

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 72

DECEMBER 1997

NUMBER 6

THE CALIFORNIA DEATH PENALTY SCHEME: REQUIEM FOR *FURMAN*?

STEVEN F. SHATZ*

NINA RIVKIND**

In 1972, in Furman v. Georgia, the United States Supreme Court struck down the death penalty schemes of Georgia and other states as unconstitutional because they created too great a risk of arbitrary death sentences. The decision was based in part on the Justices' belief that relatively few (15-20%) of the number of death-eligible murderers were being sentenced to death and that there was no meaningful basis for distinguishing the cases in which the death penalty was imposed. In subsequent cases, the Court interpreted Furman to require that the states, by statute, genuinely narrow the death-eligible class. Professors Shatz and Rivkind argue that, in disregard of Furman, California has adopted a death penalty scheme which defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-Furman death penalty schemes. They base their argument on an analysis of California statutory and decisional law and on a study of more than 400 appealed first degree murder cases. They conclude that unless the Supreme Court finds the California scheme unconstitutional, it has effectively abandoned Furman.

* Philip and Muriel Barnett Professor of Trial Advocacy, University of San Francisco School of Law. A.B., 1966, University of California, Berkeley; J.D., 1969, Harvard. Professor Shatz, who conducted the empirical research discussed in Part IV, would like to thank the following former students who assisted at various stages of the project: Rebecca Cachia-Reidl, Stephanie Haffner, Kamilah Najeib, Rachel Reiley, Louisa Weix, and Annika Woodward.

** Attorney and Lecturer in Law, University of California, Berkeley. A.B., 1974, J.D., 1977, University of California, Berkeley. We would like to thank Steven Parnes of the California Appellate Project for his substantial assistance throughout the development of this project and Susan Freiwald and Suzanne Mounts of the University of San Francisco School of Law for their review and comments on earlier drafts of the Article.

We are counsel for Teddy Sanchez, who is presently on death row in California. Preliminary versions of the data set forth in Part IV were first presented to the California Supreme Court in the course of our representation of Mr. Sanchez. See *People v. Sanchez*, 906 P.2d 1129 (Cal. 1995).

INTRODUCTION

In 1971, in *McGautha v. California*,¹ the United States Supreme Court for the last time upheld death penalty schemes which, as to those convicted of first degree murder, gave prosecutors complete discretion whether to seek, and juries complete discretion whether to impose, the death penalty. At the time, the California death penalty statute made every first degree murderer death-eligible.² McGautha had challenged the statute on substantive due process grounds, arguing that it failed to provide any rational basis for distinguishing those murderers sentenced to death from those sentenced to prison.³ Justice Harlan, writing for the Court,⁴ emphatically rejected the argument: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."⁵ He also rejected the argument (which he doubted the defendants had raised) that the Constitution required states to limit the pool of death-eligible defendants: "If . . . petitioners contend that Ohio's and California's definitions of first-degree murder are too broad, we consider their position constitutionally untenable."⁶

Finally, Justice Harlan expressed serious doubt that the death penalty ever could be imposed rationally: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁷ In dissent, Justice Brennan, joined by Justices Douglas and Marshall, argued that when the state permitted standardless sentencing, it abdicated its responsibility to prevent the random or arbitrary imposition of the death penalty and denied due process.⁸

¹ 402 U.S. 183 (1971).

² See Cal. Penal Code § 190 (West 1970) (amended by Cal. Penal Code § 190(a) (West Supp. 1997)); see also *In re Anderson*, 447 P.2d 117, 123 (Cal. 1968). *Crampton v. Ohio*, 402 U.S. 183 (1971), decided along with *McGautha*, involved a challenge to Ohio's death penalty scheme, which accorded similar discretion to sentencing juries.

³ See *McGautha*, 402 U.S. at 203-04.

⁴ The majority also included Chief Justice Burger and Justices Stewart, White, and Blackmun. Justice Black wrote separately, asserting that the Due Process Clause did not authorize courts to overturn convictions on the basis that they were "arbitrary" or "capricious" and that the Eighth Amendment did not bar capital punishment. See *id.* at 225-26 (Black, J., concurring).

⁵ *Id.* at 207.

⁶ *Id.* at 206 n.16.

⁷ *Id.* at 204.

⁸ See *id.* at 305-07 (Brennan, J., dissenting).

A year and a half later in *Furman v. Georgia*,⁹ the Supreme Court dramatically reversed course. It abandoned the *McGautha* approach and set out to regulate state death penalty schemes. In *Furman*, Justices Stewart and White joined the *McGautha* dissenters to form a 5-4 majority holding unconstitutional the death penalty schemes of Georgia and Texas and, by implication, those of the other states as well. Because each of the Justices in the majority wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. However, all five Justices focused on the infrequency with which the death penalty was imposed,¹⁰ and Justices Stewart and White, the two swing votes, emphasized that the relative infrequency of its application created the risk that it would be applied arbitrarily.¹¹ Justice Stewart found that the death sentences at issue in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual" because, of the many persons convicted of capital crimes, only "a capriciously selected random handful" were sentenced to death.¹² Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."¹³ Four years later, in *Gregg v. Georgia*,¹⁴ the plurality relied on these statements as expressing the "holding" of *Furman*.¹⁵ As explained by the *Gregg* plurality, *Furman* required that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹⁶

⁹ 408 U.S. 238 (1972).

¹⁰ See *id.* at 248 n.11 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 354 n.124, 362-63 (Marshall, J., concurring).

¹¹ Justices Douglas and Marshall expressed the additional concern that the death penalty was discriminatorily administered. See *id.* at 249-51 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring). More recently, Justice Stevens reiterated that *Furman* addressed these two related concerns, the "risk of arbitrary and capricious sentencing, specifically including the danger that racial prejudice would determine the fate of the defendant." *Tuilaepa v. California*, 512 U.S. 967, 982 (1994) (Stevens, J., concurring).

¹² *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

¹³ *Id.* at 313 (White, J., concurring).

¹⁴ 428 U.S. 153 (1976).

¹⁵ See *id.* at 188 (plurality opinion).

¹⁶ *Id.* at 189 (plurality opinion). The Court's premise—that unlimited discretion in this area inevitably leads to arbitrary and capricious results—has since been validated by at least one empirical study. See David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 80-88 (1990). The Baldus study found that, while Justices Stewart and White clearly overstated their case in *Furman* when they suggested that there

In the quarter of a century since the *Furman* decision, the Court has repeatedly reaffirmed that the *Furman* principle is the cornerstone of its death penalty jurisprudence.¹⁷ Since *Furman*, the Court has derived from the Eighth Amendment three other requirements that limit state death penalty schemes: (1) a capital defendant must be permitted to present mitigating evidence regarding his character and background and the circumstances of the crime as a basis for a sentence less than death;¹⁸ (2) the death penalty must be a proportionate penalty for the crime for which it is imposed;¹⁹ and (3) because "death is different," there must be heightened reliability in capital sentencing procedures.²⁰ Unlike *Furman*, none of these additional requirements has ever commanded unanimous assent on the Court.²¹ Nevertheless, despite the venerability of the *Furman* principle and the support it

was no rationality at all to the selection process, the pre-*Furman* selection process in Georgia was substantially random. Less than one-quarter of the death sentences imposed appear to have been evenhanded and nonarbitrary. See *id.* at 88.

¹⁷ See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); *California v. Brown*, 479 U.S. 538, 541 (1987) (stating that death penalty statutes must be structured "so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion"); see also *Walton v. Arizona*, 497 U.S. 639, 657 (1988) (Scalia, J., concurring) (asserting that *Furman* "has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion").

¹⁸ See *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion).

¹⁹ See *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (holding death penalty unconstitutional for murder where defendant "neither took life, attempted to take life, nor intended to take life"); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding death penalty unconstitutional for rape of adult woman).

²⁰ See *Woodson*, 428 U.S. at 305 (plurality opinion); *Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988) (invalidating death sentence where aggravating circumstance was based on invalid prior conviction); *Turner v. Murray*, 476 U.S. 28, 37 (1986) (requiring states to permit voir dire concerning racial prejudice in capital cases of interracial murder); *Caldwell v. Mississippi*, 472 U.S. 320, 329, 340-41 (1985) (prohibiting prosecutors from minimizing jury's sense of sentencing responsibility by misleading arguments about scope of appellate review); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (requiring trial court to give requested lesser-included offense instruction when evidence would support conviction of noncapital crime). In addition, two other procedural protections, a bifurcated trial in which the guilt determination and the sentencing decision are made in separate proceedings, and a provision for some sort of appellate review, were cited approvingly in *Gregg* and appear to be viewed as fundamental requirements. See *Gregg*, 428 U.S. at 189-91, 195, 198-99, 204-06 (plurality opinion).

²¹ In fact, the first of the three has been criticized forcefully as inconsistent with the basic *Furman* principle. See *Walton*, 497 U.S. at 664 (Scalia, J., concurring); see also *Graham v. Collins*, 506 U.S. 461, 483-98 (1993) (Thomas, J., concurring); *Penry v. Lynaugh*, 492 U.S. 302, 358-59 (1989) (Scalia, J., with whom Rehnquist, C.J., White, J., and Kennedy, J., joined, concurring in part and dissenting in part). But see *Walton*, 497 U.S. at 714-19 (Stevens, J., dissenting).

appears to enjoy on the Court, over the years the Court has only rarely, and in a limited fashion, tested state death penalty schemes against the principle.²²

The present Article examines the continued vitality of *Furman* by testing its application to the California death penalty scheme, arguably the broadest such scheme in the country.²³ In Part I, we trace the evolution of the *Furman* principle from *Furman*, where the Court's central concern was that arbitrary administration of the death penalty was inevitable when too few murderers were being selected for death from too large a death-eligible class, to *Gregg* and later cases, where the Court's solution was to require that legislatures "genuinely narrow" the death-eligible class. The Court's determination in *Furman* that the death penalty was being applied to a "random handful"²⁴ was grounded in empirical data concerning death sentence ratios at the time. Nevertheless, in their application of the *Furman* principle to various state schemes, the courts all have failed to determine, or even to attempt to determine, either the actual narrowing effected by the scheme or the resulting death sentence ratio.

In Part II, we describe the history of the California death penalty from the scheme challenged in *McGautha* to the present scheme under which first degree murder is broadly defined, and any one of thirty-two special circumstances suffices to make a first degree murderer death-eligible. Parts III and IV consider the application of the *Furman* principle to California's present scheme. In Part III, we examine California's statutes and decisional law, and conclude that the scheme, on its face, creates far too broad a death-eligible class to comply with *Furman*. In Part IV, we report on an empirical study of the

²² Some commentators have concluded that the Court effectively has abandoned the *Furman* approach. See Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form Over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. Rev. L. & Soc. Change, 641, 665-66 (1993-94); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 372-89 (1995). This conclusion seems premature because the Court has yet to address squarely a *Furman* challenge to a broad state death penalty scheme.

²³ This Article concerns the application of *Furman* in murder cases. Since *Furman*, the Supreme Court has not upheld the use of the death penalty for any other crime. See *Coker*, 433 U.S. at 599 (finding penalty of death unconstitutional for crime of rape of adult woman). But see *State v. Wilson*, 685 So. 2d 1063 (1996) (upholding constitutionality of death penalty for crime of rape of child under 12 years old), cert. denied sub nom. *Bethley v. Louisiana*, 117 S. Ct. 2425 (1997). Nor since *Furman* has California imposed the death penalty for any crime other than first degree murder, even though the death penalty remains on the books as a possible penalty for two other crimes. See Cal. Penal Code § 37 (West Supp. 1997) (allowing death penalty for treason); id. § 128 (West 1988) (allowing death penalty for procuring conviction and execution of innocent person by perjury).

²⁴ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

factual bases of murder convictions in California. On the basis of the study, we determine that the statutorily defined death-eligible class is so large and the imposition of the death penalty on members of the class so infrequent as to violate *Furman*. We then examine, by way of comparison, how the *Furman* principle would apply to a hypothetical statute that more narrowly defined the death-eligible class. We conclude, in Part V, that because California's present death penalty scheme cannot be squared with the principle and purposes of *Furman*, either the scheme is unconstitutional or *Furman* effectively has been abandoned.²⁵

I

FURMAN AND THE STATUTORY NARROWING REQUIREMENT

In *Furman*, the Justices' conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. Chief Justice Burger, writing for the four dissenters, adopted that statistic, citing to four sources.²⁶ Justice Stewart, in turn, cited to the Chief Justice's statement as support for his conclusion that the imposition of death was "unusual."²⁷ In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment."²⁸ The plurality then described the need for the legislature to distinguish "the few cases in which [the death penalty] is imposed from the many cases in which it is not."²⁹

²⁵ Because the *Furman* principle has been developed in the context of challenges to state death penalty schemes, and because our focus in this Article is to test its application to California's death penalty scheme, we refer throughout to *Furman* as a limitation on state death penalty schemes. Nevertheless, the *Furman* principle is equally applicable to the federal death penalty. See *Loving v. United States*, 116 S. Ct. 1737, 1741 (1996) (challenging Congress's delegation to President of authority to define aggravating factors applicable to death penalty in military cases).

²⁶ See *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting). Justice Powell, also writing for the four dissenters, cited similar statistics. See *id.* at 435 n.19 (Powell, J., dissenting).

²⁷ See *id.* at 309 & n.10.

²⁸ *Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (1976) (plurality opinion). The plurality relied on the same statistic in *Woodson v. North Carolina*, 428 U.S. 280, 295 n.31 (1976) (plurality opinion). Post-*Furman* research indicates that the pre-*Furman* death sentence ratio in Georgia was 15%. See Baldus et al., *supra* note 16, at 80.

²⁹ *Gregg*, 428 U.S. at 188 (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)). In *Woodson*, the plurality stated, "under contemporary standards of decency death is viewed as inappropriate punishment for a substantial portion of convicted first-degree murderers." *Woodson*, 428 U.S. at 296 n.31 (plurality opinion).

Although in *Furman* and *Gregg* the Court referred to the percentage of "those convicted of murder" who were sentenced to death, the Justices had to be concerned with the percentage of *death-eligible convicted murderers* sentenced to death.³⁰ *Furman* and *Gregg* both involved the Georgia scheme, which did not divide murder into degrees and made all murderers death-eligible. Thus, in states such as California, which divided murder into degrees and made only first degree murderers death-eligible, the relevant statistic would have been the percentage of convicted first degree murderers sentenced to death.³¹

While the Court did not indicate in *Furman* and *Gregg* what death sentence ratio (actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy *Furman*, plainly any scheme producing a ratio of less than 20% would not.³² *Furman* was a mandate to the states to increase the death sentence ratio by procedures that limited the death-eligible pool to those convicted murderers particularly deserving of the penalty. Justice White, writing for himself, the Chief Justice, and Justice Rehnquist, explained the Court's expectations:

³⁰ See *Furman*, 408 U.S. at 435 n.19 (Powell, J., dissenting) (referring to percentage of cases in which "death was a statutorily permissible punishment"); *Woodson*, 428 U.S. at 295 (plurality opinion) (referring to frequency of death verdicts in first degree murder conviction cases).

³¹ In California, at the time of *Furman*, it appears that the ratio of death sentences to first degree murder convictions was comparable to the nationwide ratio (15-20%) relied on by the Court. See Petitioner's Brief at 4f-5f, app. F, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027) (citing estimate of former Director of California Department of Corrections and statistics from 1967 and 1969).

³² The Court's reliance on pre-*Furman* death sentence ratios is noted in Baldus et al., supra note 16, at 267 n.9. Professor Paternoster appears to agree that a minimum threshold for a death sentence ratio is 20%. See Raymond Paternoster, *Capital Punishment in America* 167-68 (1991) ("[I]f a death sentence is imposed in fewer than 20 percent of the cases, that is, if a sentence of life is given in eight out of every ten cases or more, a sentence of death will be said to be arbitrary."). Professors Steiker and Steiker, in their analysis of the Supreme Court's death penalty jurisprudence, also highlight the importance of death sentence ratios but appear to get the numbers wrong. See Steiker & Steiker, supra note 22, at 415 (suggesting that a state scheme would be proper if it resulted in death sentence ratio of 10-20%—the very percentages found unconstitutional in *Furman*). Other scholars have noted that the quantitative aspect of the *Furman* principle remains undefined but have not suggested that *Furman* sets a threshold. See, e.g., James R. Acker & C.S. Lanier, *Aggravating Circumstances and Capital Punishment: Rhetoric or Real Reforms?*, 29 *Crim. L. Bull.* 467, 475 (1993) (asserting that "[t]he Court conspicuously has avoided defining in numerical terms how narrow the class of death-eligible murders must be relative to all murders"); Bruce S. Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 *Duq. L. Rev.* 317, 351-53 (1984) (noting that "[t]he numerical limiting goal is unclear"). Still other commentators discussing the *Furman* principle have not addressed the quantitative basis of the Court's analysis. See, e.g., Packer, supra note 22; Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 *B.C. L. Rev.* 1103 (1990).

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.³³

The pre-*Furman* death sentence ratio was central to the Court's holding in *Furman* and was referred to several times in *Gregg*. *Furman* was a mandate to the states to raise their death sentence ratios, and that mandate has been the foundation of the Court's subsequent decisions requiring narrowed death penalty schemes. Nevertheless, despite the constitutional significance of a state's death sentence ratio, the Court since *Furman* has never examined that ratio for any of the death penalty schemes it has reviewed.³⁴

A. *Development of a Statutory Narrowing Requirement*

In theory, the Court might have required that the *Furman* concern—limiting the risk of arbitrariness in the administration of the death penalty—be addressed at one or more of four points in a state's criminal process: (1) the legislature's definition of capital offenses; (2) the prosecutor's decision whether to charge a capital offense; (3) the sentencer's determination whether to impose the death penalty;³⁵ or

³³ *Gregg*, 428 U.S. at 222 (White, J., concurring). In theory, raising a state's death sentence ratio could be accomplished either by narrowing the death-eligible class or by raising the number of death sentences. In stating the Court's understanding that narrowing of the death-eligible class would have to occur, Justice White implicitly rejected the possibility that a state would raise its rate of imposition of the death sentence enough over time to satisfy *Furman*. His assumption that death penalty sentencing rates would not rise significantly has proved correct. Studies have shown that the public within a given state desires a certain level of death penalty activity and that this level is relatively stable over time, irrespective of the particular death penalty scheme in effect. See, e.g., David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 Seton Hall L. Rev. 1582, 1591-94 (1996) (tabulating state-by-state statistics on number of death sentences handed down and executions carried out, and arguing that data "reflect judgments about the level of death penalty activity that the community expects").

