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Anisa Mohanty

TAKING AIM AT THE VIRGINIA TRIGGERMAN RULE: A COMMENTARY ON HOUSE BILL 2358

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INTRODUCTION

Under current Virginia law, "only the actual perpetrator of a capital murder is eligible for the death penalty;"[1] in other words, only the person who committed the physical act of murder, or "pulled the trigger," is eligible for the death penalty in Virginia.[2] The Virginia General Assembly has passed, for the third year in a row, a bill to expand this rule.[3] House Bill 2358, identical to Senate Bill 961, proposes to amend section 18.2-18 of the Virginia Code, allowing the Commonwealth to charge principals in the second degree and accessories before the fact as principals in the first degree under certain circumstances.[4] Virginia Governor Timothy M. Kaine, however, vetoed the bill for the second year in a row.[5]

This Comment will examine the legislative history of the triggerman rule in Virginia in Part I. Part II will explore the justifications and criticisms of an expansion to the triggerman rule. Part III will present a short study of American jurisprudence with respect to the death penalty and non-triggermen. Finally, Part IV will discuss the future implications for Virginia's criminal justice system if the expansion to the triggerman

· J.D. Candidate, 2010, University of Richmond School of Law; B.A., 2007, University of North Carolina at Chapel Hill.

1. Jim Nolan, *"Triggerman" Bill to Kaine*, RICH. TIMES-DISPATCH (Va.), Feb. 25, 2009, at A6; *see* VA. CODE ANN. § 18.2-18 (Repl. Vol. 2004); VA. CODE ANN. § 18.2-31 (Cum. Supp. 2008).

2. Sandhya Somashekhar, *Senate Votes to Eliminate "Triggerman" Rule*, WASH. POST, Feb. 6, 2008, at B5.

3. KENT WILLIS, EXECUTIVE DIR., AM. CIVIL LIBERTIES UNION OF VA., THE ACLU OF VIRGINIA'S 2009 GENERAL ASSEMBLY TOP TEN 5 (2009), http://www.acluva.org/legislature/2009/2009TopTen.pdf (last visited Oct. 13, 2009); *see* H.B. 2358, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 9, 2009); S.B. 961, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 4, 2009).

4. *See* H.B. 2358, § 18.2-18; S.B. 961, § 18.2-18.

5. Legislative Information System, Bill Tracking: HB2358, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=09&typ=bil&val=hb2358 (last visited Apr. 21, 2009); Legislative Information System, Bill Tracking: SB961, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=09&typ=bil&val=sb961 (last visited Apr. 21, 2009); *see* Nolan, *supra* note 1.

rule eventually becomes law.

PART I

The Virginia General Assembly enacted the triggerman rule in 1977.[6] In 1979, the Supreme Court of Virginia held, in *Coppola v. Commonwealth*,[7] that "only the immediate perpetrator of a homicide, the one who fired the fatal shot, and not an accessory before the fact or a principal in the second degree, may be convicted of capital murder under the provisions of Code [section] 18.2-31, as qualified by Code [section] 18.2-18."[8] In the years that followed, however, the General Assembly began to expand the circumstances under which the Commonwealth may try an individual for capital murder. In 1981, the General Assembly introduced gradation elements by adding subsection seven to section 18.2-31 of the Code of Virginia,[9] which allows the imposition of the death penalty on someone who was the principal in the first degree in one murder and at least an accomplice in a second murder or another accompanying offense defined in section 18.2-31 of the Virginia Code.[10] Initially extending only to principals in the second degree and accessories before the fact in cases of killing for hire, the General Assembly subsequently amended section 18.2-18 to allow the Commonwealth to try these parties for capital murder in acts of terrorism[11] and continuing criminal enterprise.[12] The Virginia Supreme Court also restated that "triggerman" means an "immediate perpetrator" to the crime.[13]

The recent impetus in Virginia for expanding the triggerman rule grew

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6. *See* Act of Mar. 29, 1977, ch. 478, 1977 Va. Acts 714; *see also* Rae K. Inafuku, Comment, Coleman v. Thompson—*Sacrificing Fundamental Rights in Deference to the States: The Supreme Court's 1991 Interpretation of the Writ of Habeas Corpus*, 34 SANTA CLARA L. REV. 625, 627 n.10 (1994).

7. 220 Va. 243, 257 S.E.2d 797 (1979).

