, 36 males), with a mean age of 21.2 years (standard deviation of 5.8 years), and a mean education level of 13.5 years (standard deviation of .96 years).

To extend the age range of the overall sample and increase the generalizability of the findings, a second group of subjects, a nonstudent-adult group, was recruited in the following way: the undergraduate students recruited one adult participant, with the caveats being that the adult agree to participate and agree to provide a phone number to verify participation. Many of the undergraduate subjects recruited family members, neighbors, employers, teachers, or landlords to be subjects. There were 78 adult subjects (45 females, 33 males), with a mean age of 42.0 years (standard deviation of 13.5 years) and a mean education level of 16.2 years (standard deviation of 2.4 years). Phone call checks of a random 20% of the adult sample confirmed that the responses were indeed theirs, and that they alone worked on the booklet.<sup>5</sup>

### Death Qualification

As neither the undergraduate nor adult groups were random samples, it is possible that their attitudes, particularly on the death penalty issue, might depart from the norm and skew

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<sup>5</sup> All subjects were told that their responses would be treated in confidence, and all were treated in accordance with the ethical standards of the American Psychological Association.



the results. To check to see if the undergraduate, adult, and total sample were comparable to national figures (Kadane 1984) in regard to death penalty attitudes, four written *voir dire* questions were given to each subject, and, based on the answers, subjects were placed into one of five groups, four “excludable” groups (i.e., Nullifiers, Guilty Phase Includables, Witt excludables, and Automatic Death Penalty types) and one group of “death-qualified” (DQs) subjects.<sup>6</sup> For prospective jurors to become sitting jurors at a capital trial, they must be classified as “death qualified,” revealing an attitude of willingness to impose the death penalty in some cases. Our procedure allows for a determination of the percentage of DQs, and, by comparison to national figures, a determination of whether the sample is representative on this crucial dimension.

### Materials

Subjects were randomly assigned one of six booklets, five being mock juror booklets and the sixth, a mock justice booklet. The front matter asked for the subject’s name, phone number, age, gender, highest grade completed, and whether the subject had ever been called for jury duty and ever served on a jury. All subjects, mock jurors and mock justices, were told that we were interested in their responses solely, and they were instructed to work alone.

#### *Mock Juror Booklets*

While the names in the *Tison* case were disguised to prevent recognition, the essential facts were unaltered. The case was identified as either *State v. Doug White* (the triggerman—defendant D), *State v. Adam Holmes* (the getaway driver—defendant A), *State v. Barry Holmes* (the *Tison* composite—defendant B), *State v. Carl Holmes* (the most reckless accessory—defendant C), or *State v. Doug White, Adam Holmes, Barry Holmes, and Carl Holmes* when the booklet presented multiple defendants on trial.

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<sup>6</sup> Of the four *voir dire* questions, the fourth question asked mock jurors whether they would always vote for the death penalty, or would not automatically vote for the death penalty. An answer of “would always” produced an ADP, an automatic death penalty excludable. On the second question, involving the trial phase, an answer indicating that their attitudes toward the death penalty would prevent them from making an impartial decision as to guilt or innocence, produced a Nullifier excludable. On the first question, if subjects answered that they would be unwilling to impose the death penalty in any case, and they were also not a nullifier, then they were classified as a *Guilty Phase Includable* excludable. If subjects were not nullifiers, ADPs, or GPIs, but nonetheless answered question 3 that their attitudes would substantially impair their ability to perform the duties as a juror in accordance with the instructions and the oath, then they were classified as a *Witt* excludable. The DQs (death qualified), then, were those who were willing to consider voting to impose the death penalty in some cases, were not nullifiers, had attitudes that would not substantially impair their abilities, and would not automatically vote for the death penalty.



The case detailed the father's (Garrett Holmes) plan to escape from prison and to take his cellmate, Doug White, along with him in the escape. The father asks for the assistance of his three sons (Carl, Barry, and Adam), and his sons agree to participate. The case also reveals that both the father and the cellmate were convicted murderers. Details of the prison escape (e.g., Adam in the getaway car outside, Barry and Carl going inside with the guns, and that no shots were fired) followed.

The flight, the change of cars, the hiding out for two days, the traveling by back roads, the flat tire in the desert with no spare tire, and the flagging down of a car in order to steal the car were all described. The events in the desert leading to the death of the Katz family, which defendant did what, and which defendant was where, then followed. The case states that Carl fired his shotgun into the car's radiator, presumably to further disable it and to prevent the Katz family from contacting the police, and that later he was right at the scene of death when his father and the cellmate fired on the Katz family, although he did not fire. The case states that Mr. Katz was pleading for the life of his family, asking his captors to just leave them there with some water, and that Barry was sent by his father back to the other car to get a canteen of water; Barry was on his way back with the water, not quite at the scene of death, when the firing started. And the case states that Adam was away from the scene of death, repacking the stolen car when the firing started. The case ends with their subsequent capture at a road block from which Garrett Holmes escaped into the desert, only to die of sun exposure.

Finally, subjects are told that Adam, Barry, and Carl Holmes were charged with felony-murder, armed robbery, kidnapping, and theft of an auto, and that Doug White was charged with first-degree murder, armed robbery, kidnapping, and theft of an auto. These were the actual charges for each defendant in the original *Tison* case.