³⁴ The Court, in *Gregg* and its companion cases, approved the Georgia, Florida, and Texas death penalty schemes on their face, without reference to the actual or anticipated death sentence ratios. See *Gregg*, 428 U.S. at 198 (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976). Subsequent evidence indicates that the post-*Furman* death penalty ratio in Georgia has risen to 23% from the pre-*Furman* 15%. See Baldus et al., *supra* note 16, at 88-89.

³⁵ In California, a jury is the sentencer unless both the defendant and the prosecutor waive a jury trial of the penalty phase. See Cal. Penal Code § 190.4(b), (c) (West 1988). In

(4) the appellate court's review of the sentencer's choice of a death sentence. In fact, the Court has focused only on the first point, the legislature's definition of capital offenses.

In *Gregg*, the Court upheld Georgia's revised death penalty scheme but without specifying which aspects of the scheme were necessary to satisfy the Eighth Amendment. Seven years later, in *Zant v. Stephens*,³⁶ the Court explained that the *Gregg* holding was based on two features of the Georgia scheme: the requirement that the jury find an "aggravating circumstance" in order to make the defendant death-eligible, and the requirement that the Georgia Supreme Court review all death sentences for possible arbitrariness or disproportionality.³⁷ Addressing the significance of the "aggravating circumstance" requirement, the Court said:

To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

....

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.³⁸

Thus, by the time of *Zant*, the requirement that states reduce the risk of arbitrary imposition of the death penalty had evolved into a requirement that there be statutory narrowing of the category of death-eligible murderers.³⁹

other jurisdictions, the sentencer may be a judge. See, e.g., Ariz. Rev. Stat. Ann. § 13-703(B) (West Supp. 1996); Mont. Code Ann. § 46-18-301 (1995).

³⁶ 462 U.S. 862 (1983).

³⁷ See *id.* at 876.

³⁸ *Id.* at 877-78. While it is usually the legislature which by statute defines death eligibility, in California, legislation also may be enacted by initiative. See Cal. Const. art. 2, §§ 8, 10; *id.* art. 4, § 1. The term "legislature" in this Article includes the electorate acting by means of initiatives.

³⁹ The Court has stated that in response to the *Furman* mandate, "the States have adopted various narrowing factors that limit the class of offenders upon which the sentencer is authorized to impose the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 341-42 (1992). These narrowing factors, which a jury must find to make a murderer death-eligible, are often denominated "aggravating circumstances," "aggravating factors," or, in California, "special circumstances." See Cal. Penal Code § 190.2 (West Supp. 1997); *People v. Bacigalupo*, 862 P.2d 808, 813 (Cal. 1993). California's special circumstances operate at the guilt phase to define the class of death-eligible first degree murderers. See *Bacigalupo*, 862 P.2d at 814. They should not be confused with California's "aggravating circumstances," which operate at the penalty phase to help the jury select the penalty. See Cal. Penal Code § 190.3 (West Supp. 1997); see also *Tuilaepa v. California*, 512 U.S. 967, 975-76 (1994) (dis-

The Court and various Justices have reiterated and reaffirmed the *Zant* rule. Thus, in *Pulley v. Harris*,⁴⁰ the Court referred to the "constitutionally necessary narrowing function of statutory aggravating circumstances."⁴¹ In *McCleskey v. Kemp*,⁴² the Court stated that the death penalty could not be imposed unless a state established "rational criteria that narrow the decisionmaker's judgment."⁴³ In *Tuilaepa v. California*,⁴⁴ the Court repeated the basic principle that narrowing circumstances "must apply only to a subclass of defendants convicted of murder."⁴⁵

At the same time, the Court has declined to require the states to address the *Furman* concerns at any of the other three points in the criminal process. The Court has squarely refused to require prosecutors to develop guidelines concerning, nor will it review the prosecutor's decision to seek, the death penalty. In *Gregg*, the Court rejected a challenge to the prosecutor's "unfettered authority" to charge a capital offense and to plea bargain:

The existence of these discretionary stages [the prosecutor's discretion and the executive's discretion at the clemency stage] is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.⁴⁶

Since *Gregg*, the Court has reaffirmed a prosecutor's "traditionally 'wide discretion'" to seek the death penalty.⁴⁷ According to the Court, the prosecutor need not explain her decision to seek the death penalty unless the defendant can show unconstitutional motives in his

tinguishing role of California's aggravating circumstances from narrowing function of special circumstances).

⁴⁰ 465 U.S. 37 (1984).

⁴¹ *Id.* at 50.

⁴² 481 U.S. 279 (1987).

⁴³ *Id.* at 305.

⁴⁴ 512 U.S. 967 (1994).

⁴⁵ *Id.* at 972.

⁴⁶ *Gregg v. Georgia*, 428 U.S. 153, 199 (plurality opinion).

⁴⁷ *McCleskey*, 481 U.S. at 296 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). The California Supreme Court has stated the conclusion even more clearly: "[O]ne sentenced to death under a *properly channeled* death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty. . . . The same reasoning applies to the prosecutor's decisions to pursue or withhold capital charges at the outset." *People v. Keenan*, 758 P.2d 1081, 1098 (Cal. 1988) (citation omitted) (emphasis added).

case—it is enough that the defendant committed a crime for which the death penalty is authorized.⁴⁸

Nor has the Court required that the sentencer's discretion to impose the death penalty on a death-eligible defendant be circumscribed to meet *Furman* concerns. At one time, it appeared that the Court, in addition to requiring statutory narrowing of the death-eligible class, would require that the sentencer's discretion be channeled at the penalty phase by "clear and objective standards."⁴⁹ However in *Zant*, the Court refused to require that the decision to impose the death penalty be guided by clear criteria.⁵⁰ Where the narrowing requirement has been met at the death-eligibility stage, the Court has refused to control the sentencer's discretion in selecting which capital defendants will be executed. The only constitutional limitation at the selection stage is the requirement of an individualized penalty determination on the basis of the character of the defendant and the circumstances of the crime.⁵¹ Thus, a sentencer may rely on both statutory and nonstatutory aggravating circumstances,⁵² on an aggravating circumstance that duplicates an element of the crime,⁵³ on evidence incorrectly characterized as an aggravating circumstance,⁵⁴ and on open-ended sentencing factors such as the age of the defendant.⁵⁵ And there is no requirement that the sentencer be given any particular guidance or instruction regarding its punishment choice.⁵⁶

Finally, the Court has not required that the states enforce the *Furman* principle through appellate review. Despite the Court's suggestion in *Zant* that the Georgia scheme was upheld in *Gregg* because it provided for review by the Georgia Supreme Court for arbitrariness and disproportionality⁵⁷—in effect, a post hoc narrowing of the death-eligible class—the Court has refused to find such review constitution-

⁴⁸ See *McCleskey*, 481 U.S. at 296-97.

⁴⁹ *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

⁵⁰ See *Zant v. Stephens*, 462 U.S. 862, 874-75 (1983). In *Zant*, the Court explicitly approved the Georgia scheme which, after narrowing the death-eligible class with the requirement that the jury find at least one statutory aggravating circumstance, permitted the jury complete discretion to decide whether to impose the death penalty. See *id.* at 875.

⁵¹ See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant*, 462 U.S. at 879.

⁵² See *Barclay v. Florida*, 463 U.S. 939, 944-46 (1983).

⁵³ See *Lowenfield v. Phelps*, 484 U.S. 231, 241, 243 (1988).

⁵⁴ See *Zant*, 462 U.S. at 864, 867-68.

⁵⁵ See *Tuilaepa*, 512 U.S. at 976-78.

⁵⁶ See *id.* at 979; see also *Zant*, 462 U.S. at 889 (finding no constitutional infirmity in simply instructing jury to consider "all facts and circumstances presented in extenuation [sic], mitigation, and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense" (quoting Georgia trial court) (alteration in original)).

⁵⁷ See *Zant*, 462 U.S. at 876.

ally required.⁵⁸ Thus, the statutory narrowing requirement emerged as the Court's only requirement implementing *Furman*.

From its inception, the statutory narrowing requirement has been described by the Court as having quantitative and qualitative prongs. In *Furman*, Justice White voiced concern not only with the infrequency with which the death penalty was imposed but with the lack of a "meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not."⁵⁹ In *Zant*, the statutory narrowing requirement meant that a state must "genuinely narrow the class of persons eligible for the death penalty" and "reasonably justify the imposition of a more severe sentence" on those made death-eligible.⁶⁰ These two prongs were restated in the Court's unanimous opinion in *Maynard v. Cartwright*⁶¹ as a requirement that the class of death-eligible murderers be "demonstrably smaller and more blameworthy" than the class of all murderers.⁶²

Despite its stated concern that legislatures identify the "more blameworthy" murderers for execution, the Supreme Court has yet to apply this prong of the statutory narrowing requirement.⁶³ The only "qualitative" limitation that the Court has placed on legislatures' discretion to determine death-eligibility for murderers was based on application of a "proportionality" rather than a "risk of arbitrariness" principle. In *Enmund v. Florida*,⁶⁴ the Court held unconstitutional the application of the death penalty to a "getaway driver" in a robbery

⁵⁸ See *Pulley v. Harris*, 465 U.S. 37, 44, 50-51 (1984). The *Pulley* Court read *Zant* as relying "on the jury's finding of aggravating circumstances, not the state supreme court's finding of proportionality as rationalizing the sentence. Thus the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances." *Id.* at 50.

⁵⁹ *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

⁶⁰ *Zant*, 462 U.S. at 877. Accord *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

⁶¹ 486 U.S. 356 (1988).

⁶² *Id.* at 364.

⁶³ Given the Supreme Court's obvious reluctance to review the states' penalty choices, see, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) (holding that mandatory life sentence without parole for Michigan defendant convicted of possessing 672 grams of cocaine is not cruel and unusual punishment), it seems unlikely that the Court would hold unconstitutional, under the qualitative prong, a state scheme which satisfied the quantitative prong. While a full discussion of the qualitative prong is beyond the scope of this Article, it should be noted that the Court could develop at least some objective standards by which to test a state scheme for minimal rationality. For example, a death penalty scheme which applied to an unintentional murderer but not to an intentional murderer, or to a murderer engaged in a nonviolent felony but not to a murderer engaged in a violent felony, might be held to violate the qualitative prong of the statutory narrowing requirement.

⁶⁴ 458 U.S. 782 (1982).

felony murder.⁶⁵ The penalty was held to be disproportionate because the defendant had neither killed, attempted to kill, nor intended to kill.⁶⁶ The *Enmund* holding was strictly limited in *Tison v. Arizona*.⁶⁷ There the Court upheld application of the death penalty to a felony murder accomplice if the accomplice was a major participant in the felony and acted with at least reckless indifference to human life.⁶⁸ Aside from the *Enmund/Tison* rule, which addresses a very small category of cases,⁶⁹ the Court has left the legislatures with the responsibility of identifying the "worst" murderers, those deserving of death.

Thus, in the quarter of a century since *Furman* held that a constitutional death penalty scheme must limit the risk of arbitrariness and yield reasonably consistent results in its application, the *Furman* principle has resulted in a statutory narrowing requirement with two components: (1) the death-eligible class of convicted murderers must be small enough that a substantial percentage are in fact sentenced to death; and (2) the states, through their legislatures, must decide the composition of the death-eligible class. In other words, *Furman* is satisfied *if, and only if*, the legislature, by defining categories of murderers eligible for the most severe penalty, genuinely narrows the death-eligible class.

⁶⁵ See *id.* at 788.

⁶⁶ See *id.* at 793, 797.

⁶⁷ 481 U.S. 137 (1987).

⁶⁸ See *id.* at 158. In both *Enmund* and *Tison*, the Supreme Court addressed the question whether the death penalty was disproportionate when applied to a felony murder accomplice "who neither took life, attempted to take life, nor intended to take life." *Enmund*, 458 U.S. at 787; cf. *Tison*, 481 U.S. at 138; see also *Cabana v. Bullock*, 474 U.S. 376, 386 (1986) ("If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated."). However, some lower courts have since read the *Enmund/Tison* rule more broadly, as articulating a constitutional minimum mens rea requirement for the death penalty, applicable to *all* murderers—actual killers as well as accomplices. See *Reeves v. Hopkins*, 102 F.3d 977, 984-85 (8th Cir. 1996), cert. granted, 66 USLW 3203 (U.S. Sept. 30, 1997) (No. 96-1693); *Woratzek v. Stewart*, 97 F.3d 329, 335 (9th Cir. 1996), cert. denied, 117 S. Ct. 1443 (1997); *United States v. Cheely*, 36 F.3d 1439, 1443 & n.9 (9th Cir. 1994); *State v. Middlebrooks*, 840 S.W.2d 317, 345 (Tenn. 1992); see also *Graham v. Collins*, 506 U.S. 461, 501 (1993) (Stevens, J., dissenting) (suggesting that *Enmund* held that death penalty was impermissible punishment for unintentional homicide). Of course, such an interpretation of the rule would raise constitutional questions about death sentences in those states (including California) which allow felony murder *simpliciter* to define death-eligibility. Since the Supreme Court has yet to approve such an extension of the *Enmund/Tison* rule, we will assume, for purposes of this Article, that the rule applies only to felony murder accomplices.

⁶⁹ Few felony murder accomplices are as uninvolved in the killing as was *Enmund*, and of that group, very few are prosecuted for and convicted of first degree murder. See *infra* notes 248-49 and accompanying text; see *infra* note 266.

B. Application of the Statutory Narrowing Requirement

Since *Furman* and *Gregg*, the Supreme Court and lower courts have addressed a number of quantitative no-narrowing challenges in murder cases. The challenges have been of two kinds. The majority have been "vagueness" challenges to a single narrowing circumstance. The contention in such cases has been that the circumstance fails to narrow because it is so vague that it can be applied to most murders. In ruling on such challenges, the courts simply have looked at the circumstance in isolation, and, if they have found the circumstance not vague, they have not examined or attempted to quantify the death sentence ratio for the scheme as a whole. The other form of no-narrowing challenge has been to a single narrowing circumstance or to an entire statutory scheme on grounds of overbreadth. The contention in these cases has been that the circumstance or scheme, although arguably definite and not vague, is so comprehensive as to necessarily encompass most murders. Resolution of this latter type of challenge should turn on the size of the death-eligible class created by the narrowing circumstance or entire scheme and the consequent death sentence ratio. Yet none of the courts addressing such challenges has attempted to calculate or even estimate either number.

1. No-Narrowing Challenges in the Supreme Court

Eight no-narrowing challenges have reached the Supreme Court. Six of the cases involved vagueness challenges to "especially heinous" or "wantonly vile" narrowing circumstances.⁷⁰ In *Godfrey v. Georgia*,⁷¹ *Maynard v. Cartwright*,⁷² and *Shell v. Mississippi*,⁷³ the Court overturned death sentences. In *Godfrey*, the plurality reasoned that

⁷⁰ See *Arave v. Creech*, 507 U.S. 463 (1993); *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam); *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Walton v. Arizona*, 497 U.S. 639 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Court had rejected two earlier vagueness challenges not raised under the narrowing rubric. See *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) (finding that neither Florida's "especially heinous, atrocious, or cruel" aggravating circumstance, which had been construed to mean "conscienceless or pitiless crime which is unnecessarily torturous to the victim," nor its "knowingly created a great risk of death to many persons" aggravating circumstance was unconstitutionally vague); *Jurek v. Texas*, 428 U.S. 262, 272, 274-76 (1976) (finding that Texas statutory question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" was not unconstitutionally vague).

⁷¹ 446 U.S. 420, 422 (1980) (involving challenge to "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance).

⁷² 486 U.S. 356, 359 (1988) (involving challenge to "especially heinous, atrocious, or cruel" aggravating circumstance).

⁷³ 498 U.S. 1, 1 (1990) (per curiam) (involving challenge to "especially heinous, atrocious, or cruel" aggravating factor).

there was nothing in the words of the aggravating circumstance, standing alone, that implied "any inherent restraint on the arbitrary and capricious infliction of the death sentence," since a "person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"⁷⁴ Similarly, in *Maynard*, the Court found unconstitutional the "especially heinous" aggravating circumstance on the ground that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"⁷⁵ By contrast, in *Walton v. Arizona*,⁷⁶ *Lewis v. Jeffers*,⁷⁷ and *Arave v. Creech*,⁷⁸ the Court found the aggravating circumstances constitutional because the state courts had given the circumstances a narrowing interpretation.⁷⁹ In none of the six cases did the Court attempt to quantify the narrowing effect of the challenged circumstance or the scheme as a whole.

*Lowenfield v. Phelps*⁸⁰ is the one case where the Court arguably addressed a no-narrowing challenge to an entire scheme. In *Lowenfield*, the defendant contended that Louisiana's death penalty scheme failed to narrow since the sole aggravating circumstance found by the jury at the penalty phase was identical to an element of first degree murder found by the jury at the guilt phase.⁸¹ The Court re-

⁷⁴ *Godfrey*, 446 U.S. at 428-29 (quoting Ga. Code § 27-2534.1(b)(7) (1978)).

⁷⁵ *Maynard*, 486 U.S. at 364 (quoting *Godfrey*, 446 U.S. at 428-29).

⁷⁶ 497 U.S. 639, 652 (1990) (involving challenge to "especially heinous, cruel, or depraved" aggravating circumstance).

⁷⁷ 497 U.S. 764, 773 (1990) (involving challenge to "especially heinous . . . or depraved" aggravating circumstance).

⁷⁸ 507 U.S. 463, 465 (1993) (involving challenge to "utter disregard for human life" aggravating circumstance).

⁷⁹ In *Walton*, the Court assumed that the trial judge, who sentenced under the Arizona death penalty statute, followed the state supreme court's limitation of the "especially heinous, cruel or depraved" aggravating factor to murders where "the perpetrator inflicts mental anguish" (which "includes a victim's uncertainty as to his ultimate fate") or "physical abuse before the victim's death." *Walton*, 497 U.S. at 654 (quoting *State v. Walton*, P.2d 1017, 1032 (Ariz. 1989)). In *Jeffers*, the defendant challenged the same aggravating circumstance at issue in *Walton*, and the Court rejected the challenge in reliance on that case. See *Jeffers*, 497 U.S. at 777-78. In *Arave*, the Court accepted Idaho's construction of the "utter disregard" aggravating circumstance as requiring proof of mens rea greater than that for first degree murder—proof that the defendant was a "cold-blooded, pitiless slayer" . . . who kills without feeling or sympathy." *Arave*, 507 U.S. at 472 (quoting *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981)). The Court found that, as construed, the aggravating circumstance did sufficiently narrow the class of defendants eligible for the death penalty since some first degree murderers do exhibit feeling, and "kill with anger, jealousy, revenge, or a variety of other emotions." *Id.* at 476.