8. *Id.* at 256, 257 S.E.2d at 806 (citing Johnson v. Commonwealth, 220 Va. 146, 150, 255 S.E.2d 525, 527 (1979)).

9. *See* Act of Apr. 1, 1981, ch. 607, 1981 Va. Acts 1280.

10. *See* VA. CODE ANN. § 18.2-31 (Cum. Supp. 2008); Hammand S. Matin, *Expansion of Section 18.2-31 of the Virginia Code*, 12 CAP. DEF. J. 7, 24 (1999); Philip H. Yoon, Note, *Code of Virginia*, 15 CAP. DEF. J. 273, 276 n.31 (2002); *see also* William J. Dinkin & Cullen D. Seltzer, *Criminal Law and Procedure*, 35 U. RICH. L. REV. 537, 554–55 (2001) (stating that capital murder is a "gradation crime" in which the Commonwealth must only prove that the defendant was the "triggerman" in the principal murder).

11. Act of Apr. 6, 2002, ch. 588, 2002 Va. Acts 810.

12. Act of Mar. 13, 1997, ch. 313, 1997 Va. Acts 456.

13. Muhammad v. Commonwealth, 269 Va. 451, 483, 619 S.E.2d 16, 34 (2005).

out of the prosecutorial difficulties in the 2002 Washington area sniper cases.[14] Two men, Lee Boyd Malvo ("Malvo") and John Allen Muhammad ("Muhammad"), shot sixteen people,[15] and "[b]ecause it was initially unclear who pulled the trigger, prosecutors said they were hampered in efforts to have the mastermind, John Allen Muhammed, executed."[16] In motions to dismiss Muhammed's capital murder charges, the defense argued that: (1) Muhammed was not eligible for the death penalty because there was no evidence he pulled the trigger or directed Malvo to do so; and (2) the terrorism provision was not intended to apply in such a case.[17] In the absence of the terrorism exception to the Virginia triggerman rule, the defense argued the prosecution was essentially "asking [the] judge to expand the . . . law to include someone who may be a puppeteer."[18] Interestingly, the trial judge ruled that "the prosecution produced enough evidence to show that [Muhammad] *could have been* a principal in the first degree," and convicted and sentenced Muhammed to death.[19] The Supreme Court of Virginia upheld Muhammad's conviction and sentence under the expanded section 18.2-18.[20] While section 18.2-18 did not apply to traditional "aiders and abettors," the court agreed that it did apply to a criminal actor who "orders" or "directs" the killing and shared the intent to kill.[21] The court elaborated, "It is the actual participation together in a unified act that permits two or more persons to be immediate perpetrators."[22]

Virginia House Bill 2358, which is identical to Senate Bill 961, would allow a principal in the second degree to be tried and punished as the principal in the first degree in all cases of capital murder, if he had the same intent to kill as the principal in the first degree.[23] Further, the bill would permit an accessory before the fact to be tried and punished as a principal in the first degree if he ordered or directed a willful, deliberate,

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14. Somashekhar, *supra* note 2.

15. *See Muhammed*, 269 Va. at 467–68, 619 S.E.2d at 24–25.

16. Somashekhar, *supra* note 2.

17. *See Muhammed*, 269 Va. at 490, 619 S.E.2d at 38; Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 363, 397 (2004).

18. Malone, *supra* note 17, at 397 n.249.

19. *Id.* at 397 (emphasis added).

20. *Muhammad*, 269 Va. at 481–84, 619 S.E.2d at 24.

21. MATTHEW ROSS LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 608 (2007).

22. *Muhammed*, 269 Va. at 484, 619 S.E.2d at 35.

23. *See* H.B. 2358, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 9, 2009); S.B. 961, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 4, 2009).

and premeditated killing.[24]

PART II

Political proponents of the expansion to the triggerman rule include the Virginia Crime Commission,[25] reversing its 2006 stance that a similar bill was too broad.[26] Advocates say but for "the creative efforts of prosecutors," Muhammad might have avoided the death penalty because he was not the triggerman and the phrase "immediate perpetrator" has normally been applied only to an accomplice who physically participates in the killing.[27] Proponents also named other instances of "loopholes" in which the accomplice was not sentenced to capital punishment.[28] Advocates for the repeal of the triggerman rule point out that someone who "participates" in a killing may be as culpable as someone who "carries it out."[29] The bill's sponsor, Virginia Senator Mark D. Obenshain[30] said in 2007:

> There are clearly situations where people are as culpable and blackhearted as the person who pulls the trigger . . . . If one person has a gun and the other person does not, and the person without the gun said: "Shoot her. Shoot that teller," without the triggerman rule, the person who is directing the killing would not be eligible for capital murder. With this bill, they would.[31]

Meanwhile, political opponents caution against expanding the death penalty in a state already ranked second in the nation based on number of executions behind Texas.[32] The American Civil Liberties Union ("ACLU") of Virginia argues the bill is "more than a symbolic expansion

24. *See* H.B. 2358, § 18.2-18; S.B. 961, § 18.2-18.

25. WHSV.com, Obenshain's Triggerman Bill Passes, Feb. 25, 2009, http://www.whsv.com/news/headlines/40307617.html (last visited Apr. 19. 2009).

26. Chris L. Jenkins, *House Votes to Repeal "Triggerman Rule,"* WASH. POST, Feb. 14, 2006, at B8.

27. Associated Press, *"Triggerman" Bill Sent to Kaine*, INSIDENOVA.COM, Feb. 22, 2008, http://www.insidenova.com/isn/news/politics/article/triggerman_bill_sent_to_kaine/4882/ (last visited Apr. 19, 2009).

28. *Id.* ("For example, Brandon Hedrick was executed in July 2006 for the rape and murder of a woman in Appomattox County while an accomplice only got life in prison.").

29. A. Barton Hinkle, *Candidates Split (Sort of) Over Capital Punishment*, RICH. TIMES-DISPATCH (Va.), Feb. 13, 2009, at A13.

30. Republican Senator Mark D. Obenshain represents Senate District 26. *See* Legislative Information System, Bill Tracking: Members, 2009 Session, http://leg1.state.va.us/091/mbr/MBR.htm (last visited Apr. 19, 2009).

31. Tim Craig, *Broader Scope for Execution Approved*, WASH. POST, Jan. 24, 2007, at B2.

32. *See* Nolan, *supra* note 1.

of the death penalty" and "could result in a resurgence of death penalty convictions and executions in Virginia."[33] The director of the Virginia Capital Case Clearinghouse, David I. Bruck, stated that expanding the triggerman rule will "mak[e] the death penalty available in more cases and guarantees [Virginia] will make more mistakes."[34] There are already fifteen "predicate" crimes for the death penalty in Virginia,[35] and previous expansions to what constitutes capital murder have been "specific and narrow in scope."[36] Virginia Delegate Joseph D. Morrissey,[37] a former prosecutor, argued that Virginia should reserve the death penalty for only the most egregious of killers and that it does not make sense to continue expanding capital punishment "to include every single garden variety type of killing."[38] Delegate Morrissey also stated that the expansions stem from a desire to appear "tough on crime" in election years.[39] Even vigorous supporters of the death penalty, such as ultraconservative Virginia Senator Ken Cuccinelli,[40] oppose the abolition of the triggerman rule.[41] Senator Cuccinelli offered the following counter-hypothetical to Senator Obenshain's hypothetical[42] to explain his opposition to the expansion of the triggerman rule: "What if two guys go into [a] bank and one shoots five tellers while the other one stands there thinking, 'Why did he do that?' It's going to look to the jury like they were executing a plan, and he's going to be executed like the first guy."[43]

PART III

Approximately three-fifths of the jurisdictions within the United

33. WILLIS, *supra* note 3.

34. Craig, *supra* note 31.

35. VA. CODE ANN. § 18.2-31 (Cum. Supp. 2008).

36. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, THE FACTS ON REDEFINING THE TRIGGERMAN RULE: VOTE NO ON SB 961 & HB 2358, http://www.vadp.org/death-penalty-expansion-elimination-of-the-triggerman-rule-sb-961-amp-hb-2358.html (last visited Apr. 19, 2009).

37. Democrat Joseph D. Morrissey represents House District 74. *See* Legislative Information System, Bill Tracking: Members, 2009 Session, http://leg1.state.va.us/091/mbr/MBR.htm (last visited Apr. 19, 2009).

38. Joseph D. Morrissey, Editorial, *Virginia Doesn't Need Death Penalty Expansion*, RICH. TIMES-DISPATCH (Va.), Feb. 26, 2009, at A13.