A verdict sheet followed, and for the group that had multiple defendants, the four verdict sheets followed in random order. The legal definitions of the crimes of felony-murder, first-degree murder, armed robbery, kidnapping, and theft of an auto were drawn from four texts: *Pattern Jury Instructions* (District Judges Association, Fifth Circuit 1983), Devitt and Blackmar's (1977) *Federal Jury Practice and Instructions*, *Black's Law Dictionary* (1979), and the *Manual of Model Jury Instructions for the Ninth Circuit* (Committee on Model Jury Instructions 1985); we opted for the wording that was least archaic, but when definitions were notably different, we chose the Ninth Circuit's terminology, since that is where the *Tison* case took place. The jury instructions were lengthy and complex, running approximately

eight single-spaced typed pages. For the armed robbery, kidnapping, and theft charges, the verdict options were guilty or not guilty. For first-degree murder and for felony-murder, the lesser included offenses—second-degree murder, voluntary manslaughter, and involuntary manslaughter—were added to the guilty and not guilty options.

A sentencing sheet (or four sentencing sheets randomly arranged) completed the booklet. The sentence ranges for the crimes were drawn from the *Federal Sentencing Guidelines Manual* (U.S. Sentencing Commission 1990). For armed robbery, the sentence range was 10 to 15 years; for kidnapping, 15 to 20 years; for theft (of an auto), 1 to 2 years; and for felony-murder or first-degree murder, life imprisonment or death.

#### *Mock Justice Booklets*

The sixth group of subjects, the group assigned only to the mock justice condition, received a mock justice booklet which informed them that each defendant (Adam, Barry, and Carl) has challenged the constitutionality of the death sentence for the crime of felony-murder. While the challenge to the constitutionality of the death sentence was the same for the three defendants, the mock justices were told that they are to make individual decisions for each defendant. After the case was presented, the terms “let stand” and “reverse and remand” were defined. Subjects then found a list of eight reasons (Finkel & Duff 1991) for letting the death penalty stand, followed by eight reasons for reversing and remanding the death penalty, with both lists drawn from *Lockett*, *Enmund*, and *Tison* quotes; they were told that these were the reasons given by the other Supreme Court justices. A decision page for each defendant followed, with the order randomly arranged. Subjects first made the let stand or reverse and remand decision and then gave reasons for their decision, either writing out their reasons or citing reasons from the previous lists, or both.

#### *Procedure*

The booklets were given out in random order, and student subjects had one week to finish their work and return the booklets. For the adult group, these subjects were randomly assigned a booklet and given a week to complete them during a time period coinciding with the students' Thanksgiving vacation. Subjects were instructed to work alone.<sup>7</sup>

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<sup>7</sup> One objection to this procedure is that “time” is uncontrolled: we do not know how long each subject worked on the booklet. While this is true, controlling “time” was irrelevant to our concern, as we wanted to give each subject enough time to read, re-read, weigh, assess, and decide. It seems to us that controlling for time, as in a telephone survey, is not likely to produce deliberative responses and is more likely to produce artificially thoughtless responses. As to our goal of producing careful delibera-

## Results

### Juror Type

Based on their answers to the *voir dire* questions, 77.1% of the total sample were death qualified (DQs). Of the excludables, 5.6% were Nullifiers, 13.9% were Guilty Phase Includables, 2.8% were Witt excludables, and 0.6% were Automatic Death Penalty types. There were no significant differences between adult and student juror type distributions, and these distributions matched quite closely with Kadane's (1984) estimates of the national distribution.

There were no significant differences between the student and adult samples on any of the four verdict measures or on the death sentence measure, so the results are presented for all subjects combined. Since only DQs serve on capital cases, just the results from the DQ subjects for verdicts and sentences are presented.

### Verdicts

In order to convict on the crime of felony-murder, it must be established that the defendant was engaged in the underlying felony, which in this case, and the *Tison* case, was armed robbery. In Table 1, the verdict results for the four charges are presented for each defendant, under single-defendant and multiple-defendant conditions. Looking first at the single-defendant condition, 96.3% find the defendants guilty on the first charge, armed robbery, with no significant differences among defendants ( $\chi^2[3, N=82]=2.1, n.s.$ ). For the second charge, kidnapping, the pattern repeats, with 87.8% of the subjects finding the defendants guilty and with no significant differences among defendants ( $\chi^2[3, N=82]=1.0, n.s.$ ). And again, for the third charge, theft of an auto, 97.6% find the defendants guilty, with no significant differences among defendants ( $\chi^2[3, N=82]=3.0, n.s.$ ). When we examine the felony-murder charge, however, the pattern changes sharply.

Since the "guilty rate" for the underlying felony was approximately 96%, and since four uncontroverted deaths occurred in the commission of the robbery, if subjects are follow-

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tion, we do know, from the returned booklets, that most of the subjects underlined sections of the jury instructions and made notes to themselves in the margins; these indications, along with verbal comments to us about how involved they got, lead us to believe that this procedure did produce careful deliberation.

A second objection to not controlling time is whether our manipulations produced some differential effects. As to the possibility of differential effects, four of the six booklets vary only the defendant, and we see no a priori reason to suspect differential effects here; as to the two multiple defendant booklets, we see no a priori reason to suspect differential effects here, save time involved, and that is of little importance.