⁸⁰ 484 U.S. 231 (1988).

⁸¹ See *id.* at 233. Under the Louisiana statute, five of the ten aggravating circumstances "overlapped" with the five categories of first degree murder. See La. Code Crim. Proc. Ann. art. 905.4 (West 1984 & Supp. 1997); La. Rev. Stat. Ann. § 14:30(A) (West 1986 & Supp. 1996).

jected the contention. The Court first explained that the finding of an aggravating circumstance was not constitutionally required since narrowing could be effected in either of two ways: (1) the legislature might narrowly define capital offenses, so that a finding of guilt would sufficiently limit death-eligibility at the guilt phase or, (2) the legislature might define capital offenses more broadly and accomplish narrowing by requiring the finding of an aggravating circumstance, usually at the penalty phase.⁸² The Court then went on to hold that the Louisiana scheme sufficiently narrowed the death-eligible class at the guilt phase because there were only five narrowly defined categories of first degree murder, so there was no need for further narrowing by the finding of an aggravating circumstance.⁸³ The Court's resolution of the narrowing issue by counting the separately numbered categories of first degree murder and characterizing them as "narrow" seems altogether too superficial an approach. Not only is counting categories an inexact exercise,⁸⁴ but the number of categories and the Court's unexplained impression that they were narrow says nothing about the size of the resulting death-eligible class.

In *State v. Middlebrooks*,⁸⁵ the last no-narrowing case to reach the Court, the Court declined the opportunity to confront the broadest such challenge when it ultimately dismissed certiorari as improvidently granted. *Middlebrooks* was a challenge to Tennessee's "double counting" of felony murder in its death penalty scheme.⁸⁶ Under the Tennessee scheme in effect at the time of the murder, the commission of a felony murder simpliciter (i.e., felony murder without proof that the defendant had any mens rea as to the homicide) was sufficient to convict the defendant of first degree murder.⁸⁷ Since fel-

⁸² See *Lowenfield*, 484 U.S. at 246. "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons." *Id.* at 244.

⁸³ See *id.* at 246. At the time, first degree murder required proof that the defendant specifically intended to kill or to inflict great bodily harm and that: (1) the killing occurred during the perpetration or attempted perpetration of one of seven felonies; (2) the victim was a fireman or peace officer engaged in the performance of his lawful duties; (3) the defendant intended to kill or inflict great bodily harm on more than one person; (4) the killing was for financial gain; or (5) the victim was under the age of twelve years. See La. Rev. Stat. Ann. § 14:30(A).

⁸⁴ Since one of the Court's five categories included seven separate forms of felony murder and another included two categories of victims, the Court could as easily have counted 12 categories.

⁸⁵ 840 S.W.2d 317 (Tenn. 1992), cert. granted, 507 U.S. 1028, cert. dismissed as improvidently granted, 510 U.S. 124 (1993).

⁸⁶ See *id.* at 323.

⁸⁷ In 1989, Tennessee amended its first degree murder statute to require proof that the killing was at least reckless in order to invoke the felony murder rule. See Tenn. Code Ann. § 39-13-202(a)(2) (1991).

only murder was one of the narrowing circumstances, the commission of a felony murder also made the defendant death-eligible.⁸⁸ The Tennessee Supreme Court held that the scheme failed to narrow sufficiently since the broad definition of felony murder and the duplicating language of the felony murder narrowing circumstances meant that an unacceptably large number of first degree murderers were automatically death-eligible.⁸⁹ The court also questioned whether the scheme met the qualitative prong of the *Furman* principle since the "perverse result of the felony murder narrowing device" was to treat those who committed an unintentional felony murder more harshly than those who killed with premeditation and deliberation.⁹⁰ The court went on to state, in dictum, that even if the state had a felony murder rule requiring proof of reckless indifference, such a rule would not meet the constitutional narrowing requirement. According to the court, since such a rule would meet only the Supreme Court's threshold limits for a proportional death penalty under *Enmund* and *Tison*,⁹¹ states were obliged to narrow further from this baseline.⁹² The question whether the states have any obligation to narrow from the *Enmund/Tison* baseline as well as the constitutionality of the "double-counting" of felony murder were before the Supreme Court when it dismissed the case.⁹³

2. No-Narrowing Challenges in the Lower Federal Courts

The lower federal courts also have failed to engage in extensive or meaningful analysis of no-narrowing challenges. Aside from a few successful vagueness challenges to a single narrowing circumstance,⁹⁴ there have been only two successful no-narrowing challenges in the

⁸⁸ See *Middlebrooks*, 840 S.W.2d at 335.

⁸⁹ See *id.* at 346.

⁹⁰ See *id.* at 345.

⁹¹ As noted above, the Tennessee court apparently interpreted the *Enmund/Tison* rule to apply to actual killers. See *supra* note 68.

⁹² See *Middlebrooks*, 840 S.W.2d at 345.

⁹³ The state's contention that it had no obligation to narrow further the class of felony murderers who met the *Enmund/Tison* threshold, see Petitioner's Brief at 18-20, *State v. Middlebrooks*, 840 S.W.2d 317 (No. 92-989), amounted to a contention that the Supreme Court's proportionality decisions had superseded the *Furman* principle. Clearly, the Court's post-*Enmund*, post-*Tison* upholding of *Furman* challenges in *Maynard* and *Shell* and its consideration of *Furman* challenges in *Walton* and *Arave* belie such an understanding.

⁹⁴ See, e.g., *Moore v. Clarke*, 904 F.2d 1226, 1228-30 (8th Cir. 1990) (striking down Nebraska's "manifested exceptional depravity by ordinary standards of morality and intelligence" aggravating circumstance as unconstitutionally vague); *Newlon v. Armontrout*, 885 F.2d 1328, 1334-35 (8th Cir. 1989) (striking down Missouri's "depravity of mind" aggravating circumstance).

lower federal courts, both in the Ninth Circuit. In *Wade v. Calderon*,⁹⁵ the Ninth Circuit, following the lead of the California Supreme Court,⁹⁶ held that California's torture-murder special circumstance had to be interpreted as requiring "intent to inflict extreme pain" in order to satisfy the Eighth Amendment.⁹⁷ In the absence of an intent element, the special circumstance "would be capable of application to virtually any intentional, first degree murder"⁹⁸ since most murders result in severe pain to the victim. In *United States v. Cheely*,⁹⁹ the court held unconstitutional the federal death penalty provisions applicable to murder resulting from trafficking in explosives in interstate commerce or by mail.¹⁰⁰ The court reasoned that since the provisions applied even where the defendant's intent was only to injure property, "they create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them."¹⁰¹ Even though the defendant in *Cheely* had intended to kill a person, not to damage property, the court recognized that the defendant could still challenge the scheme because "a challenge under *Furman* is a challenge to the capital sentencing regime as a whole, not its application to a particular defendant."¹⁰²

The other no-narrowing challenges in the federal appellate courts have been unsuccessful. In upholding various state death penalty schemes, the courts decided the no-narrowing issue by counting narrowing circumstances in the scheme,¹⁰³ or by relying on logic or intuition to determine the narrowing effect.¹⁰⁴ None of the courts

⁹⁵ 29 F.3d 1312 (9th Cir. 1994).

⁹⁶ See *People v. Davenport*, 710 P.2d 861, 875 (Cal. 1985) (construing torture-murder special circumstance to require proof of defendant's intent to inflict torture).

⁹⁷ See *Wade*, 29 F.3d at 1320.

⁹⁸ *Id.* (quoting *Davenport*, 710 P.2d at 871).

⁹⁹ 36 F.3d 1439 (9th Cir. 1994).

¹⁰⁰ See 18 U.S.C. §§ 844(d), 1716(a) (1994).

¹⁰¹ *Cheely*, 36 F.3d at 1444. The court relied on a non-murder case to support its holding. See *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). In *Harper*, the court held unconstitutional the death penalty provisions of the Espionage Act on the ground that they failed to narrow the death-eligible class. See *id.* at 1224-26.

¹⁰² *Cheely*, 36 F.3d at 1444 n.11.

¹⁰³ See *McKenzie v. Risely*, 842 F.2d 1525, 1539 (9th Cir. 1988) (en banc) (upholding Montana death penalty scheme on basis that only six types of deliberate homicide made defendant death-eligible and that aggravated kidnapping led to death-eligibility only where victim died as result of kidnapping); *Andrews v. Shulsen*, 802 F.2d 1256, 1261 (10th Cir. 1986) (upholding Utah death penalty scheme because at time capital homicide was restricted to "intentional or knowing murders committed under eight aggravating circumstances"). Utah's substantially broadened death penalty scheme survived a subsequent state court no-narrowing challenge in *State v. Young*, 853 P.2d 327 (Utah 1993).

¹⁰⁴ See *Brecheen v. Reynolds*, 41 F.3d 1343, 1360 (10th Cir. 1994) (upholding Oklahoma's "great risk of death to others" aggravating circumstance on ground that cir-

attempted to quantify the narrowing effect of the scheme in question or to estimate the resulting death sentence ratio.¹⁰⁵

The federal death penalty included in the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended,¹⁰⁶ also has been subject to no-narrowing challenges. The statute provides in part: "any person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual, and such killing results . . . may be sentenced to death."¹⁰⁷ In addition to proving an intentional killing in furtherance of a continuing criminal enterprise, the prosecution, in order to obtain a death verdict, must prove both an intent aggravator as set forth in subsection

cumstance "cannot reasonably be said to apply to every defendant convicted of murder" but "applies to a defined and limited subclass of murderers"); *Streetman v. Lynaugh*, 835 F.2d 1519, 1521 (5th Cir. 1988) (upholding Texas scheme because statutory question at penalty phase—whether defendant posed threat of future dangerousness to society—sufficiently narrowed); *Thompson v. Lynaugh*, 821 F.2d 1054, 1059 (5th Cir. 1987) (same). *Thompson* was decided before the United States Supreme Court decided *Lowenfield v. Phelps*, and therefore the Fifth Circuit did not have the benefit of the Court's explanation that narrowing could occur (as it arguably did in Texas) at the guilt stage.

¹⁰⁵ The federal courts also have addressed another kind of challenge to state schemes, mistakenly described as a no-narrowing challenge. Some defendants have contended that a particular aggravating circumstance failed to narrow since the circumstance merely replicated a type of first degree murder ("double counting"). For example, in *Woratzek v. Stewart*, 97 F.3d 329 (9th Cir. 1996), cert. denied, 117 S. Ct. 1442 (1997), the defendant, who was found guilty of robbery felony murder, argued that Arizona's "expectation of receiving anything of pecuniary value" aggravating circumstance failed to narrow since it would apply in every case of robbery-murder. See *id.* at 334. Similarly, in *Ruiz v. Norris*, 104 F.3d 163 (8th Cir. 1997), the defendant claimed that, since robbery felony murder was a type of first degree murder, Arkansas's robbery felony murder aggravating circumstance failed to narrow. See *id.* at 165. Both courts rejected the challenge after an unnecessary and dubious effort to establish that the aggravating circumstance was in fact "narrower" than the corresponding type of first degree murder. See *id.* at 165; *Woratzek*, 97 F.3d at 334-35. In fact, the double-counting claim is not a no-narrowing claim at all. That one particular type of murder is double-counted to define death eligibility says nothing about whether the statutory scheme as a whole complies with *Furman*, since proof of double-counting does not constitute evidence on the relevant issues: the size of the death-eligible class created by the scheme and the percentage of the class who are sentenced to death. Even assuming that a true no-narrowing challenge (other than a vagueness challenge) might be addressed to a single aggravating factor rather than the scheme as a whole, the validity of the challenge would turn not on the relationship of the aggravating factor to the definition of first degree murder but on the percentage of persons committing that type of murder who are sentenced to death.

¹⁰⁶ 21 U.S.C. § 848 (1994).

¹⁰⁷ *Id.* § 848(e).

848(n)(1),¹⁰⁸ and at least one of eleven other aggravators as set forth in subsections 848(n)(2)-(12).¹⁰⁹

The Eleventh Circuit in *United States v. Chandler*,¹¹⁰ and the Tenth Circuit in *United States v. McCullah*,¹¹¹ rejected no-narrowing challenges in reliance on *Lowenfield*. The courts found that section 848(e) defined a sufficiently narrow category of murderers—those who intended to kill and acted “in furtherance of a continuing criminal enterprise”—so that whether the death-eligible class was further narrowed by section 848(n) was irrelevant.¹¹² In *United States v. Flores*,¹¹³ the Fifth Circuit took a different tack and hopelessly confused the issue. The defendant had argued that, since the (n)(1) intent factors were taken from *Enmund v. Florida*¹¹⁴ and *Tison v. Arizona*,¹¹⁵ which together already set forth the minimum culpability requirements for a constitutional death penalty, the factors had no narrowing effect whatsoever. The court accepted defendant’s (erroneous) argument that the (n)(1) factors duplicated the *Enmund/Tison* baseline¹¹⁶ and found that, since the *Enmund/Tison* class was narrower than the class defined by the general murder statute,¹¹⁷ subsection (n)(1) sufficiently narrowed.¹¹⁸ Plainly, a class of murderers

¹⁰⁸ The prosecution must prove that the defendant either:

- (A) intentionally killed the victim;
- (B) intentionally inflicted serious bodily injury which resulted in the death of the victim;
- (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;
- (D) intentionally engaged in conduct which —
 - (i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and
 - (ii) resulted in the death of the victim.

21 U.S.C. § 848(n)(1) (1994).

¹⁰⁹ See 21 U.S.C. § 848(n)(2)-(12) (1994).

¹¹⁰ 996 F.2d 1073 (11th Cir. 1993).

¹¹¹ 76 F.3d 1087 (10th Cir. 1996).

¹¹² See *id.* at 1109; *Chandler*, 996 F.2d at 1092.

¹¹³ 63 F.3d 1342 (5th Cir. 1995).

¹¹⁴ 458 U.S. 782 (1982).

¹¹⁵ 481 U.S. 137 (1987).

¹¹⁶ As noted above, *Enmund* and *Tison*, by their terms, do not establish minimum constitutional mens rea requirements for actual killers. See *supra* note 68. Since subsection (n)(1) establishes “intent” requirements for actual killers, it clearly narrows from the *Enmund/Tison* baseline.

¹¹⁷ 18 U.S.C. § 1111 (1994).

¹¹⁸ See *Flores*, 63 F.3d at 1370-72. In dictum, the court alluded to the two grounds on which it could have legitimately reached its narrowing conclusion: “And lastly, we find significant the fact that we are dealing with a statute that includes an additional narrowing factor (killing in furtherance of a CCE [continuing criminal enterprise]) and requires the jury to find not just *Enmund/Tison* culpability but at least one other narrowing aggravator.” *Id.* at 1372 (citing 21 U.S.C. § 848(n)(2)-(12) (1994)).

meeting only the *Enmund/Tison* requirements—murderers who actually killed, attempted to kill, intended to kill, or acted with reckless indifference while a major participant in a felony—excludes so few murderers that it cannot possibly satisfy the *Furman* principle. Again, none of the courts made any attempt to quantify its conclusion as to the narrowing effect of the statute, nor to determine the frequency of death judgments within the “narrowed” classes.

3. *No-Narrowing Challenges in the State Courts*

While the state courts have addressed and rejected numerous no-narrowing challenges, there is a paucity of cases with any meaningful discussion of the issue. Aside from *Middlebrooks*, there have been few decisions addressing whether a scheme, taken as a whole, genuinely narrowed the death-eligible class, and for the most part, the courts have held, without extended discussion, that the state’s definition of capital murder or its narrowing circumstances sufficiently narrowed the class.¹¹⁹ Other challenges to the use of a particular category of capital murder or particular narrowing circumstances,¹²⁰ vagueness challenges in the *Godfrey* and *Maynard* mold,¹²¹ and

¹¹⁹ See *State v. Greenway*, 823 P.2d 22, 31 (Ariz. 1991) (holding that aggravating circumstance narrowed class of persons eligible for death penalty); *Johnson v. State*, 823 S.W.2d 800, 805 (Ark. 1992) (holding that statute defining capital murder as causing death of another with “premeditated and deliberate purpose” narrowed primarily at penalty phase with use of aggravating circumstances); *State v. Ross*, 646 A.2d 1318, 1350 & n.18 (Conn. 1994) (finding that statute narrowed at three tiers, limited death penalty to eight categories of capital felony homicides, and required proof of statutory aggravating circumstance); *People v. Britz*, 528 N.E.2d 703, 721 (Ill. 1988) (holding that statute’s eight aggravating circumstances sufficiently narrowed); *State v. Bartholomew*, 683 P.2d 1079, 1033 (Wash. 1984) (holding that statute’s aggravating factors served narrowing function at guilt phase). The response of the California Supreme Court to no-narrowing challenges is discussed *infra* notes 187-95 and accompanying text.

¹²⁰ See *Ex parte Woodard*, 631 So. 2d 1065, 1069-70 (Ala. Crim. App. 1993) (stating that Alabama statutory requirements that defendant must be found guilty of intentional murder of child under age of 14 and that sentencer must find at least one statutory aggravating circumstance sufficiently narrowed death-eligible defendants); *Carroll v. State*, 599 So. 2d 1253, 1257 (Ala. Crim. App. 1992) (finding that statutory aggravating circumstance of prior murder conviction within 20 years sufficiently narrowed death-eligible class of defendants); *State v. Guyton*, 481 N.E.2d 650, 652-53 (Ohio Ct. App. 1984) (holding that if murder is committed during burglary, burglary can be aggravating circumstance); *Romano v. State*, 909 P.2d 92, 119 (Okla. Crim. App. 1995) (finding that aggravating circumstance of “avoiding arrest or prosecution” sufficiently narrowed death-eligible defendants); *Sattiewhite v. State*, 786 S.W.2d 271, 289-90 (Tex. Crim. App. 1989) (finding that requirement that murder was “deliberate” sufficiently narrowed defendants who were eligible for death sentence).

¹²¹ See, e.g., *State v. Nash*, 694 P.2d 222, 230-31 (Ariz. 1985) (upholding “pecuniary gain” aggravating circumstance); *State v. Gretzler*, 659 P.2d 1, 9-12 (Ariz. 1983) (upholding “especially heinous, cruel, or depraved manner” aggravating circumstance); *State v. Breton*, 562 A.2d 1060, 1066-67 (Conn. 1989) (upholding “especially cruel” aggravating

double-counting challenges (challenges to the duplicate use of the same fact as both an element of murder and as the basis for death-eligibility)¹²² also have been rejected without much discussion.