39. *Id.*

40. Republican Ken T. Cuccinelli, II represents Senate District 37. *See* Legislative Information System, Bill Tracking: Members, 2009 Session, http://leg1.state.va.us/091/mbr/MBR.htm (last visited Apr. 19, 2009).

41. *See* Morrissey, *supra* note 38.

42. *See supra* notes 30–31 and accompanying text.

43. Hinkle, *supra* note 29.

States that have not abolished the death penalty outright do not authorize capital punishment absent a finding that the non-triggerman intended to kill.[44] Virginia is one of three states that has capital punishment but does not apply it to accomplices sharing the intent to kill.[45] Death penalty statutes, practically applied, have not resulted in a single execution since *Enmund v. Florida*,[46] in which the defendant did not kill, attempt to kill, or intend to kill the victim.[47]

The Supreme Court of the United States's decisions related to the death penalty and specifically to non-triggermen have been inconsistent and ambiguous. In 1972, the Court held, in *Furman v. Georgia*,[48] that the imposition of the death penalty in instances where the court or jury had unbridled discretion resulted in outcomes that were arbitrary, discriminatory, and capricious and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.[49]

In response to *Furman*, legislatures adopted statutes that imposed mandatory death sentences or implemented guided discretion.[50] The United States Supreme Court, however, struck down mandatory death sentences as unconstitutional in 1976 in *Roberts v. Louisiana*[51] and *Woodson v. North Carolina*.[52] Subsequently, in *Coker v. Georgia*,[53] the Court established guidelines for the imposition of the death penalty.[54] The Court stated that the punishment is "excessive" and unconstitutional if it: "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[55] Further, the Court stressed that "attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing

44. EVAN J. MANDERY, CAPITAL PUNISHMENT: A BALANCED EXAMINATION 296 (2004).
45. Associated Press, *supra* note 27.
46. 458 U.S. 782 (1982).
47. *See* MANDERY, *supra* note 44.
48. 408 U.S. 238 (1972).
49. *Id.* at 239–40 (per curiam); *Id.* at 255–57 (Douglas, J., concurring).
50. Douglas W. Schwartz, Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857, 859–60 (1985).
51. 428 U.S. 325, 336 (1976).
52. 428 U.S. 280, 305 (1976).
53. 433 U.S. 584 (1977).
54. *See id.* at 592.
55. *Id.*

decisions . . . ."[56]

In *Enmund*, the Florida Supreme Court affirmed Earl Enmund's first-degree murder conviction and death sentence under Florida's felony murder rule.[57] Enmund had driven the "getaway" car for Sampson and Jeanette Armstrong, who had robbed and murdered an elderly couple.[58] The jury found Enmund guilty because he had been present and actively aided and abetted the robbery.[59] The Supreme Court of the United States, in a plurality opinion, reversed the conviction and concluded:

> the Eighth Amendment [does not] permit the imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.[60]

The "[E]ighth [A]mendment prohibits all punishments which by their severity are disproportionate to the offenses charged."[61] The *Enmund* Court determined:

> [t]he Florida felony murder rule converted Enmund from a principal in the second degree to a principal in the first degree, equal to the status of the person who did the actual killing. Intent was automatically inferred, but this was wholly at odds with the individualized consideration that must be afforded every defendant convicted of a capital crime, during the sentencing phase of the trial.[62]

Ultimately, the Court in *Enmund* drew a bright line restricting the type of punishment that can be inflicted, barred the death penalty in the absence of intent, and rejected the death penalty in cases of accomplice felony murder.[63] Soon after its holding in *Enmund*, Justice Marshall and

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56. *Id.*

57. Enmund v. Florida, 458 U.S. 782, 784–86 (1982).

58. *Id.* at 784–86; Schwartz, *supra* note 50, at 861.

59. Schwartz, *supra* note 50, at 861.

60. Enmund, 458 U.S. at 797.

61. Roy Conn III, Case Note, Enmund v. Florida, *102 S.Ct. 3368 (1982)*, 26 HOW. L.J. 1679, 1695 (1983).

62. *Id.*; *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (noting that individualized consideration of the facts and circumstances of the particular offense is a "constitutionally indispensable part of the process of inflicting the penalty of death").