**Table 1.** Verdict Percentages for the Four Charges, by Defendant, for Single (S) and Multiple (M) Defendant Conditions

Verdict	Defendant									
	A Getaway Driver		B <i>Tison</i> Composite		C Reckless Accessory		D Triggerman		Total	
	S	M	S	M	S	M	S	M	S	M
Armed robbery guilty	96	96	90	89	100	96	100	96	96	94
Kidnapping guilty	83	96	90	96	95	96	89	96	88	96
Auto theft guilty	96	100	100	96	95	100	100	100	98	99
Felony-murder or first-degree murder <sup>a</sup>										
Guilty	35	52	60	50	60	65	63	92	54	64
Lesser <sup>b</sup>	22	7	10	12	15	4	37	0	21	6
Not guilty	44	41	30	39	25	31	0	8	26	30
No. of subjects by condition	23	27	20	26	20	26	19	25		

<sup>a</sup> The triggerman, D, is charged with first-degree murder, whereas defendants A, B, and C are charged with felony-murder.

<sup>b</sup> The lesser offense verdicts include second-degree murder, voluntary manslaughter, and involuntary manslaughter.

ing the felony-murder rule, then we should see a “guilty rate” for felony-murder of approximately 96%. But we do not. Across defendants, the guilty percentage for felony-murder is only 53.7%; the guilty to lesser offenses is 20.7%; and the not guilty verdicts total 25.6%. These results indicate a sizable nullification of the felony-murder rule.

It is the comparisons between defendants that are most informing to the accessorial liability theory and most relevant to the Supreme Court’s assertions in *Tison*. Here we see a significant difference among defendants ( $\chi^2[6, N = 82] = 12.3, p < .05$ ), with further analysis showing that the difference is between defendant D, the triggerman, and all the others ( $\chi^2[2, N = 82] = 9.8, p < .01$ ). The not guilty verdicts on the felony-murder charge for defendants A—the *Enmund*-like getaway driver (43.5%), B—the *Tison* composite lookout (30%), and even C—the more reckless sidekick (25%)—are substantial, whereas for D, the triggerman (0%), the percentage is naught. And where the Supreme Court asserted that reckless indifference and major participation were the significant differences that set *Tison* apart from *Enmund*, these DQ subjects see no significant difference between the *Tison* composite (B) and *Enmund*-like defendant (A), or between B and C, an even more reckless and major defendant.

Under the multiple defendants condition, where subjects rendered verdicts for all four defendants, the same pattern of verdict results recurs for the armed robbery, kidnapping, and auto theft charges, with no significant differences among defendants. But a significant difference ( $\chi^2[6, N = 104] = 13.4, p < .05$ ) does emerge on the felony-murder charge, and that dif-

**Table 2.** Number of Death Sentences and Two Death Rate Percentages (Death/*N*<sup>a</sup> and Death/*F*<sup>b</sup>) by Defendant for Single (S) and Multiple (M) Defendant Conditions

Conditions	Defendant				Total Across Defendants
	A Getaway Driver	B <i>Tison</i> Composite	C Reckless Accessory	D Triggerman	
Single defendant <sup>c</sup>					
Death	0	2	2	9	13
Death/ <i>N</i> %	0	10	10	47.4	15.9
Death/ <i>F</i> %	0	16.7	16.7	75.0	29.5
Multiple defendant <sup>d</sup>					
Death	0	0	0	18	18
Death/ <i>N</i> %	0	0	0	72.0	17.3
Death/ <i>F</i> %	0	0	0	78.3	26.9

<sup>a</sup> Death/*N* is the number of death sentences given divided by the number of subjects who rendered a verdict for that defendant.

<sup>b</sup> Death/*F* is the number of death sentences given divided by the number of subjects who rendered a guilty verdict on the felony-murder or first-degree murder charge.

<sup>c</sup> For the single defendant condition, the *n*s for the four defendants were 23, 20, 20, and 19, respectively, for a total of 82.

<sup>d</sup> For the multiple defendant condition, the *n* was 26.

ference results from defendant D being seen as different from the rest of the accomplices; once again, there are no significant differences between defendants A and B, or between B and C. Finally, when the single- versus multiple-defendant groups are compared, there are no significant differences on any of the verdicts for defendants A, B, and C. There is a significant difference for the triggerman ( $\chi^2[2, N=44]=11.9, p < .01$ ) only on the felony-murder charge, with the multiple-defendant group rendering 92% convictions and the single-defendant group rendering only 63.2% convictions.

### Death Sentences

The death sentence rates for the four defendants, under either single- or multiple-defendant conditions, are presented in Table 2. Two different death sentence rates are shown. The first, *D/N*, is the number of death sentences given by the DQ subjects over the number of subjects who rendered a verdict for that defendant on any charge. The second rate, *D/F*, is the number of death sentences given by the DQ subjects over the number of subjects who rendered a guilty verdict on the felony-murder (or first-degree murder) charge for that defendant. Under the single-defendant condition, the first death rate percentages for defendants A, B, C, and D are 0%, 10%, 10%, and 47.4%, respectively. Using this measure, the triggerman's death rate is almost five times that of the *Tison* composite (B) and the more reckless accessory, defendant C.

Looking at the same *D/N* percentages but for the multiple-

defendant condition, we find death rate percentages of 0%, 0%, 0%, and 72%. While it appears that the multiple-defendant condition does produce greater “spread,” where the triggerman (D) gets the death penalty more frequently while the lookout (B) and sidekick (C) get it less frequently, the zero figures preclude a sound statistical test. We do see clearly that defendants A, B, and C, the accessories, are treated very differently from the triggerman, D. Moreover, we *do not see* what the Supreme Court predicted—an increase in death sentences for the *Tison* composite (B) over the *Enmund*-like defendant (A), and a still greater increase for the more reckless defendant (C).