There have been only two state cases containing any significant discussion of whether the state scheme's broad coverage violated the narrowing requirement. In neither case did the court assess the quantitative narrowing effect of the scheme in question or the state's death sentence ratio.

In *State v. Wagner*,¹²³ the issue turned on counting narrowing circumstances. The defendant argued that Oregon's ten categories of aggravated murder actually made 26 types of murderers death-eligible, and that this pool of death-eligible offenders was not sufficiently narrowed. The Oregon Supreme Court rejected the defendant's calculations as "overcount[ing]" the number of aggravated murders by separately counting the nine types of felony murders listed in the provision making felony murder a capital crime and separately counting the seven categories of victims listed in the provision making murder

circumstance); *State v. Sonnier*, 402 So. 2d 650, 658-60 (La. 1981) (upholding "especially heinous, atrocious or cruel" aggravating circumstance); *Sidebottom v. State*, 781 S.W.2d 791, 798 (Mo. 1989) (upholding "one or more assaultive criminal convictions" aggravating circumstance); *State v. Griffin*, 756 S.W.2d 475, 489-90 (Mo. 1988) (upholding "depravity of mind" aggravating circumstance); *State v. Smith*, 863 P.2d 1000, 1009-10 (Mont. 1993) (upholding "deliberate homicide . . . as a part of a scheme or operation which, if completed, would result in the death of more than one person" aggravating circumstance); *State v. Ryan*, 444 N.W.2d 610, 651-52 (Neb. 1989) (upholding "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence" aggravating circumstance); *State v. Syriani*, 428 S.E.2d 118, 138-41 (N.C. 1993) (upholding "especially heinous, atrocious or cruel" aggravating circumstance); *State v. Moeller*, 548 N.W.2d 465, 490-92 (S.D. 1996) (upholding "outrageously or wantonly vile" aggravating circumstance); *State v. Williams*, 690 S.W.2d 517, 526-30 (Tenn. 1985) (upholding "especially heinous, atrocious, or cruel" involving "torture or depravity of mind" aggravating circumstance); *Vuong v. State*, 830 S.W.2d 929, 940-41 (Tex. Crim. App. 1992) (upholding murder of "more than one person . . . during same criminal transaction" aggravating circumstance). But see *Arnold v. State*, 224 S.E.2d 386, 391-92 (Ga. 1976) (invalidating "substantial history of serious assaultive criminal convictions" aggravating circumstance); *State v. David*, 468 So. 2d 1126, 1128-30 (La. 1984) (invalidating "significant prior history of criminal activity" aggravating circumstance).

¹²² See *Ferguson v. State*, 642 A.2d 772, 780-81 (Del. 1994) (holding that using felony committed in felony murder as an aggravating circumstance did not render statutory scheme unconstitutional); *Huffman v. State*, 543 N.E.2d 360, 378-79 (Ind. 1989) (stating that aggravating factor of killing while committing robbery sufficiently narrowed those eligible for death penalty); *Grandison v. State*, 670 A.2d 398, 408-09 (Md. 1995) (finding that fact defendant hired another to murder victim may serve as predicate for conviction and death sentence); *State v. Jenkins*, 473 N.E.2d 264, 279-80 (Ohio 1984) (upholding statute listing felony murder as aggravating circumstance). But see *State v. Loyd*, 489 So. 2d 898, 901 (La. 1986) ("[T]he jury is not allowed standardless, unbridled, unreviewable discretion to impose the death penalty when the only aggravating circumstances are also elements of the crime." (quoting *State v. Knighton*, 436 So. 2d 1141, 1156-57 (La. 1983))).

¹²³ 752 P.2d 1136 (Or. 1988), vacated and remanded, 492 U.S. 914 (1989).

related to the performance of the victim's official duties in the justice system a capital offense.¹²⁴ The court then relied on the similarity of the scheme to the Texas scheme upheld in *Jurek v. Texas*¹²⁵ to reject the challenge.¹²⁶

In *State v. Young*,¹²⁷ the Utah Supreme Court upheld the Utah scheme without discussion, but two Justices addressed the no-narrowing issue in their opinions. The Utah scheme made death-eligible a murderer who committed an intentional killing accompanied by one of seventeen aggravating circumstances.¹²⁸ Justice Durham wrote in dissent that Utah had adopted virtually all the aggravating circumstances used by any of the other death penalty states (and more than any other one state), and that the combined effect of the seventeen circumstances was to make virtually all intentional killers death-eligible.¹²⁹ Justice Zimmerman responded with two arguments. He asserted (correctly) that simply counting aggravating circumstances in the statute did not prove that most murders were covered, i.e., Justice Durham had no empirical evidence to support her claims.¹³⁰ Justice Zimmerman then displayed a complete misunderstanding of *Furman* when he asserted, in effect, that as long as each aggravating circumstance discriminated among murderers, *Furman* was satisfied.¹³¹

The contrariety of interpretations and misinterpretations of the *Furman* principle in the lower courts testifies to the lack of direction from the Supreme Court over the last twenty years. However, in one respect, the lower courts have followed consistently the Supreme Court's lead: they all have approached the narrowing question without any examination of, or discussion about, the central concern of

¹²⁴ See *id.* at 1157-58.

¹²⁵ 428 U.S. 262 (1976).

¹²⁶ See *Wagner*, 752 P.2d at 1157-58. Both of the court's rationales are dubious. First, as discussed above, the formal arrangement of narrowing circumstances in a statute can hardly be determinative of its scope. See *supra* note 84 and accompanying text; see also *infra* note 141. Second, the court's reliance on *Jurek* seems altogether misplaced since, even on the Oregon court's counting, the Oregon scheme had twice as many narrowing circumstances as the Texas scheme upheld in that case.

¹²⁷ 853 P.2d 327 (Utah 1993).

¹²⁸ See Utah Code Ann. § 76-5-202 (1990), as amended by 1991 Utah Laws ch. 10, § 8 (amended 1994, 1996).

¹²⁹ See *Young*, 853 P.2d at 399 (Durham, J., concurring in part and dissenting in part). Justice Durham concluded: "Utah's statutory definition of capital homicide excludes so few categories and so few actual murders that it has in effect returned the state to where it was before *Furman* was decided; there is no meaningful narrowing of the class of death-eligible murders pursuant to objective, rational standards." *Id.*

¹³⁰ See *id.* at 412 (Zimmerman, J., concurring).

¹³¹ See *id.* ("[T]he sheer number or percentage of murderers exposed to the death penalty, even if we knew those facts, would not tell us much in determining whether the statute imposing the death penalty was constitutional.").

Furman—namely, the death sentence ratio under the scheme in question.¹³²

II

HISTORY OF THE CALIFORNIA DEATH PENALTY SCHEME

In California, from 1874 through the time of *McGautha v. California*,¹³³ every first degree murderer was death-eligible.¹³⁴ The prosecutor had complete discretion to seek, and the jury had complete discretion to impose, the death penalty.¹³⁵ At the time of *McGautha*, first degree murder was established if the defendant or an accomplice killed: (1) during the commission or attempted commission of one of six felonies—arson, rape, robbery, burglary, mayhem, or lewd act with a minor;¹³⁶ (2) with malice and by means of a bomb, poison, torture, or lying in wait; or (3) with malice and premeditation and deliberation.¹³⁷ In the subsequent 25 years, the death penalty scheme was completely revamped and the definition of first degree murder was significantly changed by the legislature and by the electorate through the initiative process. The result of these developments is that Cali-

¹³² While the courts have assumed, without evidence, that the narrowing circumstances in the various schemes have effected genuine narrowing of death-eligibility, scholars generally have assumed the opposite. See, e.g., Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 Cornell L. Rev. 989, 1008 n.68 (1996) ("The death-eligible class today is about as large as it was before *Furman*."); Ledewitz, *supra* note 32, at 350 n.126 ("The Court has never verified that the capital pool under broad statutory aggravating circumstances is actually much smaller than in the pre-*Furman* period, and there is reason to doubt that it is."); Steiker & Steiker, *supra* note 22, at 373 ("[D]eath-eligibility remains remarkably broad—indeed, nearly as broad as under the expansive statutes characteristic of the pre-*Furman* era."). But see David McCord, Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?, 24 Fla. St. U. L. Rev. 545, 577 (1997) (arguing that effect of statutory narrowing is not "huge, neither is it de minimis").

¹³³ 402 U.S. 183 (1971).

¹³⁴ See *In re Anderson*, 447 P.2d 117, 123 (Cal. 1968); John W. Poulos, Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California, 23 U.C. Davis L. Rev. 157, 168 (1990). As amended in 1874, California Penal Code § 190 stated that "[e]very person guilty of murder in the first degree, shall suffer death or confinement in the State Prison for life, at the discretion of the jury, trying the same; or upon a plea of guilty, the Court shall determine the same." 1873-74 Amendments to the Codes of California 315 (Bancroft & Co. 1874).

¹³⁵ In fact, the death penalty historically was imposed in only a minority of cases. During the ten-year period 1945-54 (before the courts began to subject the death penalty to significant scrutiny), just under 25% of convicted first degree murderers were being sentenced to death. California General Assembly, Report of the Subcommittee of the Judiciary Committee on Capital Punishment 10 (1957) (on file with the *New York University Law Review*).

¹³⁶ In California, neither malice nor foreseeability of death is an element of first degree felony murder. See *People v. Dillon*, 668 P.2d 697, 717-19 (Cal. 1983).

¹³⁷ See Cal. Penal Code § 189 (West 1970) (amended 1970, 1981, 1982, 1990, 1993).

fornia now has one of the broadest death penalty schemes in the country.

A. From Anderson to the Briggs Death Penalty Initiative Act

In 1972, one year after *McGautha* and prior to the *Furman* decision, the California Supreme Court, in *People v. Anderson*,¹³⁸ overturned the California death penalty on the ground that it violated the state constitution's ban on cruel or unusual punishments.¹³⁹ California voters reacted immediately to overturn *Anderson*. In November 1972, they passed an initiative measure, Proposition 17, amending the California Constitution to provide that the death penalty was not unconstitutional.¹⁴⁰

In response to the passage of Proposition 17, and in light of the intervening *Furman* decision apparently holding discretionary death penalty schemes unconstitutional, the California legislature adopted a mandatory death penalty to be applied upon proof of first degree murder and one of ten special circumstances.¹⁴¹ In 1976, in *Woodson*

¹³⁸ 493 P.2d 880 (Cal. 1972).

¹³⁹ See *id.* at 883 (citing Cal. Const. art. I, § 6, amended by Cal. Const. art. I, § 17).

¹⁴⁰ Proposition 17, the proposed amendment to article I, section 27, reads:

Sec. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

Proposed Amendments to Constitution, Propositions and Proposed Laws, General Election, Nov. 7, 1972, Part II—app. at 21 (on file with the *New York University Law Review*).

¹⁴¹ See 1973 Cal. Stat. 719, §§ 1-5. The special circumstances were:

- (a) The murder was intentional and was carried out pursuant to an agreement with the defendant. 'An agreement,' as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.
- (b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:
 - (1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.
 - (2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.
 - (3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:
 - (i) Robbery, in violation of Section 211.

v. North Carolina,¹⁴² the Supreme Court held mandatory death penalty statutes unconstitutional, and the California Supreme Court followed by again holding the California scheme unconstitutional.¹⁴³ In 1977, the California legislature once more reestablished the death penalty, returning discretion to the jury, but limiting that discretion by requiring that the jury find one of twelve special circumstances existed beyond a reasonable doubt to make a first degree murderer death-eligible.¹⁴⁴ The special circumstances defined in the 1977 statute and

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- (ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.
 - (iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.
 - (iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.
 - (v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling house entered by the defendant with an intent to commit grand or petit larceny or rape.
- (4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

Id. § 5.

Throughout this Article, for purposes of "counting" special circumstances, the various felony murder special circumstances are counted separately, and the "prior murder" and "multiple murder" circumstances are also counted separately. Other commentators have sometimes combined such circumstances in their count. See generally, e.g., Poulos, *supra* note 134. In assessing the narrowing function of the special circumstances, it is the number of distinct types of murderers, not the statutory denomination or arrangement of the special circumstances, that is significant.

¹⁴² 428 U.S. 280 (1976).

¹⁴³ See *Rockwell v. Superior Court*, 556 P.2d 1101, 1116 (Cal. 1976).

¹⁴⁴ 1977 Cal. Stat. 316, § 9. The special circumstances were:

- (a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;
- (b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;
- (c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

contained in Penal Code section 190.2, were substantially similar to the special circumstances in the 1973 statute.

According to the California Supreme Court, the special circumstances were intended to perform the narrowing function required by *Furman*.¹⁴⁵

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- (1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.
 - (2) The murder was willful, deliberate and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.
 - (3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:
 - (i) Robbery in violation of Section 211;
 - (ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.
 - (iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;
 - (iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;
 - (v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.
 - (4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.
 - (5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.
 - (d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

Id.

¹⁴⁵ See *People v. Green*, 609 P.2d 468, 497 (Cal. 1980).

The heart of [the 1977] statute was the concept of "special circumstances." The jury's discretion to impose the death penalty was strictly limited to those cases of first degree murder presenting one or more of several enumerated special circumstances; in all other cases the murder, no matter how willful, deliberate and premeditated, was a non-capital offense.¹⁴⁶

The court also asserted that death-eligibility was to be the exception rather than the rule; first degree murder was "punish[able] by life imprisonment except for extraordinary cases in which special circumstances [were] present."¹⁴⁷ Whether the 1977 law satisfied *Furman* has never been decided. The California Supreme Court left the question open,¹⁴⁸ and the United States Supreme Court, in *Pulley v. Harris*,¹⁴⁹ assumed that the special circumstances "limit[ed] the death sentence to a small subclass of capital-eligible cases"¹⁵⁰ but acknowledged the possibility that additional evidence might be presented to show that the law did not comply with *Furman*.¹⁵¹ However, questions about the constitutionality of the 1977 law were largely mooted by passage of the Briggs Death Penalty Initiative Act¹⁵² (Briggs Initiative).

B. The Briggs Initiative

The 1977 law was superseded in 1978 by the enactment of Proposition 7, the Briggs Initiative. According to its author, State Senator John V. Briggs, the initiative was intended to "give Californians the toughest death-penalty law in the country."¹⁵³ The intent, as expressed in the ballot proposition arguments, was to make the death penalty applicable to *all* murderers: "And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would."¹⁵⁴

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* at 496-97 (quoting *Owen v. Superior Court*, 152 Cal. Rptr. 88, 91 (Ct. App. 1979)).

¹⁴⁸ See *id.* at 498 n.35; *People v. Frierson*, 599 P.2d 587, 619 (Cal. 1979) (Mosk, J., concurring); *id.* at 621 (Bird, C.J., concurring); *id.* at 622 (Tobriner, J., concurring).

¹⁴⁹ 465 U.S. 37 (1984).

¹⁵⁰ *Id.* at 53.

¹⁵¹ *Id.* at 53-54.

¹⁵² Initiative Measure Proposition 7 (approved Nov. 7, 1978).

¹⁵³ California Journal Ballot Proposition Analysis, Calif. J., Nov. 1978, Special Section, at 5.

¹⁵⁴ State of California, Voter's Pamphlet 34 (1978). Under California law, ballot arguments constitute the legislative history used to interpret initiative measures. See, e.g.,

The Briggs Initiative sought to achieve this result by expanding the scope of Penal Code section 190.2 in a number of respects.¹⁵⁵

Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 663 n.5 (Cal. 1986).

¹⁵⁵ As amended by the Briggs Initiative, Penal Code § 190.2 read:

- (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:
- (1) The murder was intentional and carried out for financial gain.
 - (2) The defendant was previously convicted of murder in the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.
 - (3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.
 - (4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
 - (5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect or attempt to perfect an escape from lawful custody.
 - (6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to one or more human beings.
 - (7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties, was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.
 - (8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.
 - (9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.
 - (10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding,

First, the Briggs Initiative more than doubled the number of special

and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

- (11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or of a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.
 - (12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.
 - (13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.
 - (14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As utilized in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.
 - (15) The defendant intentionally killed the victim while lying in wait.
 - (16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.
 - (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:
 - (i) Robbery in violation of Section 211.
 - (ii) Kidnapping in violation of Sections 207 and 209.
 - (iii) Rape in violation of Section 261.
 - (iv) Sodomy in violation of Section 286.
 - (v) The performance of a lewd or lascivious act upon the person of a child under the age of 14 in violation of Section 288.
 - (vi) Oral copulation in violation of Section 288a.
 - (vii) Burglary in the first or second degree in violation of Section 460.
 - (viii) Arson in violation of Section 447.
 - (ix) Trainwrecking in violation of Section 219.
 - (18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.
 - (19) The defendant intentionally killed the victim by the administration of poison.
- (b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of

circumstances, adding: five more "victim" circumstances,¹⁵⁶ four more felony murder circumstances,¹⁵⁷ two more "means" circumstances,¹⁵⁸ two more "motive" circumstances¹⁵⁹ and one new catchall circumstance (that the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity").¹⁶⁰ Second, the Briggs Initiative substantially broadened the definitions of prior special circumstances, most significantly by eliminating the across-the-board intent to kill requirement of the 1977 law. Under the Briggs Initiative, the majority of the special circumstances, including the felony murder circumstances, were applicable even in the absence of proof that the murder was intentional.¹⁶¹ Third, the Briggs Initiative expanded death-eligibility for accomplices by eliminating the "personal presence" and "physical aid" requirements¹⁶² generally applicable under the 1977 law.¹⁶³

Despite the far broader sweep of the special circumstances under the Briggs Initiative, the special circumstances are still supposed to play the same role as they had under the 1977 law—"to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty."¹⁶⁴ As the California Supreme Court explained, "Under our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes."¹⁶⁵ The court's statement that in the California scheme the special circumstances are to serve the constitutionally required narrowing func-

this section has been charged and specially found under Section 190.4 to be true.

Cal. Penal Code § 190.2 (West 1988).

¹⁵⁶ See *id.* § 190.2(a)(8) (federal law enforcement officer), (9) (fireman), (11) (prosecutor), (12) (judge), (13) (elected or appointed official).

¹⁵⁷ See *id.* § 190.2(a)(17)(iv) (sodomy), (vi) (oral copulation), (viii) (arson), (ix) (trainwrecking).

¹⁵⁸ See *id.* § 190.2(a)(15) (lying in wait), (19) (poison).

¹⁵⁹ See *id.* § 190.2(a)(5) (to avoid arrest or escape), (16) ("hate" motive).

¹⁶⁰ See *id.* § 190.2(a)(14).