63. *See* Conn, *supra* note 61, at 1696; *see also* Margaret Carmody Jenkins, Comment, *Intent After* Enmund v. Florida*: Not Just Another Aggravating Circumstance*, 65 B.U. L. REV. 809, 810, 815–16 (1985).

Justice Brennan, in their dissent from the denial of certiorari in *Stewart v. Texas*,[64] stated that the Court needed to clarify that states cannot circumvent this intent requirement by imposing the death penalty based on "the fiction of vicarious intent."[65]

Enmund's holding guarantees two things: (1) there is some minimally culpable mental state required to impose the death penalty, and (2) juries must determine the mental state of a defendant prior to imposing the death penalty.[66] Thus, *Enmund* prevents the application of cruel and unusual punishment by ensuring that the defendant's crime is proportional to the punishment.[67] Enmund's conviction, ultimately, could not stand because it served no penological punitive purpose and could not serve as retribution.[68]

However, *Enmund*'s holding retains a great deal of ambiguity. Lower courts have construed intent to mean the defendant "contemplated" a killing would occur, "intended 'lethal force' be used," or "'contemplated' that 'lethal force' be used," leading to widely disparate results in the application of *Enmund*'s holding.[69] Lower courts have also reached different conclusions about whether the jury must *actually* consider the defendant's mental state or whether a court can find that the evidence *could* have supported a jury finding—the result in *Muhammad*—to permit capital punishment.[70] As a result, lower courts have been applying the death penalty in two extremes—where the defendant had actual knowledge and intent that a killing would occur and where the defendant should have known or foreseen a killing would occur[71]—and everywhere in between.[72]

Justice O'Connor, in her dissent in *Enmund*, stated:

> the intent-to-kill requirement is crudely crafted [because] the determination of the degree of blameworthiness is best left to the sentencer . . . . While the type of mens

64. 474 U.S. 866 (1986).

65. *Id.* at 869 (Marshall, J., dissenting).

66. Schwartz, *supra* note 50, at 866.

67. *Id.* at 867.

68. Graham T. Stiles, Comment, *North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalities to Satisfy First Degree Felony-Murder*, 22 CAMPBELL L. REV. 169, 201–02 (1999).

69. Schwartz, *supra* note 50, at 869–70.

70. *Id.* at 879; *see* Muhammad v. Commonwealth, 269 Va. 451, 485, 619 S.E.2d 16, 35 (2005).

71. *See* Schwartz, *supra* note 50, at 879.

72. Andrew H. Friedman, Note, Tison v. Arizona*: The Death Penalty and the Non-Triggerman: The Scales of Justice Are Broken*, 75 CORNELL L. REV. 123, 136 (1989).

> rea of the defendant must be considered . . . , it is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder.[73]

Five years later, Justice O'Connor wrote the majority opinion for *Tison v. Arizona*,[74] incorporating similar language as in her dissent in *Enmund* and throwing the standard for capital punishment in cases of non-triggermen in even greater flux.[75] In *Tison*, the defendants, who were three brothers, helped their father and his cellmate escape from prison, and when their getaway car developed a flat tire, they flagged down a passing car for help.[76] The group kidnapped the family in the car and eventually drove both cars into the desert.[77] While the defendants retrieved water from the family's car, their father and his cellmate shot and killed the family.[78] Because the defendants participated in the escape effort, they were convicted and sentenced to death under Arizona's accomplice liability and felony-murder statutes.[79]

Instead of vacating the defendants' convictions under *Enmund*, the Court created a new substantive standard for capital liability and held:

> the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.[80]

By permitting the imposition of the death penalty for those who have a "major participation in the felony committed, combined with reckless indifference to human life," the Court allowed the lower courts' misapplication of *Enmund* to justify the decision's expansion of the death penalty even in the absence of an intent to kill.[81]

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73. Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting).
74. 481 U.S. 137 (1987).
75. *See id.* at 158.
76. *Id.* at 139–40.
77. *Id.* at 140–41.
78. *Id.*
79. *Id.* at 139, 141–42.
80. *Id.* at 157–58; *see* Friedman, *supra* note 72, at 140.
81. Tison, 481 U.S. at 158; *see* Friedman, *supra* note 72, at 140–42.