The second death rate measure,  $D/F$ , yields quite similar results to  $D/N$ , with one exception. Where the triggerman in the single-defendant group has a  $D/N$  percentage of 47.4%, the  $D/F$  percentage jumps to 75%, which is now roughly equivalent to that of the multiple-defendant group. It would seem that the single- versus multiple-defendant effect, which was only found for the triggerman, primarily occurs in felony-murder convictions (63.2% for single defendant versus 92% for multiple defendant); however, once subjects do render a conviction on the felony-murder charge for defendant D, their death sentence rates are about the same as the multiple-defendant condition.

### Mock Justice Decisions

For the mock justice decisions, data from DQ and excludable subjects are combined, since the comparison here is to the Supreme Court, which included DQs and excludables at the time of *Tison*. The reverse and remand percentage across defendants is 75.8%; for defendants A (getaway driver), B (*Tison* composite), and C (more reckless accessory), the percentages are 80.7%, 80%, and 66.7% respectively, and these figures are not significantly different ( $\chi^2[2, N=31]=2.05$ , n.s.). A further test, a comparison of defendants A and B versus C, was also not significant as well ( $\chi^2[1, N=31]=2.48$ , n.s.). Here, again, we do not see what the Court predicted—an increase in the sentiment for the death sentence when reckless indifference and major participation are present.

Mock justices cited reasons for their “let stand” or “reverse and remand” decision for each defendant, using the lists of reasons drawn from *Lockett*, *Enmund*, and *Tison*. Those reasons do not significantly differ across defendants. For the 24.2% who said “let stand,” the most frequently cited reason is “Petitioner actively participated in the events leading to death by providing the murder weapon.” For the 75.8% who said “reverse and remand,” the most frequently cited reason is “The Eighth Amendment does not permit the . . . death penalty [for] a de-

fendant who . . . does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”

As in Finkel and Duff (1991), cluster analyses were run on the let stand and reverse and remand reasons to find higher order factors. For the 24.2% “let stand” subjects, three clusters emerged and accounted for .638 of the total proportion of the variance: the first cluster endorsed the equalist position; the second found the death penalty proportionate for reckless indifference; and the third found the death penalty proportionate for major participation. These were the factors cited by the *Tison* Court, but here they are cited by only a minority (24.2%) of this community sample. Three reverse and remand clusters emerged, accounting for .556 of the total proportion of the variance: the first cluster finds the death penalty disproportionate for felony-murder; the second finds the death penalty unjustified; and the third finds the death penalty disproportionate for minor accessories. These factors correspond almost exactly to earlier findings, and correspond to what the *Tison* minority held.

## Discussion

Our modified *Tison* case did not produce a noticeable increase in either felony-murder convictions or death sentences when compared to earlier cases (Finkel & Duff 1991). What we did see, consistent with earlier findings, was a sizable nullification effect for the accessories (A, B, and C): the felony-murder guilty verdicts were markedly lower than the underlying felony (armed robbery) verdicts. In addition, felony-murder verdicts displayed a proportional rather than equalist effect: guilty verdicts were highest for the triggerman, D, and then lower as we move from C to B to A. This rejection of the accessorial liability theory is again consistent with earlier results. These results also support predictions made from attribution theories regarding causal attributions of moral responsibility.

The proportional effect was not merely an artifact of multiple defendants, for the effect occurred under single-defendant conditions as well. Having a case with multiple defendants seems to affect only the triggerman’s conviction rate, which is significantly higher than when the triggerman is tried alone.

In its decision that permits the imposition of the death sentence, the *Tison* Court believed there was a bright line between the *Enmund*- and *Tison*-like defendant, because the latter was more reckless and a more major participant than the former. In our study on no measure did that prediction prove true. Whether the variable was felony-murder verdicts, or death sentences, or “let stand versus reverse and remand” decisions, there was no significant difference between defendants A and



B. When we pushed the *Tison* Court's assertion still further, creating a defendant C who was even more reckless and more major a participant, the results on the felony-murder conviction, death sentence, and "let stand versus reverse and remand" measure all refute the Court's prediction once more.

## Experiment II

We know why the *Tison* brothers got the death penalty: the death penalty determination in Arizona is made by a judge, not a jury, and the judge found three statutory aggravating factors and no statutory mitigating factors.<sup>8</sup> But the results of experiment I and earlier experiments (Finkel & Duff 1991) strongly suggest that had it been a jury determination, the results might have been quite different, for community sentiment, by a wide margin, does not support the death penalty for *Tison*-like defendants.

In experiment II, we sought to identify and manipulate variables that might *increase the probability of a death sentence* being awarded by a jury. We hoped to resolve an apparent inconsistency between our results using a *Tison*-like case, and the general pattern of death penalty imposition in capital felony-murder cases. FBI Supplementary Homicide Reports (Rapaport 1991) and studies of death penalties in Florida, Georgia, and Illinois (Gross & Mauro 1989) show that more than 75% of the death sentences meted out in some jurisdictions involved felony-murder cases. And we know that many of these death sentences were imposed by juries. Our broad question is, "Under what conditions would mock jurors give the death sentence for accessory felony-murderers?"