¹⁶¹ See, e.g., *id.* § 190.2(a)(17); see also *People v. Anderson*, 742 P.2d 1306, 1325 (Cal. 1987) (holding that "intent to kill is not an element of the felony murder special circumstance").

¹⁶² See 1977 Cal. Stat. 316(c).

¹⁶³ With respect to murderers other than actual killers, the prosecution still was required to prove an intent to kill. See Cal. Penal Code § 190.2(b) (West 1988) (repealed 1990).

¹⁶⁴ *People v. Visciotti*, 825 P.2d 388, 430 (Cal. 1992); accord *People v. Bacigalupo*, 862 P.2d 808, 813 (Cal. 1993).

¹⁶⁵ *Bacigalupo*, 862 P.2d at 813.

tion is the final authority on that issue.¹⁶⁶ Whether they in fact serve that function is open to question.

C. *Developments Since the Briggs Initiative*

The nineteen years since the adoption of the Briggs Initiative have seen the repeated expansion of the scope of first degree murder¹⁶⁷ and of special circumstances.¹⁶⁸

The scope of first degree murder has been expanded in two ways. First, eight new types of first degree murder have been added to Penal Code section 189. In 1982, the legislature added a new means murder: knowing use of armor-piercing bullets.¹⁶⁹ In 1990, the electorate, in Proposition 115, added five more felony murders: kidnapping, train-wrecking, sodomy, oral copulation, and rape by instrument.¹⁷⁰ In 1993, the legislature added another felony murder (carjacking) and a new means murder (discharging a firearm from a motor vehicle).¹⁷¹ Second, in 1981 the legislature, as part of a general rejection of the diminished capacity defense, eliminated two mental state defenses previously available in first degree murder cases.¹⁷² The California Supreme Court previously had held that proof of intoxication (and, inferentially, any mental defect) could negate malice, even in the case of a premeditated killing,¹⁷³ but the defense was eliminated by amendments to the definition of "malice."¹⁷⁴ Similarly, the California Supreme Court earlier had held that, even in the case of a planned killing, a defendant could negate "premeditation and deliberation" by raising a doubt as to whether the defendant had the capacity to "*maturely and meaningfully reflect upon . . . his contemplated act.*"¹⁷⁵

¹⁶⁶ See *Stringer v. Black*, 503 U.S. 222, 234-35 (1992) (explaining in context of Mississippi capital case that federalism mandates that highest court of state serve as "final authority" on that state's law and sentencing schemes).

¹⁶⁷ See Cal. Penal Code § 189 (West 1988) (amended 1990, 1993).

¹⁶⁸ See *id.* § 190.2 (amended 1989, 1990, 1995).

¹⁶⁹ See 1982 Cal. Stat. 950, § 1 (codified as amended at Cal. Penal Code § 189 (West 1988)).

¹⁷⁰ See State of California, Crime Victims Justice Reform Act, Initiative Measure Proposition 115, § 9 (approved June 5, 1990).

¹⁷¹ See 1993 Cal. Stat. 611, § 4.

¹⁷² See 1981 Cal. Stat. 404, §§ 2, 7 (codified as amended at Cal. Penal Code §§ 22, 189 (West 1988)).

¹⁷³ See *People v. Conley*, 411 P.2d 911, 916 (Cal. 1966).

¹⁷⁴ See Cal. Penal Code § 188 (West 1988); see also *People v. Saille*, 820 P.2d 588, 594 (Cal. 1991) (explaining that changes in section 188 of California Penal Code repudiated *Conley*).

¹⁷⁵ *People v. Wolff*, 394 P.2d 959, 975 (Cal. 1964).

That defense was eliminated by amendments to the definition of "willful, deliberate, and premeditated killing."¹⁷⁶

The list of special circumstances underwent a similar, if less dramatic, statutory expansion. In 1990, Proposition 115 added two more felony murders to the special circumstances list: mayhem and rape by instrument.¹⁷⁷ It also expanded the liability of felony murder accomplices, eliminating the intent to kill element and requiring only that the accomplice meet the constitutional threshold established by *Enmund* and *Tison*: that the accomplice have acted with "reckless indifference to human life and as a major participant" in a special circumstance felony.¹⁷⁸ In 1996, Proposition 196 was enacted, adding three more special circumstances: felony murder carjacking, murder of a juror, and murder by discharging a firearm from a motor vehicle.¹⁷⁹

Two decisions of the California Supreme Court during the tenure of Chief Justice Bird cut against the expansion of section 190.2. In

¹⁷⁶ See Cal. Penal Code § 189 (West 1988) (amended 1990, 1993); see also *People v. Stress*, 252 Cal. Rptr. 913, 920 (Ct. App. 1988) (explaining that legislature explicitly removed requirement of mature and meaningful reflection when it amended section 189 of California Penal Code).

¹⁷⁷ See Initiative Measure Proposition 115, *supra* note 170, § 10 (codified in part at Cal. Penal Code § 190.2(d) (West Supp. 1997)). The following provisions were added to section 190.2(a)(17) of the California Penal Code:

- (x) Mayhem in violation of Section 203.
- (xi) Rape by instrument in violation of Section 289.

¹⁷⁸ See Initiative Measure Proposition 115, *supra* note 170, § 10. The section provides:

- (d) Notwithstanding subdivision (c), every person not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for life without the possibility of parole, in any case in which a special circumstance enumerated in paragraph (17) of subdivision (a) of this section has been found to be true under Section 190.4.

¹⁷⁹ See 1995 Cal. Stat. 478, enacted by Proposition 196, § 2 (approved Mar. 26, 1996). The section renumbered the felony murder special circumstances and added another felony, carjacking, as subsection (L) to section 190.2(a)(17). It also added subsections (20) and (21):

- (20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
- (21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

People v. Superior Court (Engert),¹⁸⁰ the court held unconstitutional, on vagueness grounds, the catchall "heinous, atrocious or cruel" special circumstance.¹⁸¹ In *Carlos v. Superior Court*,¹⁸² the court held that, as a matter of statutory interpretation and in order to avoid possible constitutional difficulties, intent to kill was an element of all felony murder special circumstances.¹⁸³ In 1986, Chief Justice Bird and Associate Justices Grodin and Reynoso were voted off the California Supreme Court, largely because of a perceived reluctance to enforce the death penalty.¹⁸⁴ Shortly thereafter, the newly reconstituted court under Chief Justice Lucas, repudiated *Carlos* in *People v. Anderson*,¹⁸⁵ referring to the decision as "court-created error" based on a misunderstanding of federal precedents.¹⁸⁶ In the ten years since, the California Supreme Court has imposed no significant limits on the scope of section 190.2.

Recently, the California scheme has been subject to *Furman* challenges in a number of cases arising under the 1978 law. The California Supreme Court has given short shrift to the challenges without explaining its conclusion that section 190.2 sufficiently narrows. In the first two cases, the court rejected the challenge without discussion, except to indicate that the defendant had failed to make an empirical showing in support of the challenge.¹⁸⁷ In the third case,¹⁸⁸ the court rejected the challenge, relying on *Pulley v. Harris*,¹⁸⁹ a case concern-

¹⁸⁰ 647 P.2d 76 (Cal. 1982).

¹⁸¹ See *id.* at 77-78. This holding subsequently has been reaffirmed. See, e.g., *People v. Wade*, 750 P.2d 794, 804 (Cal. 1988). Nevertheless, the special circumstance has been reenacted with each amendment to section 190.2 (see, e.g., 1995 Cal. Stat. 478, enacted by Proposition 196, § 2 (approved Mar. 26, 1996)). For present purposes, it is assumed that the section is unconstitutional. Obviously, if the circumstance were valid, it would further diminish any narrowing effect of section 190.2.

In another decision, the court, in order to avoid constitutional questions, interpreted the torture-murder special circumstance to require proof not only that the victim suffered extreme pain, but also that the defendant intended to cause such pain. See *People v. Davenport*, 710 P.2d 861, 875-76 (Cal. 1985); see also *supra* notes 95-98 and accompanying text.

¹⁸² 672 P.2d 862 (Cal. 1983).

¹⁸³ See *id.* at 871.

¹⁸⁴ See Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 760-61 (1995); Frank Clifford, Voters Repudiate 3 of Court's Liberal Justices, L.A. Times, Nov. 5, 1986, pt. 1, at 8.

¹⁸⁵ 742 P.2d 1306 (Cal. 1987).

¹⁸⁶ See *id.* at 1331. In 1990, Proposition 115 amended section 190.2 to conform to the *Anderson* holding. See Initiative Measure Proposition 115, *supra* note 170, § 10.

¹⁸⁷ See *People v. Crittenden*, 885 P.2d 887, 930 (Cal. 1994); *People v. Wader*, 854 P.2d 80, 114-15 (Cal. 1993).

¹⁸⁸ See *People v. Stanley*, 897 P.2d 481, 530 (Cal. 1995).

¹⁸⁹ 465 U.S. 37, 51-53 (1984) (discussing 1977 statute).

ing the narrower 1977 law.¹⁹⁰ In a fourth case,¹⁹¹ in which the defendant did present empirical evidence tending to show that the statute had only a minimal narrowing effect, the court again rejected the challenge without discussion, citing to two of its previous decisions and the decision of the United States Supreme Court in *Tuilaepa v. California*.¹⁹² The court's reliance on *Tuilaepa* is odd since the United States Supreme Court did not address the narrowing effect of section 190.2 in that case.¹⁹³ In fact, Justice Blackmun, in dissent, emphasized that the Court had never given the California system "a clean bill of health":

[T]he Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.¹⁹⁴

The California Supreme Court now regularly rejects *Furman* challenges citing to *Tuilaepa* and its own prior cases.¹⁹⁵ Thus, while the application of the *Furman* principle to the California scheme remains an open question in the federal courts, the California Supreme Court has firmly rejected all *Furman* challenges. In none of the cases rejecting such a challenge has the court considered empirical evidence on the issue, nor attempted to examine, or even estimate, either the narrowing effect of Penal Code section 190.2 or California's death sentence ratio.

III

NARROWING THE CLASS: CALIFORNIA PENAL CODE SECTION 190.2

The question whether a given death penalty scheme narrows the death-eligible class sufficiently to produce an acceptable death sen-

¹⁹⁰ See *Stanley*, 897 P.2d at 530.

¹⁹¹ See *People v. Sanchez*, 906 P.2d 1129, 1181 (Cal. 1995).

¹⁹² 512 U.S. 967 (1994).

¹⁹³ The defendant in *Tuilaepa* made no challenge to the scope of the special circumstances. Justice Stevens, joined by Justice Ginsburg, pointed out that, because the defendant had not challenged the special circumstances finding, he would assume for purposes of the case that the scheme met the constitutional narrowing requirement. See *id.* at 981 (Stevens, J., concurring).

¹⁹⁴ *Id.* at 994 (Blackmun, J., dissenting).

¹⁹⁵ See, e.g., *People v. Ray*, 914 P.2d 846, 872 (Cal.), cert. denied, 117 S. Ct. 393 (1996); *People v. Arias*, 913 P.2d 980, 1040-41 (Cal. 1996), cert. denied, 65 U.S.L.W. 3793 (1997).

tence ratio is at bottom a factual question, and we answer the question with regard to California in Part IV on the basis of empirical data. In this section we examine the relevant statutes and case law concerning the scheme to explore how narrowing might (or might not) occur under the scheme, to explain the law relevant to our empirical research, and to give context to our conclusions based on that research.

At present, the California death penalty scheme has twenty-one separately numbered special circumstances encompassing thirty-two distinct categories of first degree murderers. An adult murderer fitting any one of the thirty-two categories is death-eligible.¹⁹⁶ With the exception of the "heinous, atrocious or cruel" special circumstance already held unconstitutional by the California Supreme Court,¹⁹⁷ any of the thirty-two individual special circumstances may be sufficiently objective and, viewed in isolation, sufficiently narrow to satisfy *Furman*. However, the question is whether, given the number and breadth of the special circumstances, the scheme as a whole genuinely narrows the death-eligible class. While it is tempting to conclude that, on its face, thirty-two special circumstances is an oxymoron, the narrowing effect, if any, of Penal Code section 190.2 can only be tested by measuring the special circumstances against the Penal Code section 189 factors that define first degree murder. A comparison of the two statutes leads to the conclusion that there are, even in theory, only seven categories of first degree murderers excluded from death-eligibility. That is to say, while thirty-two categories of first degree murderers *are* made death-eligible, only seven categories of first degree murderers are *not*.¹⁹⁸ However, it is not the number of categories alone, but the comparative breadth of the "special circumstances" and "excluded" categories which determines whether the scheme genuinely narrows.

A. *The Breadth of the Special Circumstances Categories*

Although some of the thirty-two special circumstances virtually never occur in actual murder cases,¹⁹⁹ a substantial majority have real life application. For example, within the limited sample of the 159

¹⁹⁶ See Cal. Penal Code § 190.2(a)(1)-(21) (West Supp. 1997). Juvenile murderers, those under 18 years old at the time of the crime, are exempt from the death penalty. See Cal. Penal Code § 190.5(a) (West Supp. 1997).

¹⁹⁷ See *supra* note 181 and accompanying text.

¹⁹⁸ As noted above, the death-eligible class is also narrowed somewhat by the exemption of juveniles under section 190.5(a). The narrowing effected by this section is included in the calculation of California's death sentence ratio. See *infra* notes 267-68 and accompanying text.

¹⁹⁹ For example, the published murder cases since *Furman* reveal no instance of the intentional killing of a firefighter, see Cal. Penal Code § 190.2(a)(9), or a judge, see *id.*

death penalty appeals decided between 1988 and 1992, the California Supreme Court affirmed death judgments based on one or more of sixteen different special circumstances.²⁰⁰ The real breadth of the special circumstances categories, however, is not in the number of categories alone or in the number that produce death sentences, but in two factors which, in combination, make California's scheme exceptional. First, California, along with only seven other states,²⁰¹ makes felony murder simpliciter a narrowing circumstance.²⁰² Thus any person who kills "in the commission of, or attempted commission of, or the immediate flight after committing or attempting to commit" any of twelve listed felonies is not only guilty of first degree murder but is also automatically death-eligible, irrespective of the defendant's mental state.²⁰³ Second, California, along with only three other states,²⁰⁴

§ 190.2(a)(12), or of a killing during the commission of trainwrecking, see *id.* § 190.2(a)(17)(I), or mayhem, see *id.* § 190.2(a)(17)(J).

²⁰⁰ The special circumstances (with one case example for each) were: felony murder kidnapping, see *People v. Alcala*, 842 P.2d 1192 (Cal. 1992); multiple murder, see *People v. Clark*, 833 P.2d 561 (Cal. 1992); lying in wait, see *People v. Edwards*, 819 P.2d 436 (Cal. 1991); felony murder child molestation, see *People v. Mickle*, 814 P.2d 290 (Cal. 1991); prior murder, see *People v. Wharton*, 809 P.2d 290 (Cal. 1991); avoiding arrest, see *People v. Daniels*, 802 P.2d 906 (Cal. 1991); felony murder oral copulation, see *People v. Kaurish*, 802 P.2d 278 (Cal. 1990); peace officer victim, see *People v. Gonzalez*, 800 P.2d 1159 (Cal. 1990); felony murder arson, see *People v. Clark*, 789 P.2d 127 (Cal. 1990); felony murder robbery, see *People v. Adcox*, 763 P.2d 906 (Cal. 1988); felony murder sodomy, see *People v. Coleman*, 759 P.2d 1260 (Cal. 1988); felony murder burglary, see *People v. Belmontes*, 755 P.2d 310 (Cal. 1988); witness victim, see *People v. Heishman*, 753 P.2d 629 (Cal. 1988); felony murder rape, see *People v. Thompson*, 753 P.2d 37 (Cal. 1988); torture, see *People v. Wade*, 750 P.2d 794 (Cal. 1988); and financial gain, see *People v. Howard*, 749 P.2d 279 (Cal. 1988).

²⁰¹ The seven states are: Florida, Georgia, Maryland, Mississippi, Montana, Nevada, and North Carolina. See Fla. Stat. Ann. §§ 782.04(1)(a)(2)-(3), 921.141(5)(d) (West Supp. 1997); Ga. Code Ann. § 16-5-1(c) (1996); *id.* § 17-10-30(b)(2) (1997); Md. Ann. Code art. 27, §§ 408-10, 412(b), 413(d)(4), (10) (1996); Miss. Code Ann. §§ 97-3-19(2)(e), (f), 99-19-101(5)(d) (1994); Mont. Code Ann. §§ 45-5-102(1)(b), 46-18-303(7), (9) (1995); Nev. Rev. Stat. §§ 200.030(1)(b), 200.033(4) (1995); N.C. Gen. Stat. §§ 14-17, 15A-2000(e)(5) (Supp. 1996).

²⁰² See *People v. Anderson*, 742 P.2d 1306, 1329-31 & n.8 (Cal. 1987).

²⁰³ See Cal. Penal Code § 190.2(a)(17), (b) (West Supp. 1997). Although the felony murder language of Penal Code section 189 is not identical to the special circumstances language (referring to "perpetration" rather than "commission" and omitting any reference to "flight"), in application there is no difference. See *People v. Hayes*, 802 P.2d 376, 410 (Cal. 1990) (holding that reach of felony murder and felony murder special circumstance are equally broad and both apply to killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction'" (quoting *People v. Ainsworth*, 248 Cal. Rptr. 568, 587 (1988))).

²⁰⁴ The three states are Colorado, Indiana, and Montana. See Colo. Rev. Stat. § 16-11-103(5)(f) (Supp. 1996); Ind. Code Ann. § 35-50-2-9(b)(3) (Michie Supp. 1997); Mont. Code Ann. § 46-18-303(4) (1995). It appears that Colorado has never applied its lying in wait circumstance at all, and Indiana's version of lying in wait is much narrower than Califor-

makes "lying in wait" a narrowing circumstance.²⁰⁵ As interpreted by the California Supreme Court, this circumstance encompasses a substantial portion of premeditated murders. Only California and Montana have death penalty schemes with both felony murder simpliciter and lying in wait narrowing circumstances, and, unlike California's numerous and broad felony murder special circumstances, Montana's felony murder narrowing circumstances encompass only two felonies: aggravated kidnapping and sexual assault on a minor.²⁰⁶

1. *The Felony Murder Special Circumstances*

The breadth of the felony murder special circumstances is due not only to the fact that all first degree felony murders are special circumstances cases,²⁰⁷ but also to the fact that the California felony murder rule itself is exceedingly broad in at least three respects. First, the felony murder rule applies to the most common felonies resulting in death, particularly robbery and burglary,²⁰⁸ crimes which themselves are broadly defined by statute and court decision. With regard to robbery, the courts have given the broadest interpretation to the "force or fear" element²⁰⁹ and the "immediate presence" element.²¹⁰ With regard to burglary, California makes any (even minimal) entry²¹¹ into virtually any enclosed space²¹² with the intent to commit any felony or theft²¹³ a burglary.²¹⁴ Second, the felony murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape, i.e., before the defendant reaches a place of "temporary safety."²¹⁵ Third, the felony murder rule is not limited in its ap-

nia's since it requires proof of physical concealment of the murderer. See *Matheney v. State*, 583 N.E.2d 1202, 1208 (Ind. 1992).