Justice Brennan's dissent in *Tison* argued that the majority opinion was inconsistent with *Enmund* because it permitted the death penalty in applications of the felony-murder rule and contravened the "legitimate justifications for the imposition of capital punishment—deterrence and retribution."[82] *Tison*, while resting on constitutionally questionable grounds and introducing a standard potentially more subject to arbitrary and capricious interpretation than *Enmund*, appears to adopt the view that a defendant must merely be aware that a killing is foreseeable and be a major participant in the felony.[83] The Court in *Tison* essentially abandoned the traditional factors and addressed only societal views on the specific crime and punishment.[84] It is unclear whether the Court's holding in *Tison* intended to overrule *Enmund*; rather, it leaves the application of the death penalty to the legislatures and courts, which will likely result in disparate applications inconsistent with the principles articulated in *Furman* and *Enmund*.[85]

PART IV

House Bill 2358, which is identical to Senate Bill 961, proposes that accessories before the fact and principals in the second degree "may be indicted, tried, convicted, and punished" as if they were principals in the first degree, provided they have the same intent as the principals in the first degree.[86] The amendment is superfluous because section 18.2-31 already permits "immediate perpetrators"—those inseparably intertwined with the criminal act—to be sentenced to death, as clarified

82. Friedman, *supra* note 72, at 142–43 (citing *Tison*, 481 U.S. at 172–73).

83. *Id.* at 144–45, 147–49.

84. *Id.* at 151. Generally, the Court considered other factors in the balancing approach, including:

> (1) the gravity of the offense and harshness of the penalty; (2) an individualized consideration of the defendant's culpability; (3) whether the punishment is disproportionate to the severity of the crime; (4) whether the punishment is an affront to human dignity; and (5) whether the punishment contributes to the two social purposes of the death penalty—retribution and deterrence.

Id.

85. *See* Lynn D. Wittenbrink, Note, *Overstepping Precedent?* Tison v. Arizona *Imposes the Death Penalty on Felony Murder Accomplices*, 66 N.C. L. REV. 817, 835 (1988).

86. H.B. 2358, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 9, 2009); S.B. 961, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 4, 2009). This does not include cases involving capital murder for hire, capital murder involving a continuing criminal enterprise, or capital murder involving an act of terrorism where accessories before the fact and principals in the second degree may be indicted, tried, convicted, and punished as a principals in the first degree without the same intent. *See* H.B. 2358, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 9, 2009); S.B. 961, Va. Gen. Assembly (Reg. Sess. 2009), § 18.2-18 (as enrolled Mar. 4, 2009).

by the Supreme Court of Virginia.[87] Where a defendant actually urged a killing, as suggested by Senator Obenshain's hypothetical,[88] the act would likely fall under existing law as an immediate perpetrator. Thus, it is not clear whether the proposed law even reaches the types of perpetrators Senator Obenshain describes or whether it would be constitutional, because a finding of a "desire" to kill coupled with direct physical action or participation in the actual murder better comports with the Eighth Amendment's requirements.[89] These requirements would also restore the proportionality required between the criminal act and the punishment.[90] Because the proposed bill requires "intent" alone, it stands on tenuous constitutional grounds and would surely result in arbitrary and capricious convictions and sentences. The proposed bill could also essentially result in the mandatory impositions of the death penalty deemed unconstitutional in *Roberts* and *Woodson*.[91]

CONCLUSION

Despite Governor Kaine's veto,[92] the expansion of the triggerman rule promises to be an issue in upcoming years. The Virginia General Assembly must remain cautious of overstepping the bounds of United States Supreme Court cases that define the parameters of the death penalty's constitutional application.[93] The legislature should also avoid an expansion of the death penalty that could lead to more mistaken convictions when existing law can already address the circumstances in which principals in the second degree and accessories before the fact should be subject to capital punishment.

87. *See* VA. CODE ANN. § 18.2-31 (Cum. Supp. 2008); Muhammed v. Virginia, 269 Va. 451, 483, 619 S.E.2d 16, 34 (2005).

88. *See supra* notes 30–31 and accompanying text.

89. Friedman, *supra* note 72, at 154.

90. *See id.* at 154–55.

91. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

92. *See* Legislative Information System, Bill Tracking: HB2358, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=09&typ=bil&val=hb2358 (last visited Apr. 21, 2009); Legislative Information System, Bill Tracking: SB961, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=09&typ=bil&val=sb961 (last visited Apr. 21, 2009).

93. *See supra* Part III.