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<sup>8</sup> The three statutory aggravating factors were: (1) the *Tisons* had created a grave risk of death to others (not the victims), (2) the murders had been committed for pecuniary gain, and (3) the murders were especially heinous.

The judge found no statutory mitigating factor. Importantly, the judge specifically found that the crime was *not* mitigated by the fact that each petitioner's "participation was relatively minor." . . . Rather, he found that the "participation of each [petitioner] in the crimes giving rise to the application of the felony murder rule in this case was very substantial." . . . The trial judge also specifically found . . . that each "could reasonably have foreseen that his conduct . . . would cause or create a grave risk of . . . death." . . . He did find, however, three nonstatutory mitigating factors: (1) the petitioners' youth—Ricky was 20 and Raymond was 19; (2) neither had prior felony records; (3) each had been convicted of the murders under the felony-murder rule. Nevertheless, the judge sentenced both petitioners to death. (*Tison v. Arizona* 1987:142-43)

It remains an interesting and open empirical question whether jurors would have "found" the same three statutory aggravating and no mitigating factors as the judge did, and what they would have done with the nonstatutory mitigating factors had they been making the death decision. Our results do suggest that the death decision would have been different.

### 1. Which Triggerman?

We selected three variables suggested by comments on the *Tison* case directly. The first variable and hypothesis is suggested by the appellate lawyer for the Tisons, Alan Dershowitz. Dershowitz (1982) entitled his chapter on the *Tison* case, "Capital Punishment for the Sins of Their Father." His hypothesis is roughly this: since the father died in the desert and the community could not exact its vengeance on him, the vengeance was transferred to the sons. Thus, the death penalty for Ricky and Raymond Tison represents "displaced" vengeance. This hypothesis predicts that had the father lived and gone to trial, the sons might not have gotten the death penalty. On a more general level, the hypothesis would predict that if jurors do not "get a shot at" the triggerman, they may direct their ire and fire at the accessories.

To empirically test this hypothesis, we create two versions of the *Tison* case, the original (see experiment I), where the cellmate (Greenawald) is the triggerman on trial (along with the three accessories, A, B, and C), and a second version, where the father, Gary Tison, is the triggerman on trial and where the cellmate died in the desert. The Dershowitz hypothesis would predict significantly more death sentences for the accessories in the Greenawald (father absent) version than in the Tison (father present) version. Since there were no significant differences in experiment I in the way accessories were treated under single-defendant versus multiple-defendant conditions, subjects will all have multiple-defendant cases, where they have to render verdicts and sentences for four defendants.

### 2. Who Dies?

The second hypothesis derives from the words of Raymond and Ricky Tison (Dershowitz 1982:315): Raymond asked, "Why the baby? . . . [W]hy did they have to shoot the baby?" And Ricky stated, "You know, we still get death threats from other inmates because of the baby." Perhaps it is "who dies," rather than which triggerman survived and came to trial? More generally, perhaps when a victim is seen as particularly vulnerable, whose death appears as totally unnecessary, the community becomes more willing to give the death sentence. To test this "Who dies" hypothesis, in half the cases one of the four victims is the 2-year-old child, and in the other half the 2-year-old becomes a 15-year-old. If it is the death of the child that matters, we should see significantly more death sentences in the child condition than in the teenager condition.

### 3. Conclusive Presumption Instruction

The third variable involves giving a conclusive presumption instruction (e.g., *Sandstrom v. Montana* 1979), which states that if you find a defendant guilty of the underlying felony (armed robbery), and if individuals were killed during the robbery, then you should find the defendant guilty of felony-murder. If a strong conclusive presumption instruction is given to the jurors, and if jurors follow it, then felony-murder conviction rates should rise, and death sentence rates might rise as a consequence.

To test this possibility, in one instruction condition (CP) we gave the conclusive presumption, plus instructions that defendants who aid and abet in the robbery are as guilty as the triggerman, and that jurors must follow the law exactly as the judge gives it, without letting sympathy intrude. These instructions are found in the *Manual of Model Jury Instructions for the Ninth Circuit* (Committee on Model Jury Instructions 1985), the circuit that embraces *Tison*. A “no instruction” (NI) condition was also used, where subjects simply got verdict forms with brief definitions of the crimes. The third instruction condition, “nullification” (NU), was similar in length to the CP instruction, but it told the jurors that they had the final authority as to whether to apply the law, and that they could bring the feelings of the community and their own feelings based on conscience into their deliberations (e.g., Horowitz 1985). If the type of instruction matters, we should see more felony-murder convictions, and perhaps more death sentences in the CP condition. In this mock juror experiment, then, we have a  $2 \times 2 \times 3$  (Which Triggerman  $\times$  Who Dies  $\times$  Instruction) between-subject design, where the type of defendant is a within-subject variable.

#### *Mock Justice*

The primary reason for the mock justice part of the experiment is to examine the subjects' *actual* reasons for letting stand or reversing and remanding the death sentence. A criticism of experiment I's mock justice methodology is that subjects *were given lists of reasons* drawn from Supreme Court cases, and thus we cannot know for certain whether the reasons cited were the subjects' own reasons or whether they were merely endorsing reasons they saw on the lists. In experiment II, subjects received no lists; rather, they were asked to write out their own reasons and explain them. Subjects received either the *Greenawald* or the *Tison* (“Which Triggerman”) case, where the child dies. The four defendants were each seeking to overturn their death sentences, so type of defendant was again a within-subject variable.