²⁰⁵ See Cal. Penal Code § 190.2(a)(15) (West Supp. 1997).

²⁰⁶ See Mont. Code Ann. § 46-18-303(7), (9) (1995).

²⁰⁷ Excluding, of course, *Enmund/Tison* ineligible. See Cal. Penal Code § 190.2(c), (d) (West Supp. 1997); see also *supra* notes 64-69 and accompanying text; *infra* note 266.

²⁰⁸ Among the other 37 death penalty states, 11 do not make felony murder robbery a narrowing circumstance, and 11 do not make felony murder burglary a narrowing circumstance.

²⁰⁹ See *People v. Mungia*, 286 Cal. Rptr. 394 (Ct. App. 1991) (finding that shove in course of purse snatching was sufficient to trigger "force or fear" requirement).

²¹⁰ See *People v. Webster*, 814 P.2d 1273 (Cal. 1991) (determining that property one-quarter mile away from site of murder was within victim's immediate presence).

²¹¹ See *People v. Ravenscroft*, 243 Cal. Rptr. 827 (Ct. App. 1988) (finding that use of ATM card constituted entry into bank).

²¹² See *People v. McCormack*, 285 Cal. Rptr. 504 (Ct. App. 1991) (finding that going from room to room within house constituted entry).

²¹³ See *People v. Salemmme*, 3 Cal. Rptr. 2d 398 (Ct. App. 1992) (holding that entry to sell fraudulent securities was burglary).

²¹⁴ See Cal. Penal Code § 459 (West Supp. 1997) (defining burglary).

²¹⁵ See *People v. Cooper*, 811 P.2d 742, 748-49 (Cal. 1991).

plication by normal rules of causation²¹⁶ and applies to altogether accidental and unforeseeable deaths:

[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.²¹⁷

The felony murder special circumstances are actually broader than the felony murder rule since they cover a species of implied malice murder as well. In California, the felony murder rule is not applied where the killing is not done by one of the felons but is instead done by a third party, for example, a robbery victim responding to the felony.²¹⁸ However, if a felon's provocative acts caused the killing, the felon may be convicted of murder on an implied malice theory, in which case the felon will be guilty of first degree murder,²¹⁹ and the felony murder special circumstances will apply.²²⁰

The sweep of the robbery and burglary special circumstances is perhaps best illustrated by the facts of two murder cases, which were not, but could have been, charged as death penalty cases. In one case,²²¹ the defendant yanked the victim's purse off her arm in a store parking lot and fled. When the victim gave chase, she suffered a heart attack and died shortly thereafter.²²² The defendant was charged with murder. Because the defendant had used force on the victim by yanking the purse, the purse-snatch was a robbery. Because the death occurred during flight from the robbery, the defendant was guilty of

²¹⁶ See *People v. Johnson*, 7 Cal. Rptr. 2d 23, 29 (Ct. App. 1992) ("First degree felony murder does not require a strict causal relation between the felony and the killing [as long as] both are part of one continuous transaction.").

²¹⁷ *People v. Dillon*, 668 P.2d 697, 719 (Cal. 1983).

²¹⁸ See *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (holding that "for a defendant to be guilty of murder under the felony murder rule the act of killing must be committed by the defendant or his accomplice acting in furtherance of their common design").

²¹⁹ See *Taylor v. Superior Court*, 477 P.2d 131, 134 & n.2 (Cal. 1970) (stating that "provocative act" murder is first degree murder if committed during one of felonies listed in Penal Code § 189), partially overruled on other grounds, *People v. Antick*, 539 P.2d 43 (Cal. 1975).

²²⁰ See *People v. Kainzrants*, 53 Cal. Rptr. 2d 207, 213-14 (Ct. App. 1996) (holding that felony murder special circumstance may apply to defendant convicted of "provocative act" murder rather than felony murder).

²²¹ See *People v. Scott*, No. 179796 (Santa Clara Super. Ct., filed Dec. 19, 1994).

²²² *Sandra Gonzales, Murder Charge in Purse-Snatching Case*, San Jose Mercury News, Dec. 20, 1994, at 1B, available in Westlaw, SJMERCURY Database.

felony murder and was death-eligible.²²³ In the second case,²²⁴ the defendant entered a department store and stole some clothes. Driving away from the store with the clothes, the defendant ran a red light and accidentally hit and killed a passenger in another car.²²⁵ The defendant was convicted of first degree murder on the theory that his entry into the store constituted a burglary and the death occurred during his flight from the burglary.²²⁶ The fact that neither case was charged as a death penalty case suggests the good sense of the prosecutors; the fact that both defendants were statutorily death-eligible illustrates the overbreadth of California's scheme.

2. *The Lying in Wait Special Circumstance*

First degree murders that are not felony murders are almost all "willful, deliberate, and premeditated" killings. Other special circumstances often will apply to premeditated murders, but it is the lying in wait special circumstance²²⁷ which makes *most* premeditated murders potential death penalty cases.²²⁸ Although the term "lying in wait" carries with it the connotation of an ambush from hiding, the California Supreme Court has given the special circumstance a far more expansive interpretation. According to the court, lying in wait is established if the defendant: (1) concealed his purpose to kill the victim; (2) watched and waited for a substantial period for an opportune time to act; and (3) immediately thereafter launched a surprise attack on the victim from a position of advantage.²²⁹ The court has interpreted the second element to require only that the duration of the

²²³ Ultimately, the defendant was allowed to plead no contest to involuntary manslaughter and grand theft, but, because of prior convictions, he was sentenced to 35 years to life under California's "three strikes law." Cf. Bill Romano, *Manslaughter Plea in Purse-Snatch Death*, San Jose Mercury News, Dec. 22, 1995, at 7B, available in Westlaw, SJMERCURY Database.

²²⁴ See *People v. Weddle*, 2 Cal. Rptr. 2d 714 (Ct. App. 1991).

²²⁵ See *id.* at 715.

²²⁶ See *id.* at 719-20. The defendant was actually engaged in extensive reckless driving prior to the accident, see *id.* at 715, but, as a legal matter, he would have been guilty of felony murder and been death-eligible even if his driving had been blameless because he was still in flight from the felony.

²²⁷ See Cal. Penal Code § 190.2(a)(15) (West Supp. 1997).

²²⁸ See generally Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. Rev. 1249 (1996) (reviewing development and expansive application of lying in wait special circumstance). "[T]he lying in wait definition 'has been expanded to the point [that] it is in great danger of becoming a 'general circumstance' rather than a 'special circumstance,' one which is present in most premeditated murders not just a narrow category of those killings.'" *Id.* at 1279 (alteration in original) (quoting *Iniguez v. Superior Court*, 19 Cal. Rptr. 2d 66, 71 (Ct. App. 1993) (Johnson, J., concurring), republished, No. S028650, 1993 Cal. LEXIS 4333, at *1 (Aug. 12, 1993)).

²²⁹ See *People v. Morales*, 770 P.2d 244, 261 (Cal. 1989).

watching and waiting be "such as to show a state of mind equivalent to premeditation or deliberation."²³⁰ As a result, whether a premeditated murder is done while lying in wait turns on the first and third elements.

Most premeditated murders satisfy those two elements. It will be a rare premeditated murder, i.e., a murder done "as a result of careful thought and weighing of considerations . . . carried on coolly and steadily, [especially] according to a preconceived design,"²³¹ where the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage. As Justice Mosk explained in arguing that the lying in wait special circumstance was unconstitutional:

[The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.²³²

Thus, the lying in wait special circumstance applies to a wide variety of first degree murders, ranging from the true ambush²³³ to murders where the defendant follows the victim for a period before killing,²³⁴ lures the victim into a trap,²³⁵ engages the victim in conversation and then attacks the victim from behind,²³⁶ or kills the victim in his or her sleep.²³⁷

²³⁰ *People v. Edelbacher*, 766 P.2d 1, 24 (Cal. 1989) (emphasis omitted) (quoting California Jury Instructions, Criminal (CALJIC) No. 8.25, and upholding its definition of lying in wait).

²³¹ *People v. Bender*, 163 P.2d 8, 19 (Cal. 1945) (quoting definition of "deliberate" in Webster's New International Dictionary (2d ed. 1944)).

²³² *Morales*, 770 P.2d at 273 (Mosk, J., concurring in part and dissenting in part); see also *People v. Ceja*, 847 P.2d 55, 63-64 (Cal. 1993) (Kennard, J., concurring) (expressing concern that court's expansive definition of lying in wait "may have undermined the critical narrowing function of the lying in wait special circumstance").

²³³ See *People v. Roberts*, 826 P.2d 274, 283-84 (Cal. 1992) (stating that prior to attack, defendant waited in prison corridor for inmate victim to arrive).

²³⁴ See *People v. Edwards*, 819 P.2d 436, 460 (Cal. 1991) (describing how prior to attack, defendant watched two girls and waited for them to reach isolated place).

²³⁵ See *People v. Sims*, 853 P.2d 992, 998-99 (Cal. 1993) (stating that prior to attack, defendant lured pizza delivery driver to hotel by ordering pizza); *Morales*, 770 P.2d at 253 (stating that prior to attack, defendant's accomplice lured victim into car by asking her to accompany him to shopping mall).

²³⁶ See *People v. Webster*, 814 P.2d 1273, 1294 (Cal. 1991) (describing how prior to attack defendant and his friends lured victim back to riverbank camp and then attacked from behind).

²³⁷ See *People v. McDermid*, 211 Cal. Rptr. 773, 784 (Ct. App. 1984) (stating that prior to attack, defendant waited until victim was asleep).

The combination of the felony murder special circumstances, which themselves perform no narrowing function at least as to the actual killer, and the lying in wait special circumstance, which by definition encompasses most premeditated murders, means that section 190.2 does not effect any significant narrowing.²³⁸

B. The Narrowness of the Excluded Categories

In contrast to the broad sweep of the special circumstances categories, the seven excluded first degree murder categories are exceedingly narrow. Five of the seven excluded categories encompass those first degree murders committed by unusual means: (1) malicious killing by means of a destructive device that was not planted, hidden, concealed, mailed, or delivered;²³⁹ (2) malicious killing by armor-piercing ammunition;²⁴⁰ (3) malicious but unintentional killing by poison;²⁴¹ (4) malicious but unintentional killing by lying in wait;²⁴² and (5) malicious but unintentional killing by torture.²⁴³

Although each of these five unusual means-based first degree murders could theoretically be committed without a special circumstance occurring, such murders are exceedingly rare. In the quarter of a century since *Furman* was decided, there have been only a handful of published murder cases fitting any of the five categories. There are

²³⁸ Of course, there are some "simple" premeditated murders that are neither felony murders nor lying in wait murders (and do not fall under other special circumstances). For example, in *People v. Jaspal*, 286 Cal. Rptr. 337 (Ct. App. 1991), after an argument and struggle in which the defendant drew his gun and was disarmed, the defendant picked up the gun, loaded it in plain view of the victim, and shot him. In *People v. Leggett*, No. A038084 (Cal. Ct. App. Sept. 22, 1988), the defendant walked into the victim's bedroom without warning and shot him. In *People v. Cerna*, No. SOC39120 (Kern County Super. Ct. filed June 19, 1989), the defendant telephoned ahead to the victim that he was coming to kill him, and, upon arriving, defendant shot victim. However, the very existence of such a category of noncapital murders calls into serious question whether the California scheme comports with the qualitative element of *Furman*. See *supra* notes 59-63 and accompanying text. No rational justification comes to mind for making death-eligible the unarmed defendant who accidentally kills during a purse-snatch because, for example, his victim has a heart attack, or the defendant who accidentally kills while driving away from the scene of a nonviolent commercial burglary, while not making death-eligible the defendant who, after "careful thought and weighing of considerations," shoots his victim in cold blood. The California Supreme Court itself has recognized that premeditated murder is "the most aggravated form of homicide known to our law," and it is a more serious crime than even an intentional felony murder. See *People v. Dillon*, 668 P.2d 697, 726 (Cal. 1983).

²³⁹ See Cal. Penal Code §§ 189, 190.2(a)(4), (6) (West Supp. 1997).

²⁴⁰ See *id.* § 189 (West 1988).

²⁴¹ See *id.* §§ 189, 190.2(a)(19).

²⁴² See *id.* §§ 189, 190.2(a)(15).

²⁴³ See *id.* §§ 189, 190.2(a)(18). The sixth unusual means-based first degree murder, intentional killing by a firearm from a motor vehicle, is itself a special circumstance. See *id.* §§ 189, 190.2(a)(21) (West Supp. 1997).

none in the first three categories.²⁴⁴ There are very few in the last two categories.²⁴⁵

The remaining two excluded categories encompass: (1) murderers who committed "simple" premeditated murder, i.e., murderers who have not been convicted of another murder and who did not murder one of the specified victims, with one of the specified motives, or by one of the specified means or during one of the enumerated felonies listed in section 190.2 special circumstances; and (2) accomplices to felony murders who were "*Enmund/Tison* ineligible," i.e., who did not actually kill, attempt to kill, intend to kill, or act with reckless indifference to human life while a major participant in a special circumstance felony.²⁴⁶ Unlike the five unusual means-excluded categories, these categories are not empty or nearly empty sets, but it would be unrealistic to assume they contain any substantial number of real life murders.

With regard to simple premeditated murders, these would have to be planned murders where the killer simply confronted and immediately killed the victim or, even more unlikely, where the killer advised the victim, in advance and before initiating any assault, of his intent to kill. As discussed above,²⁴⁷ given the California Supreme Court's broad interpretation of the lying in wait special circumstance, simple premeditated murders will constitute a distinct minority of premeditated murders.

As for the category of *Enmund/Tison* ineligible, there will be few convicted first degree murderers in this category for two reasons. First, the category as defined is very narrow, largely limited to getaway drivers like *Enmund* who were not physically present at the murder. Almost anyone who participated to any greater degree in a felony could be labeled a major participant, and a major participant in a special circumstances felony is very likely to be found to have acted with reckless indifference to human life.²⁴⁸ Second, it appears from a

²⁴⁴ In one case, the state may not have established that a killing by poison was intentional, but the defendant had committed other killings by poison, thereby triggering the multiple murder special circumstance. See *People v. Diaz*, 834 P.2d 1171, 1202, 1210-11 (Cal. 1992). In another case, there was an unintentional killing by poison, but it occurred in the course of a rape, a special circumstance. See *People v. Mack*, 15 Cal. Rptr. 2d 193 (Ct. App. 1992).

²⁴⁵ See *People v. Wiley*, 554 P.2d 881 (Cal. 1976) (involving unintentional murder by torture); *People v. Laws*, 15 Cal. Rptr. 2d 668 (Ct. App. 1993) (detailing unintentional killing by one lying in wait to assault); *People v. Mills*, 2 Cal. Rptr. 2d 614 (Ct. App. 1991) (demonstrating unintentional murder by torture); *People v. James*, 241 Cal. Rptr. 691 (Ct. App. 1987) (same); *People v. Demond*, 130 Cal. Rptr. 590 (Ct. App. 1976) (same).

²⁴⁶ See Cal. Penal Code § 190.2(c), (d) (West Supp. 1997).

²⁴⁷ See *supra* Part III.A.2.

²⁴⁸ See *Rosen*, *supra* note 32, at 1150, 1154-55.

review of actual cases that those defendants who are only minor participants in felonies where a felony murder occurs are only rarely convicted of first degree murder.²⁴⁹ Because of their minor involvement, such defendants may be allowed to plead to lesser charges, perhaps in return for testimony against their co-felons, or, if tried, they may be tried on lesser charges or convicted of lesser offenses because of the prosecutor's or jury's exercise of discretion.

In contrast to the number and breadth of the special circumstances categories, the seven excluded categories are so narrow that, taken together, they encompass too few first degree murderers to narrow genuinely death-eligibility in California. Nine years ago, Justice Broussard of the California Supreme Court reached exactly that conclusion: "California's 1978 statute . . . sweeps so broadly that most murders are subject to the death penalty, and only a few excluded."²⁵⁰

IV

NARROWING THE CLASS—THE EMPIRICAL EVIDENCE

As we argued in the previous section, an analysis of the California scheme, even without empirical data, clearly establishes that the scheme cannot satisfy *Furman*. Nevertheless, the *Furman* decision was based on empirical evidence as to death sentence ratios, and California's compliance with *Furman* should be tested on the basis of empirical evidence as well. The question to be answered is whether California's death penalty scheme defines a sufficiently narrow class of death-eligible first degree murderers so that a significant percentage of the class is in fact sentenced to death.

In Part IV.A. below, the question is answered on the basis of a study of the fact situations of 404 direct appeals of first degree murder convictions. The study covers published decisions of the California Supreme Court and Court of Appeal in 253 cases decided during the period 1988-1992 and unpublished decisions of the Court of Appeal for the First Appellate District²⁵¹ in 151 cases decided during the same period.²⁵² Based on the facts of the cases as described by the appel-

²⁴⁹ See *infra* note 266.

²⁵⁰ *People v. Adcox*, 763 P.2d 906, 946 (Cal. 1988) (Broussard, J., concurring).

²⁵¹ The First Appellate District, one of six appellate districts comprising the California Court of Appeal, includes 12 of California's 58 counties and covers the western region from just south of San Francisco to the Oregon border. The district, with both large and small counties, includes major urban centers such as San Francisco and Oakland, small cities such as Santa Rosa and Vallejo, as well as suburban and rural areas.

²⁵² The published cases were identified through standard research methods, and we believe that the cases studied constitute all of the cases decided during the period. The unpublished cases were identified through multiple sources, the principal source being a list of such cases provided by the California Attorney General on behalf of the state respon-

late courts, it is clear that the overwhelming majority of convicted first degree murderers satisfy one or more of section 190.2's thirty-two special circumstances. Succinctly stated, the special circumstances perform no substantial narrowing function. As a consequence, the death-eligible class is so large that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death.