A schema for categorizing subjects' “let stand” and “re-

verse and remand” reasons was developed that had five categories for both let stand and reverse and remand reasons. The schema was exhaustive, in that it captured all the reasons subjects gave, and it was also reliable, having an interrater reliability (kappa coefficient) of .809. The subjects’ reasons were then categorized to see (a) which of the reasons were most central, (b) what higher-order clusters emerged, and (c) whether the reasons differed for defendants.

## Method

### Subjects

There were 257 subjects (105 males and 152 females), 161 undergraduate students with a mean age of 20.5 years (standard deviation of 3.7 years) and a mean education level of 14.3 years (standard deviation of .9 years) and 96 nonstudent adults with a mean age of 42.0 years (standard deviation of 12.5 years) and a mean education level = 15.9 (s.d. = 1.9), recruited as in experiment I. The breakdown of subjects by *juror type* found 75.1% DQs, with no significant differences between the undergraduate and adult distributions; both distributions and the total distribution again matched closely with Kadane’s (1984) national percentage figures.

### Materials

#### *Juror and Justice Research Booklets*

Subjects were randomly assigned either a mock juror booklet (1 of the 12 types) or a mock justice booklet (1 of 2 types). Mock jurors received the modified *Tison* case with either a child or a teenager being killed (*Who Dies*), with either Tison or Greenawald as the triggerman on trial (*Which Triggerman*), and with either the conclusive presumption (CP) instructions, no instructions (NI), or the nullification instructions (NU). The general instructions for both the CP and NU groups were drawn from the same sources as experiment I; they featured sections on duty to follow instructions, the presumption of innocence, the burden of proof, what “reasonable doubt” means, and the difference between evidence and inferences, be they direct and circumstantial, on the impeachment of witnesses, and what “knowingly” and willfully means; this was followed by specific instructions on all the charges, armed robbery, kidnapping, theft of an auto, and either first-degree murder or felony-murder, plus definitions of the lesser included offenses, and a final note.

The conclusive presumption group read the following instructions:

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The CP group also received another instruction, used in felony-murder cases defining aiding and abetting.

Thus, if you believe that the defendants intended to commit the armed robbery, and that during that robbery individuals were killed unlawfully, then you should find the defendant guilty of Felony-Murder. It does not matter that the defendant was not the triggerman. If the defendant aided and abetted in the armed robbery, then his guilt for the killing that resulted is equal to that of the triggerman.

Finally, the CP group received instructions on duty to follow instructions.

The nullification group (NU) received the following:

That while you must give respectful attention to the laws, you have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial. You represent the community, and it is appropriate to bring into your deliberation the feelings of the community and your own feelings based on your conscience.

Verdict sheets for each defendant were randomly arranged, as were sentencing sheets.

For the mock justice booklets, subjects received either the Tison or Greenawald triggerman on trial version, with the child (*Who Dies*) being killed version. The four defendants were appealing their death sentences, and subjects had to make a let stand or reverse and remand decision for each defendant, and to give their reasons and explain their reasons for each defendant.

## Procedure

Students and adults were given their booklets over a week's time period, coinciding with the students' Easter break, and, again, subjects were cautioned to work alone.

## Results

### Verdicts

Only the verdicts for the DQ subjects are presented, as they are the representative sample. A test of student versus adult found no significant differences for the four charges, or for the death sentence measure, so the two groups were combined. For the first three charges, armed robbery, kidnapping, and theft of an auto, there were no significant differences among defendants, and no significant differences for which triggerman (Greenawald or Tison) comes to trial, for who dies (child or teenager), or for which instruction was used. On the underlying felony (armed robbery) charge, 96.5% found all defendants guilty; on the kidnapping charge, 94.2% did so; and on the theft of an auto, 97.5% did so.

On the key felony-murder verdict, however, the equalist findings abruptly end (see Table 3). The guilty percentages for the getaway driver (38.5%), the *Tison* composite (39.2%), the more reckless accessory (51.5%), and the triggerman (79.2%) clearly show the proportional effect. Looking at the not guilty verdicts, we see that the getaway driver (47.7%) and the *Tison* composite (45.4%) are treated similarly, with a significant reduction for the more reckless accessory (26.9%); for the triggerman, the not guilty verdicts drop almost to nil (3.1%).

With multiple main-effect variables (i.e., three between-subject variables and one within-subject variable) and the possibility of interaction effects, a loglinear analysis, rather than a simple chi-square, was the appropriate statistical test. Using that test, the differences between defendants were highly significant ( $\chi^2[3, N=130]=135.0, p<.0001$ ), with planned comparisons showing a difference between D and all the accessories, and between C versus A and B. The type of victim did produce a significant difference ( $\chi^2[2, N=130]=10.9, p<.01$ ), with more convictions occurring when the child died. The conclusive presumption instruction variable is also significant ( $\chi^2[4, N=130]=13.0, p<.01$ ), with the CP instructions producing more convictions than NI or NU. The difference between the two types of triggermen is not significant. Finally, when compared to the robbery conviction rate of 96.5%, the conviction rate for felony-murder is only 52.1% across defendants, showing a sizable nullification effect overall: almost half the subjects (47.9%) are not convicting on the felony-murder charge, even though guilt was established on the underlying felony, and it was an uncontroverted fact that deaths occurred in the commission of the felony. Moreover, this "nullification effect" grows proportionately greater as we move from defendant D to C to B to A.