Part IV.B. below reports on survey results from two other case samples used to verify the validity of the study. Since some cases where the facts would support a first degree murder conviction result in lesser convictions, we examined a sample of published appellate decisions and unpublished decisions of the Court of Appeal for the First District in second degree murder cases. Since a significant minority of murder convictions are not appealed, we also examined a sample of unappealed murder conviction cases in three counties. Both of these additional samples produced special circumstances percentages similar enough to the study's percentages to confirm that the study cases are representative and to support the study's conclusion.

Part IV.C. addresses how a substantially narrower version of section 190.2 might apply to the study cases. Recently the call has come from different commentators to narrow drastically state death penalty statutes. The cases in the study are used to compare the reach of the current version of section 190.2 to a hypothetical narrower scheme constructed along the lines suggested by two such commentators.

A. The Study of Appealed First Degree Murder Cases

During the five-year period 1988-1992, an average of 346 persons per year were convicted of first degree murder in California.²⁵³ An average of 33.2 persons per year convicted of first degree murder were

dents in the course of discovery in a federal habeas corpus proceeding. See Respondent's Second Supplemental Answers Re: Claim No. 30 at Exh. B, *Karis v. Calderon*, No. Civ. S-89-0527 (E.D. Cal. June 30, 1995) (on file with the *New York University Law Review*). If any cases from the period were, by chance, omitted from the study, there is no reason to believe that the study was biased in any particular direction as a result. Cases generating more than one opinion are included only once in the study.

²⁵³ See *id.* at 3. This average is derived from the yearly totals of convicted first degree murderers received for the first time by the California Department of Corrections. This average is generally consistent with the less precise data on first degree murder convictions provided to the authors by the California Department of Justice. See California Department of Justice Law Enforcement Information Center, *Offender-Based Transaction Statistics* (Sept. 23, 1993) (on file with the *New York University Law Review*). The Department of Justice data estimates the first degree murder conviction average to be between 282 and 404 convictions per year. Because of a failure to input more recent data, the Department of Justice cannot presently provide statewide murder conviction information for years after 1992.

sentenced to death.²⁵⁴ Thus during the period of this study, approximately 9.6% of those convicted of first degree murder were sentenced to death.²⁵⁵

The statutorily death-eligible class consists of those found guilty of first degree murder on facts satisfying one or more special circumstances. Accordingly, the study analyzed published and unpublished appellate decisions to determine the frequency of occurrence of special circumstances facts in first degree murder cases.²⁵⁶ The study relied on appellate opinions because they provide the most accessible descriptions of the facts supporting such convictions.

1. *The Published First Degree Murder Case Appeals*

During the period 1988-1992, the California Supreme Court and Court of Appeal published opinions in 253 direct appeals from first degree murder convictions. The published case convictions underlying those appeals were distributed as follows: 159 death judgments; 41 first degree murder cases with a special circumstance finding but no death judgment; and 53 first degree murder cases without a special circumstance finding. Because all California death judgment cases are automatically appealed to the California Supreme Court, and all decisions of the Supreme Court are published, death judgment cases are heavily overrepresented among the published cases. The results of the published case study are set out below:²⁵⁷

Table 1 makes clear a number of points. First (and not surprisingly), essentially all death penalty cases turn out to be special circumstances cases—only once in 158 cases did the Supreme Court reverse for insufficient evidence of special circumstances.²⁵⁸ Second, the over-

²⁵⁴ See California Department of Justice, *Homicide in California*, 1992, at 95 (1995).

²⁵⁵ If 9.6% of first degree murderers are being sentenced to death, the class of first degree murderers would have to be narrowed statutorily by more than half to achieve a death sentence ratio greater than 20%, a ratio thought to be too low by the Justices in *Furman*. See *supra* notes 26-27 and accompanying text; see also *Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994) (suggesting that California's special circumstances would have to apply in less than majority of cases to satisfy Eighth Amendment).

²⁵⁶ With respect to each decision, the test we applied was whether, under the facts stated, a reasonable juror could have found a special circumstance true beyond a reasonable doubt. Cf. *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (sustaining vagueness challenge to individual aggravating circumstances because jury members could fairly have applied circumstance to almost every murder); *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (same).

²⁵⁷ Three cases in the study are not included in the table because the opinions did not set out the facts underlying the convictions. See *People v. Marks*, 756 P.2d 260 (Cal. 1988); *People v. Scaffidi*, 15 Cal. Rptr. 2d 167 (Ct. App. 1992); *People v. Burrows*, 269 Cal. Rptr. 206 (Ct. App. 1990).

²⁵⁸ See *People v. Morris*, 756 P.2d 843, 843 (Cal. 1988) (holding that evidence was insufficient to establish that murder was committed during commission of robbery).

TABLE 1
NARROWING EFFECT OF SECTION 190.2
IN PUBLISHED APPEALS FROM FIRST DEGREE MURDER
CONVICTIONS (1988-1992)

Actual Conviction	Finding/Evidence of Special Circumstance*	
	Yes	No
Death Judgment	157	1
Felony-murder	116	
Multiple murder/prior murder	72	
Lying in wait	8	
Other special circumstances	23	
First Degree Murder with Special Circumstances	40	0
Felony-murder	26	
Multiple murder/prior murder	13	
Lying in wait	8	
Other special circumstances	11	
First Degree Murder	45	7
Felony-murder	25	
Multiple murder/prior murder	3	
Lying in wait	21	
Other special circumstances	9	

* Within each category, the total number of special circumstances exceeds the number of special circumstances cases, because many cases had findings of proof of more than one special circumstance.

whelming majority (92%) of non-death judgment first degree murder cases are also factually special circumstances cases.²⁵⁹ Third, the felony murder special circumstances play the predominant role in defining death-eligibility in the California scheme. One or more of the felony murder special circumstances was proved in almost three-

²⁵⁹ There are a number of reasons why cases which are factually special circumstances cases might result in a first degree murder conviction without a special circumstances finding. In many cases, the prosecutor simply may have exercised her discretion not to charge special circumstances. In some cases, special circumstances charges may have been dropped as part of a plea agreement or for other concessions, for example, the agreement to waive jury trial. In still other cases, the judge or jury may have exercised discretion not to find special circumstances. Whatever the reason for the lesser conviction, the defendants in this situation are among the many who are statutorily death-eligible but are not sentenced to death.

quarters (74%) of the death judgment cases²⁶⁰ and in 60% of the other actual or potential special circumstances cases.²⁶¹

2. *The Unpublished First Degree Murder Case Appeals*

The 151 unpublished cases involving direct appeals from first degree murder convictions decided during the period 1988-1992 by the California Court of Appeal for the First District involved convictions distributed as follows: 41 first degree murder cases with a special circumstances finding; 110 first degree murder cases without a special circumstances finding. The results of the study of these unpublished cases are set out below:²⁶²

The data for the unpublished cases generally confirm the data for the published cases. Again, the overwhelming majority (85%) of first degree murder cases are factually special circumstances cases, with the majority of the special circumstances cases being felony murder cases. The distribution of special circumstances closely tracks the distribution in the published non-death judgment first degree murder cases.

3. *The Samples Combined*

The two appellate case samples produce somewhat different results in measuring the narrowing effect of section 190.2 in non-death judgment cases. The published case sample indicates that 92% of non-death judgment first degree murder cases are factually special circumstances cases, while the unpublished case sample puts the number at 85%. Assuming that this difference in percentages reflects a real difference in the distribution of murders among published and unpublished cases (perhaps because of a tendency for more egregious cases to become published cases),²⁶³ the data have to be combined and, in

²⁶⁰ In an amicus brief to the U.S. Supreme Court, the State of California asserted that at least one of the felony murder special circumstances had been found by the factfinder in 146 of 212 murderers then on death row. See Amicus Brief of the State of California at 10, *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) (Civ. No. 92-989).

²⁶¹ The table also indicates that the various special circumstances are differently distributed between death and non-death cases. For example, murderers who committed multiple murders or a prior murder appear more likely to receive the death penalty than murderers who committed only felony murder. Whether these differences reflect that prosecutors and juries are in fact selecting on this basis cannot be determined without a study of other factors present in the cases.

²⁶² Nine cases are not included because the opinions did not set out the facts underlying the convictions.

²⁶³ This is the assumption most favorable to finding a narrowing effect. In fact, the difference in percentages may be simply a random variation caused by limits in the sample sizes, or it may reflect a difference in the way the Court of Appeal writes published and unpublished decisions. As the court itself has acknowledged, in unpublished opinions the court sets out the facts in less detail. See, e.g., *People v. Ganter*, No. A040449 (Cal. Ct.

TABLE 2
NARROWING EFFECT OF SECTION 190.2
IN UNPUBLISHED APPEALS FROM FIRST DEGREE MURDER
CONVICTIONS (FIRST APPELLATE DISTRICT, 1988-1992)

Actual Conviction	Finding/Evidence of Special Circumstance*	
	Yes	No
First Degree Murder with Special Circumstances	40	1
Felony-murder	24	
Multiple murder/prior murder	10	
Lying in wait	7	
Other special circumstances	12	
First Degree Murder with Special Circumstances	81	20
Felony-murder	47	
Multiple murder/prior murder	3	
Lying in wait	38	
Other special circumstances	12	

* Within each category, the total number of special circumstances exceeds the number of special circumstances cases, because many cases had findings of proof of more than one special circumstance.

turn, combined with the data from the death judgment cases.²⁶⁴ When the percentages for the three categories of first degree murder cases (death judgment cases, published non-death judgment cases, and unpublished cases) are combined according to their respective proportions of total first degree murder cases, the result is that approximately 87% of first degree murder cases are *factually* special circumstances cases under the present version of section 190.2.²⁶⁵

App. Nov. 4, 1988). Consequently, unpublished opinions may not state facts revealing the existence of special circumstances even when such facts are part of the case.

²⁶⁴ A comparison of the published and unpublished case samples indicates that, during the period covered by the surveys, the courts published their decisions in approximately 10.5% of the non-death judgment first degree murder conviction appeals. Death judgment cases constituted approximately 10% of first degree murder convictions.

²⁶⁵ The 87% overlap is almost identical to that found in a study of Georgia's scheme, perhaps the second broadest scheme in the country. See Baldus et al., *supra* note 16, at 263 n.31 (indicating 86% of murder and non-negligent manslaughter cases were death-eligible). In actuality, reliance on facts stated in appellate cases probably leads to *understatement* of the special circumstances/first degree murder conviction overlap. Where the prosecution did not charge special circumstances, the prosecution may not have developed or introduced available evidence that would have proved special circumstances. Similarly, in cases where special circumstances were not found, an appellate opinion may not have addressed evidence that might have supported such a finding.

That approximately seven out of eight first degree murder cases are factually special circumstances cases is entirely predictable from the structure of the California scheme. The majority of first degree murders are felony murders, and felony murders are virtually all special circumstances murders.²⁶⁶ Thus, the felony murder special circumstances alone defeat any possibility of genuine narrowing.

The class of first degree murderers is narrowed to a death-eligible class not only by the special circumstances of section 190.2, but also by Penal Code section 190.5, which forbids application of the death penalty to anyone under the age of eighteen at the time of the commission of the crime.²⁶⁷ When juvenile first degree murderers are excluded from the calculation, the result is that more than 84% of convicted first degree murderers are statutorily death-eligible under the present California scheme. If 84% of first degree murderers are statutorily death-eligible but only 9.6% are sentenced to death, California has a death sentence ratio of approximately 11.4%.²⁶⁸ In other words, fewer than one out of eight death-eligible convicted first degree murderers is selected for death at the complete discretion of prosecutors and juries.²⁶⁹ This 11.4% death sentence ratio is significantly lower than Georgia's death sentence ratio at the time of *Furman*²⁷⁰ and California's death sentence ratio just prior to the *Furman* decision.²⁷¹

²⁶⁶ The only exception is for *Enmund/Tison* ineligible, which comprise four cases in the study. See *People v. Anderson*, 285 Cal. Rptr. 523 (Ct. App. 1991) (defendant participated in planning robbery but was not present at scene); *People v. Johnson*, No. A046483 (Cal. Ct. App. June 27, 1991) (defendant stood watch at door during robbery); *People v. Denis*, 273 Cal. Rptr. 724 (Ct. App. 1990) (defendant posed as drug dealer to set up robbery but did not participate in sudden killing by co-defendant); *People v. Hunter*, No. A035557 (Cal. Ct. App. Dec. 29, 1988) (defendant was lookout in armed robbery).

²⁶⁷ Because the California Department of Justice did not maintain data for the study period from which such information can be derived, it has been difficult to obtain statistics concerning the percentage of convicted first degree murderers who were minors at the time of the crime. Based on data in the present study, it appears that approximately 2.5% to 3.5% of the non-death judgment first degree murderers were under 18 at the time of the murder. The higher figure (the figure suggesting the greater narrowing) is used in the calculation in the text that follows this footnote.

²⁶⁸ Professor Baldus, in a recent study of New Jersey covering the years 1983-1995, arrived at a slightly higher death sentence ratio for that state (13%). See Baldus, *supra* note 33, at 1599.

²⁶⁹ The 1977 death penalty law, which was replaced by the Briggs Initiative, would have created a significantly narrower class of death-eligible first degree murderers, but it still would have produced a death sentence ratio unacceptably low in light of *Furman*. As measured against the cases in the present study, the 1977 law would have limited death-eligibility to 53% of convicted first degree murderers. Assuming that 9.6% of first degree murderers continued to be sentenced to death, the 1977 law would have resulted in a death sentence ratio of only 18%.

²⁷⁰ See *supra* note 28.

²⁷¹ See *supra* note 31. At first blush, it might seem anomalous that the present scheme, under which there is at least some narrowing of the death-eligible class, should produce a

B. Appealed Second Degree Murder Cases and Unappealed Cases

Reliance on appealed first degree murder convictions to judge the narrowing effect of the California special circumstances risks ignoring two other categories of murder cases relevant to the inquiry: (1) murder cases that are factually first degree murder cases, but that result in second degree murder convictions owing to the exercise of discretion by the prosecutor and/or jury; and (2) unappealed murder cases that are factually first degree murder cases. In theory at least, these categories might encompass a significant number of less egregious first degree murder cases, cases without special circumstances facts. To test whether either of these categories would demonstrate a greater narrowing effect for the special circumstances, we surveyed a sample of cases from each category.²⁷²

With respect to the first category, we surveyed 192 appellate decisions in second degree murder cases decided during the period 1988-1992. These cases consisted of sixty-five published cases from the California Supreme Court and Court of Appeal and 127 unpublished cases from the Court of Appeal for the First District. Among the published cases, there were twenty-seven cases in which there was sufficient evidence stated to support a first degree murder conviction. In twenty-two of these twenty-seven cases (81%), there also was sufficient evidence to support a special circumstance finding.²⁷³ Among the unpublished cases, there were sixty-six in which there was sufficient evidence stated to support a first degree murder conviction. In fifty-five of these sixty-six cases (83%), there also was sufficient evidence to support a special circumstance finding.²⁷⁴

With respect to the second category, we surveyed seventy-eight unappealed murder conviction cases filed during the period 1987-1992 in three counties: Alameda, a mixed urban/suburban/rural county;

substantially lower death sentence ratio than the pre-*Furman* scheme under which all first degree murderers were death-eligible. However, the lower ratio is a product of the fact that, in recent years, the number of first degree murder convictions has risen much faster than the number of death sentences. Measured against the benchmark 1945-1954 period, first degree murder convictions have gone up more than twice as fast as death sentences. See California General Assembly, *supra* note 135, at 10.

²⁷² Second degree murder cases were surveyed because their fact situations shed light on the potential narrowing effect of section 190.2. However, second degree murder cases are irrelevant for purposes of calculating the death sentence ratio since only convicted first degree murderers are possible members of the death-eligible class.

²⁷³ See, e.g., *People v. Flores*, 9 Cal. Rptr. 2d 754 (Ct. App. 1992) (defendant intentionally aided driveby shooting); *People v. Coleman*, 7 Cal. Rptr. 2d 40 (Ct. App. 1992) (defendant committed murder during kidnapping for purposes of robbery).

²⁷⁴ See, e.g., *People v. Black*, No. A035618 (Cal. Ct. App. Sept. 21, 1983) (defendant committed double murder); *People v. Brewer*, No. A042184 (Cal. Ct. App. July 17, 1989) (defendant, hired to assault victim, did driveby shooting).

Kern, a predominantly rural county; and San Francisco, an urban county. The seventy-eight unappealed cases represent a portion of 327 murder conviction cases filed during that period in the three counties.²⁷⁵ In the case of Alameda County, we reviewed a substantial majority, but not all, of the cases from the period. The survey included all known cases from Kern County and San Francisco County.²⁷⁶

In all three counties, a substantial majority of murder convictions in the three samples was appealed: Alameda (69%); Kern (81%); San Francisco (80%). In all three counties, the overwhelming majority of the unappealed murder convictions was the product of pleas: Alameda (97%); Kern (95%); San Francisco (85%). A substantial majority of the murder convictions was for second degree murder (76%), presumably because of plea bargaining, and, unlike the situation in appealed cases, a substantial majority (75%) of unappealed second degree murder convictions occurred in cases that were factually first degree murder cases.²⁷⁷

Combining the cases from the three counties, special circumstances were or could have been found in 89% of the first degree murder conviction cases. When second degree murder conviction cases are included, special circumstances were or could have been found in 84% of the cases in which first degree murder was proved, admitted, or could have been proved.

These two surveys fully support the study's conclusions as to the narrowing effect of section 190.2. While consideration of appealed second degree murder cases suggests that section 190.2 has a slightly

²⁷⁵ The cases were divided as follows: Alameda (39); Kern (19); San Francisco (20). Because there is obviously some lag time between the filing of a case, conviction, and appellate decision, the time periods covered by the appealed and unappealed case samples and by the surveyed cases and the California Department of Correction and U.S. Department of Justice records are not entirely congruent. However, there is no reason to think that any set of cases is unrepresentative of California murder cases generally.

²⁷⁶ In the case of Alameda County, the murder conviction case files were identified through multiple sources. In the case of Kern County, a list of murder case filings was obtained as a result of a California Public Records Act request to the District Attorney of Kern County. In the case of San Francisco County, a list of murder case filings was obtained from the San Francisco District Attorney's Office in the course of discovery in *People v. Brown*, No. 1518018 (S.F. Mun. Ct. Oct. 27, 1994) (order granting discovery). To the extent any cases from the three counties were not surveyed, there is no reason to believe that the survey was thereby biased in any direction.

²⁷⁷ See, e.g., *People v. Crow*, No. A054055 (Cal. Ct. App. July 28, 1992) (allowing defendant who raped, robbed, and strangled victim to plead guilty to second degree murder); *People v. Solano*, No. A051794 (Cal. Ct. App. Sept. 5, 1991) (allowing defendant charged with two counts of first degree murder and multiple murder special circumstances to plead guilty to second degree murder and voluntary manslaughter).

greater narrowing effect than appears in first degree murder cases,²⁷⁸ consideration of the unappealed cases suggests that, if anything, appealed cases overreport the narrowing effect of special circumstances. Whether one considers actual or actual and potential first degree murder cases, and whether one considers appealed or appealed and unappealed cases, the conclusion is the same: the section 190.2 special circumstances accomplish no genuine narrowing of the death-eligible class.²⁷⁹

²⁷⁸ The lower percentages may only reflect that in appellate decisions in second degree murder cases, the court is even less likely than in first degree murder cases to set out facts relevant to a special circumstance finding.

²⁷⁹ *Furman* was concerned with the risk of arbitrary application of the death penalty. The Court presumed that, if there is too large a pool from which relatively few are selected for death, arbitrariness is inevitable. Professor Baldus and his group have provided empirical support for this presumption in their study of the death penalty in Georgia. See Baldus et al., *supra* note 16. Other investigators have attempted to test this presumption by means of county comparisons in states with broad death penalty statutes. These studies consistently have demonstrated that there are substantial, and unaccounted for, county-to-county disparities in the use of the death penalty. See Paternoster, *supra* note 32, at 175-80 (reviewing studies). The issue of county-to-county disparities in California has not been studied thoroughly yet, although two preliminary studies have found such disparities. In a statewide study of homicides committed during 1985 and 1986, Professor Gerald Uelman found wide variations among counties in the percentage of death penalty cases filed per homicides in the county. See Charles Finnie et al., *Location is Key in Capital Cases: Death Decisions Vary by County*, L.A. Daily J., Apr. 23, 1992, at 1. In a five-year (1987-1991) study of the death penalty in Kern County, Professor Everett Mann found that, whether measured against county population or county homicide arrests, Kern County imposed almost three times as many death sentences as the average for the rest of the state and 2.3 times as many as the highest of Kern's eight neighboring counties. See Declaration of Everett E. Mann, Jr., at 3-4, *People v. Shaw*, No. SC053273 (Kern County Super. Ct. filed Mar. 9, 1993) (on file with the *New York University Law Review*).

A byproduct of the present study is further evidence of substantial county-to-county disparities. In the course of the present study, all murder filings in Kern County and San Francisco County during the period 1987-1992 were examined. The filings resulted in 98 murder convictions in Kern County and 102 murder convictions in San Francisco County. (Two San Francisco cases and one Kern case were disregarded because the facts of the murders could not be determined from the available files.) Table 3 below compares the two counties in terms of the factual bases of the murder convictions as measured by the version of section 190.2 in effect at the time of the homicide:

TABLE 3
KERN AND SAN FRANCISCO COUNTIES COMPARED
(CASES FILED 1987-1992)

	Finding/Evidence of Special Circumstance	
	Kern	San Francisco
First Degree Murder with Special Circumstances	51	57
First Degree Murder	28	25
Second Degree Murder	18	18
Total Cases	97	100

C. *Projecting the Data Against a Narrower Statute*

If the present California scheme is unquestionably overbroad, what would be the effect of a narrower scheme on California murder cases? Recently, two death penalty observers—from different sides of the death penalty debate—have expressed the common conclusion that overbroad statutes (such as California’s) have effectively defeated any attempt to bring rationality to the imposition of the death penalty. The two have called for states to narrow drastically death-eligibility to “only the most depraved killers.”²⁸⁰

Judge Alex Kozinski of the Ninth Circuit, a supporter of the death penalty, speaking primarily of the California experience, has argued that legislatures must limit the scope of death penalty statutes:

First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would ensure that the few who suffer the

Table 4 below compares the actual case outcomes of those cases where first degree murder and special circumstances were or might have been proved:

TABLE 4
KERN AND SAN FRANCISCO COUNTIES COMPARED
(ACTUAL AND POTENTIAL SPECIAL CIRCUMSTANCES CASES FILED 1987-1992)

Actual Conviction	Kern	San Francisco
Death Judgment	8	0
First Degree Murder with Special Circumstances	17	7
First Degree Murder	14	24
Second Degree Murder	12	26
Total Cases	51	57

As the tables indicate, the distribution of homicides resulting in murder convictions is quite similar for the two counties with respect to the number of provable first degree murder cases and the occurrence of special circumstances in such cases. However, the prosecution outcomes were dramatically different. While these disparities suggest actual arbitrariness in charging and/or sentencing decisions, they cannot prove arbitrariness since the only factor surveyed in the cases was statutory death-eligibility. Other factors that might explain the disparities were not reviewed. Contrast Professor Baldus’s multivariate analysis of the Georgia death penalty. See Baldus et al., *supra* note 16.

²⁸⁰ Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 30 (1995); see Baldus, *supra* note 33, at 1590-91.

Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death.

Kozinski & Gallagher, *supra*, at 29.

death penalty really are the worst of the very bad—mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random.²⁸¹

Subsequently, Professor David Baldus, whose empirical studies have supported attacks on the death penalty,²⁸² addressed the same theme. He urged that the state courts should, by proportionality review, limit the death penalty to those cases where it can serve a deterrent and retributive function: “those involving multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror.”²⁸³

A narrower death penalty statute, combining the narrowing circumstances suggested by Judge Kozinski and Professor Baldus in their call for a scheme which truly singles out the “worst of the very bad,” might have the following special circumstances: (1) multiple murder; (2) prior murder conviction; (3) terrorism; (4) torture; (5) sexual assault; (6) contract murder; and (7) peace officer victim.²⁸⁴ How such a scheme would apply to the cases in the present study is set out below:

A majority of those actually sentenced to death (63%) would have been death-eligible even under this hypothetical narrower statute, but relatively few of the other first degree murderers (29% in the published cases, 20% in the unpublished cases) would have been. Such a statute would narrow substantially the death-eligible class, making only approximately 24% of convicted first degree murderers statutorily death-eligible.²⁸⁵

What death sentence ratio such a statute would produce cannot be estimated easily since it would depend on the combined reaction of prosecutors and jurors to the narrower scheme. On the one hand, even under a much narrower statute, California might still produce the same number of death judgments as under the present scheme. Certainly, that was the assumption that animated the Court’s statutory narrowing doctrine.²⁸⁶ On the other hand, it might be that fewer mur-

²⁸¹ Kozinski & Gallagher, *supra* note 280, at 31.

²⁸² See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²⁸³ Baldus, *supra* note 33, at 1605.

²⁸⁴ In exploring the consequences of such a hypothetical narrower statute, we do not endorse the scheme as desirable, or even constitutional, nor do we suggest that there would be general agreement that the particular narrowing circumstances identified the worst murderers.

²⁸⁵ These percentages were derived in the same manner as the percentages for the actual scheme. See *supra* Part IV.A.

²⁸⁶ See text accompanying note 33.

TABLE 5
PROJECTION OF A NARROWER STATUTE ONTO APPEALED CASES

	Finding/Evidence of Special Circumstance	
	Yes	No
Published Cases — Actual Conviction		
Death Penalty	99	59
First Degree Murder with Special Circumstances	21	18
First Degree Murder	5	46
Unpublished Cases — Actual Conviction		
First Degree Murder with Special Circumstances	19	22
First Degree Murder	9	93

derers would be sentenced to death under a narrower statute precisely because the special circumstances would be less inclusive. Presumably, though, at least those actually sentenced to death under the present law and still made death-eligible under the narrower statute would receive the death penalty. Depending on the degree to which either assumption proved valid, the death sentence ratio under such a statute would rise to between 25% and 40%, a significantly higher ratio than the nationwide ratio at the time of *Furman*.

However, there is little likelihood that the California legislature (or the electorate) will heed Judge Kozinski's call to enact such a statute. To the contrary, the history of section 190.2 reflects repeated broadening of death-eligibility. Nor is there much likelihood that the California Supreme Court will heed Professor Baldus's call and engage in meaningful proportionality review; the court has firmly rejected such a course.²⁸⁷ In the absence of corrective action by the California legislature or the electorate or by the California Supreme Court, the obligation to limit the risk of arbitrariness in California's death penalty scheme will continue to fall, as it did twenty-five years ago, on the federal courts.

V

REQUIEM FOR *FURMAN*?

The United States Supreme Court's insight in *Furman*—that the risk of arbitrariness and discrimination in application of the death penalty is a function of the ratio of the number selected for death to

²⁸⁷ See *People v. Lang*, 782 P.2d 627, 663 (Cal. 1989) (adhering to view that intercase proportionality review is not required).

the size of the death-eligible pool—has never been repudiated by the Supreme Court. The Court's determination in *Furman*, that when only 15-20% of statutorily death-eligible murderers are in fact sentenced to death the risk of arbitrariness is constitutionally unacceptable, has never been overruled. Likewise, the Court's mandate to legislatures to genuinely narrow the death-eligible pool of murderers by reasonably objective criteria has never been withdrawn. Nevertheless, since *Furman*, the Supreme Court and lower courts have made no attempt to ascertain the death sentence ratio for a given death penalty scheme, and consequently, they have had no basis for judging whether the legislatures have complied with *Furman*. Instead, the courts apparently have assumed that if the scheme, in form, narrows the death-eligible class, and if the narrowing circumstances are reasonably objective, the death sentence ratio is at an acceptable level.²⁸⁸

The California death penalty scheme—under which fewer than one out of eight statutorily death-eligible convicted first degree murderers is sentenced to death—cannot be reconciled with any reasonable interpretation of the *Furman* principle. In 1978, the drafters of the Briggs Initiative and the California electorate, far from taking seriously the Court's mandate to narrow death-eligibility, threw down a challenge to the courts. They overturned the narrower 1977 death penalty law and, flouting the *Furman* principle, substituted a law which they hoped would make all murderers eligible for the death penalty. This refusal to narrow the death-eligible class is not mitigated by controls on arbitrariness at other points in the process: the California Supreme Court has expressly refused to limit the discretion of the prosecutor at the charging stage,²⁸⁹ to control the jury's discretion at the selection stage,²⁹⁰ or to engage in proportionality review.²⁹¹ Furthermore, the scheme has been approved repeatedly by the California Supreme Court without any examination of the narrowing effect of section 190.2 or the resulting death sentence ratio. As a result, California now has a death penalty scheme with a higher risk of arbi-

²⁸⁸ See *supra* Part I.

²⁸⁹ See *People v. Keenan*, 758 P.2d 1081, 1098 (Cal. 1988).

²⁹⁰ See *People v. Osband*, 919 P.2d 640, 692 (Cal. 1996), cert. denied, 117 S. Ct. 696 (1997); cf. *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994) (recognizing that California's single list of sentencing factors did not guide jury in evaluating penalty evidence).

²⁹¹ See *Lang*, 782 P.2d at 663. While the Constitution does not require that the states act to limit the risk of arbitrariness at any of these stages, see *supra* notes 46-58 and accompanying text, it might be argued that where a state did so act—for example, by requiring meaningful proportionality review—the state's death sentence ratio should be subject to a more lenient test. However, since the courts have yet to examine states' death sentence ratios, they have yet to address this argument.

trary and discriminatory death sentences than the *McGautha*-era California scheme.

Enforcement of the *Furman* principle matters—the consequences of the courts' failure to enforce *Furman* are substantial. Simply stated, a significant percentage of those now on death row would not be there but for the overbreadth of the California scheme. As is illustrated by our hypothetical narrower statute,²⁹² a statute that is arguably narrow enough to satisfy *Furman* would not cover many convicted murderers presently being sentenced to death.²⁹³ That conclusion is not a product of the particular narrowing circumstances used in the hypothetical statute; any combination of narrowing circumstances that genuinely narrowed would exclude a similar percentage. The existence of an overbroad death penalty statute also greatly affects even those murder defendants who are not ultimately sentenced to death. The threat of the death penalty inevitably pressures the defendant to plead guilty. As one commentator put it:

[T]here can be little question that the prospect of a death sentence exerts a powerful influence once the defendant has been apprehended and must decide how to plead. Death can be the price for a refusal to plead or otherwise cooperate. "Indeed, an examination of the system as it actually operates suggests that in fact the most important function of the death penalty may be to facilitate prosecutors' efforts to induce guilty pleas."²⁹⁴

Because of the overbreadth of the California scheme, the prosecutor can use the death penalty threat against almost any defendant charged with first degree murder.²⁹⁵

The failure to enforce *Furman* creates other distortions in the administration of the death penalty. The point of *Furman* was to require the legislatures to take responsibility for defining, for the community, who are the worst murderers. In the present political climate, the failure to enforce *Furman* means that there are no incentives whatsoever for politicians (legislators and initiative drafters) to accept that responsibility. In fact, having apparently "gotten away" with enacting

²⁹² See *supra* Part IV.C.

²⁹³ At this writing, California has 476 inmates on death row, the largest death row in the country. If, as suggested by application of our hypothetical narrower statute, one-third or more of those inmates would not be there but for the overbreadth of the California scheme, the number of people affected by the failure to enforce *Furman* is well over a hundred.

²⁹⁴ Daniel Givelber, *The New Law of Murder*, 69 Ind. L.J. 375, 410-11 (1994) (quoting Welsh S. White, *The Death Penalty in the Eighties* 46-47 (1987)).

²⁹⁵ In the survey of San Francisco County murder convictions, all the pleas by adults to first degree murder and the overwhelming majority of the pleas by adults to second degree murder (88%) were in potential special circumstances cases.

the Briggs Initiative, California politicians, since 1978, have expanded repeatedly the death-eligible pool by broadening statutory definitions of first degree murder and special circumstances.²⁹⁶

The combination of an overbroad statute and the courts' nonenforcement of *Furman* has a particularly pernicious impact on capital juries. Under the pre-*Furman* scheme in California, juries had complete discretion whether to sentence a convicted first degree murderer to death, and they were aware of that fact. They knew that the responsibility was theirs to act as the voice of the community in choosing the "worst of the worst." Under the present scheme, juries have the same discretion, but they are deceived as to their role. When jurors learn that their finding on a charged special circumstance determines whether the defendant is death-eligible, they necessarily assume, and are entitled to assume, that the legislature, on behalf of the community, has already determined that the defendant before them is among the "worst of the worst." There is no way for the jurors to know otherwise since they are not instructed concerning the thirty-one other special circumstances which also have been enacted. Thus, a juror who, left to her own devices, might not conclude that a murderer who unintentionally killed during a robbery or who killed a sleeping victim (lying in wait) is the "worst of the worst," might be led to impose the death penalty under the impression that the legislature already has decided otherwise.

As has been argued by others,²⁹⁷ the illusion that the Supreme Court is regulating the administration of the death penalty, without the reality of regulation, has still broader consequences. That illusion tends to legitimate the death penalty in its present form, thus muting any concerns that otherwise might be felt by the participants in its administration and by the public in general. As summarized by Professors Steiker and Steiker, "We are left with the worst of all possible worlds: the Supreme Court's detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts . . . our profoundly failed system of capital punishment."²⁹⁸

²⁹⁶ In this regard, it is interesting to note that, with respect to each of the states where the Supreme Court has rejected a no-narrowing challenge (Arizona, Idaho, and Louisiana), the legislature has subsequently acted to expand the death-eligible pool. See Ariz. Rev. Stat. Ann. § 13-703(F) (West Supp. 1996); Idaho Code § 19-2515 (1997); La. Rev. Stat. Ann. § 14:30(A) (West Supp. 1996).

²⁹⁷ See Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 395 (1983); Steiker & Steiker, *supra* note 22, at 438.

²⁹⁸ Steiker & Steiker, *supra* note 22, at 438.

In urging the importance of enforcing *Furman*, we do not mean to contend that enforcement of *Furman* is a nostrum which will, by itself, rationalize the administration of the death penalty in this country or eliminate arbitrariness in its application. Some have argued that the whole effort to rationalize use of the death penalty is misguided. Justice Blackmun, who dissented in *Furman* and then concurred in *Gregg*, concluded before leaving the Court that, irrespective of states' compliance with *Furman* and *Gregg*, the death penalty as currently administered is unconstitutional.²⁹⁹ The *Furman* goal, "that the death penalty must be imposed fairly, and with reasonable consistency, or not at all," was illusory, he wrote, because it had turned out to be impossible to achieve both fairness and consistency.³⁰⁰ Justice Powell, who dissented in *Furman* and was a member of the plurality in *Gregg* and its companion cases, reached the same conclusion after leaving the Court.³⁰¹ It also has been argued that the death penalty is inflicted arbitrarily for reasons other than the overbreadth of death penalty schemes, particularly the inadequacy of counsel provided for capital defendants.³⁰²

Nevertheless, as the Supreme Court recognized twenty-five years ago, a system under which the death penalty may be imposed arbitrarily is intolerable, and, if there is any hope of introducing even a minimal level of rationality into the administration of the death penalty,

²⁹⁹ See *Callins v. Collins*, 510 U.S. 1141, 1158-59 (1994) (Blackmun, J., dissenting from denial of cert.).

³⁰⁰ *Id.* at 1144, 1155-57.

³⁰¹ See John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 451-52 (1994) (stating Powell's view that "the death penalty should be barred, not because it was intrinsically wrong but because it could not be fairly and expeditiously enforced").

³⁰² See *McFarland v. Scott*, 512 U.S. 1256, 1264 (1994) (Blackmun, J., dissenting from denial of cert.) ("My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt . . . whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled."); American Bar Ass'n, Report Submitted with Recommendation No. 107, at 6 (Feb. 3, 1997) (on file with the *New York University Law Review*).

No state has fully embraced the system the ABA has prescribed for capital trials. To the contrary, grossly unqualified and undercompensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives.

Id. at 6; see also Louis D. Billionis & Richard A. Rosen, Lawyers, Arbitrariness, and the Eighth Amendment, 75 Tex. L. Rev. 1301, 1304-06 & nn. 13-19 (1997) (listing Articles and judicial opinions "decry[ing] the sorry state of capital lawyering"); Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1849-52 (1994) (describing lack and/or inadequacy of indigent defense programs in numerous jurisdictions).

adherence to the *Furman* principle—narrowing the death-eligible class—is a necessary first step. The California scheme constitutes a profound challenge to the Court's commitment to *Furman*. Either the Court will have to enforce the *Furman* principle by holding California's scheme unconstitutional, or it will have to abandon that principle and, with it, any pretense that the Constitution requires the death penalty to be administered in an evenhanded and nonarbitrary manner. In that event, the Court will have returned to its long-abandoned position in *McGautha*.