**Table 3.** Percentage of Felony-Murder<sup>a</sup>(*F*), Lesser Offense (*L*), and Not Guilty (*N*) Verdicts by Defendant, for the “Which Triggerman” (Tison or Greenawald), “Who Dies” (Child or Teenager), and “Instruction” Conditions

Conditions	<i>n</i> <sup>b</sup>	Defendant											
		Getaway Driver			<i>Tison</i> Composite			Reckless Accessory			Triggerman		
		<i>F</i>	<i>L</i>	<i>N</i>	<i>F</i>	<i>L</i>	<i>N</i>	<i>F</i>	<i>L</i>	<i>N</i>	<i>F</i>	<i>L</i>	<i>N</i>
Triggerman													
Greenawald	65	34	15	51	37	15	48	49	25	26	79	18	3
Tison	65	43	12	45	42	15	43	54	18	28	80	17	3
Who Dies													
Child	61	46	13	41	49	13	38	59	21	20	82	16	2
Teenager	69	32	14	54	30	17	52	45	22	33	77	19	4
Instruction													
CP	37	49	8	43	49	16	35	63	16	22	89	8	3
NI	51	37	18	45	41	18	41	53	22	25	78	18	4
NU	42	31	14	55	29	12	60	41	26	33	71	26	2

<sup>a</sup> Includes the first-degree murder verdicts, for the triggerman.

<sup>b</sup> *n* is the number of subjects in each condition.

### Death Sentences

The death sentences under differing conditions for each defendant are presented in Table 4. For the *Defendant* variable, we have a very sizable significant effect ( $\chi^2[3, N=130]=233.1, p < .0001$ ). For the first death rate measure, Death/*N*, the death rates for defendants A, B, C, and D are 3.1%, 3.1%, 3.9%, and 63.1%, respectively; thus defendant D’s death rate is approximately 17 times greater than C, and approximately 21 times greater than B or A. On the second death rate measure, Death/*F*, the percentages for the four defendants are 8%, 7.8%, 7.5%, and 79.6%, with D’s death rate percentage being approximately 10 times that of the accessories. The three between-subject variables, *Who Dies*, *Which Triggerman*, and *Instructions*, did not produce significant differences overall or when each defendant was analyzed separately. For the *Which Triggerman* variable, there was a marginally significant difference for defendants A and B, but opposite the Dershowitz hypothesis: there was an increase in the death sentences for A and B when the father stands trial, but the low numbers and marginal significance prevent a conclusion to that effect.

### Mock Justice Decisions

On the decision to either “let stand versus reverse and remand” the death penalty, there was no significant difference ( $\chi^2[1, N=81]=2.0, n.s.$ ) between the *Which Triggerman* conditions. There was, however, a large significant difference among defendants ( $\chi^2[3, N=81]=123.4, p < .001$ ): the “let stand”



**Table 4.** Number of Death (D) Sentences and Two Death Rate Percentages ( $D/N^a$  and  $D/F^b$ ) by Defendant for the “Which Triggerman,” “Who Dies,” and “Which Instruction” Conditions

Condition	Defendant											
	A Getaway Driver			B Tison Composite			C Reckless Accessory			D Triggerman		
	Death	Death/ $N$ (%)	Death/ $F$ (%)	Death	Death/ $N$ (%)	Death/ $F$ (%)	Death	Death/ $N$ (%)	Death/ $F$ (%)	Death	Death/ $N$ (%)	Death/ $F$ (%)
<b>Which Triggerman</b>												
Greenwald	0	0	0	0	0	0	1	2	3	40	62	78
Tison	4	6	14	4	6	14	4	6	14	42	65	81
<b>Who Dies</b>												
Child	2	3	7	2	3	7	3	5	8	40	66	80
Teenager	2	3	9	2	3	10	2	3	6	42	61	79
<b>Which Instruction</b>												
Conclusive	2	5	11	1	3	6	1	3	4	26	70	79
No instruct	2	4	11	3	6	14	4	8	15	31	61	78
Null	0	0	0	0	0	0	0	0	0	25	60	83
Totals	4	3	8	4	3	8	5	4	8	82	63	80

<sup>a</sup> Death/ $N$  is the number of death sentences divided by the number who rendered a verdict.

<sup>b</sup> Death/ $F$  is the number of death sentences divided by the number of felony-murder or first-degree murder verdicts.

percentages for the four defendants were 9.9% (A), 14.8% (B), 25.9% (C), and 82.7% (D). The proportional effect is again evident, with a "bright line" separating the triggerman from all accessories. In addition, the *Tison* defendant (B) is treated much more similarly to the *Enmund* defendant (A) than to the triggerman (D); and even the more reckless and culpable accessory (C) is treated more like the other accessories than the triggerman.

The five categories for subjects' reverse and remand reasons were (1) *participation* (e.g., did not kill, did not attempt to kill, not at scene of death); (2) *control* (e.g., could not control situation; could not stop father from killing); (3) *intent* (e.g., did not intend to kill, could not foresee the killings, no premeditation or malice, no reckless indifference); (4) *past status* (e.g., were not criminals, no past record, first offenders); and (5) *death penalty is cruel and unusual punishment*. The first four let stand reasons also involved *participation*, *control*, *intent*, and *past status*, but here the facts are construed as showing greater participation, control, and intent, and finding a past criminal record. The fifth reason stresses that *a death occurred*, and that is all that matters for punishment to follow; when subjects cited that a child was killed, that was categorized under this fifth category.

There were significant differences among defendants for both the let stand ( $\chi^2[12, N=81]=72.7, p<.001$ ) and reverse and remand reasons ( $\chi^2[12, N=81]=103.8, p<.001$ ), with the triggerman again being treated differently from the three accessories. For defendants A, B, and C, the three most frequently cited let stand reasons were participation, control, and intent; for the triggerman, participation, intent, past status, and the fact that a death occurred were the most frequently cited reasons. For the reverse and remand reasons for the accessories, participation, intent, and control were the most frequently cited reasons; for the triggerman, intent and the death penalty being cruel and unusual were the two most frequently cited factors.

The cluster analysis results for the let stand reasons found three clusters, accounting for .703 of the total proportion of the variance. The reasons for finding the death penalty constitutional were when the defendant (1) could have prevented the death but did not, (2) intended to kill, and (3) was a major participant and had a past criminal record. These three reasons fit the triggerman far more closely than the accessories. For the reverse and remand analysis, three clusters were found that accounted for .725 of the total proportion of the variance. The reasons for finding the death penalty unconstitutional were when the defendant (1) was a minor participant and could not control, (2) did not have a criminal record, and (3) did not in-

tend to kill. These reasons fit the accessories more than the triggerman.

## Discussion

The Dershowitz hypothesis of displaced vengeance was not confirmed on any dependent measure. The type of victim, however, did produce a significant effect on felony-murder convictions but not on death sentences. Even though convictions rise when a child dies, the death penalty is imposed only proportionally. Taken together, the effects associated with the type of victim produce neither more death sentences nor equalist justice.

When a conclusive presumption is given, convictions rise significantly in comparison to no instructions or the nullification instruction conditions. This is not surprising. What is surprising is that the conclusive presumption neither produces equalist results nor yields more death sentences. As to the latter, it appears that rendering a conviction and rendering a death sentence are two distinct, *independent* acts. As to the former, the strong proportionalist sentiment of this community emerges and dominates, even under this strict instruction all but mandating equal treatment of accessories and principal.

Finally, when we looked closely at the subjects' reasons for the reverse and remand decisions that were not constrained by a list, they reflected the participation, intent, and control factors. These subjects found the death penalty for felony-murder accessories unconstitutional when participation was minor, when the defendant did not intend to kill, and when the defendant could not control or prevent the death. Theoretically, these findings fit quite closely with predictions derived from attribution theories. When an actor is perceived as (1) playing a minor part, (2) not intending the harm, (3) not exerting effort to bring it about, (4) having little control over the outcome, and (5) not having a history of criminality, perceivers are not likely to attribute causal responsibility and moral blame to the actor.

## Conclusion

There are caveats to this work. The samples, for one, were not representative of actual jurors, at least on the dimension of educational level; however, on a crucial dimension, that of "death qualified," this sample is representative of the national population. A second caveat involves the "paper and pencil" methodology, which is not a faithful rendition of actual cases. If this artificiality causes subjects to take this task lightly (which we do not believe, given their comments), we might expect to

see more death sentences or let stand decisions than we do, particularly given the anonymity subjects had.

On the other side, our faith in these results, which support the earlier findings (Finkel & Duff 1991), is strengthened because they also accord quite closely with Dressler's results (1979) from actual felony-murder cases with multiple defendants, with the Baldus data (Baldus et al. 1983, 1985) on death sentences in Georgia where defendants were underlings or minor participants in the crime, and with legislative enactments data.<sup>9</sup> Taken together, then, actual cases, mock juror findings, and legislative enactments do accord, and this convergent validation strengthens the main conclusions about where community sentiment lies.

Our final point concerns how Supreme Court justices go about conducting a "social science analysis" when they try to gauge community sentiment in Eighth Amendment cases. On the face of it, the Court appears committed to doing an empirical analysis to glean community sentiment from the objective indicia. Social scientists might applaud the intent but decry the "science." For the Court's reading of legislative enactments data in capital felony-murder and juvenile death penalty cases has split the Court and yielded widely divergent readings; the same and then some could be said for the Court's handling of jury decisions data.

What role can social science data play if the current Court's receptivity mirrors Justice Scalia's opinion that "scientific evidence is not an available weapon," and when he tells social scientists (*Stanford v. Kentucky* 1989:378) that "[t]he audience for these arguments . . . is not this Court but the citizenry of the United States"? The social scientist needs to remember that the issue about what "counts" *in science* is not the Court's to decide. That is decided by those who do science. The evidence we presented through two experiments, with less than perfect methodology, nonetheless adds to our understanding of principals and accessories in capital felony-murder in good part because they were experiments, with fine-grained distinctions and controls, that permitted causal conclusions.

The Supreme Court in *Tison* held to the equalist position, upheld the death penalty, and claimed that community sentiment would support this conclusion when reckless indifference and more major participation by an accessory were shown. The Court's empirical assertions are undermined by our experimental results. Across a wide variety of experimental cases (Finkel & Duff 1991), now including the *Tison* case—using single- or multiple-defendant presentations, giving conclusive

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<sup>9</sup> Finkel's analysis (1990) of the legislative enactments data at the time of *Tison* showed only a minority of states supporting the death penalty for a *Tison*-like defendant.

presumption instructions, and creating a defendant even more reckless than the Tison brothers were—community sentiment strongly opposes the death penalty, rejects equalism, and overwhelmingly favors proportional justice for felony-murder accessories.

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