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**\*719 THE EIGHTH AMENDMENT, THE DEATH PENALTY, AND ORDINARY ROBBERY-BURG-LARY MURDERERS: A CALIFORNIA CASE STUDY**

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**\*720 I. Introduction**

On September 20, 1968, after a one-day trial, a Georgia jury sentenced William Henry Furman to **death** for a felony-murder committed a year earlier and so set the stage for the Supreme Court's now thirty-five-year-old effort to regulate and rationalize the states' use of the **death penalty**. The murder occurred during a burglary of the victim's house and was described by Furman, the only eyewitness, as follows:

They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it. [FN1]

The Georgia Supreme Court accepted Furman's version of the facts—that “he accidentally tripped over a wire in leaving the premises causing the gun to go off” [FN2]—and the U.S. Supreme Court understood the killing to **\*721** have been unintentional. [FN3] Furman's death sentence was overturned in the landmark decision of Furman v. Georgia, [FN4] and, in Furman and subsequent cases, the Supreme Court read the Eighth Amendment to contain two principles limiting the states' power to make death-eligible defendants found guilty of murder. [FN5]

The first of these principles is understood to have been the basis for the holding in Furman itself. Although there was no majority opinion in Furman, all five justices in the majority focused on the infrequency with which the death penalty was imposed, [FN6] with Justices Stewart and White in particular emphasizing that the relative infrequency of its application created the risk that it would be arbitrarily imposed. Justice Stewart found that the death sentences at issue in Furman were “cruel and unusual” because, of the many persons convicted of capital crimes, only “a capriciously selected random handful” were sentenced to death. [FN7] 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.” [FN8] Subsequently, the Court cited to the opinions of Justices Stewart and White as embodying the Furman holding, [FN9] and in Zant v. Stephens [FN10] the Court held that, to meet the Furman concern about the risk of arbitrary enforcement, the states, by statute, were required to “genuinely narrow,” by rational and objective criteria, the death-eligible class. [FN11]

The Court's second principle was articulated in Gregg v. Georgia, [FN12] where the Court addressed a chal-

lenge that was made in *Furman* but was \*722 not the basis of the *Furman* “holding”: that the death penalty violated the Eighth Amendment because it was disproportionate. [FN13] Although, in *Gregg*, the Court held that the death penalty was not disproportionate for all murders, [FN14] the plurality assumed that the Eighth Amendment did embody a proportionality principle and left open the possibility that the death penalty might be disproportionate for certain crimes. [FN15] A year after *Gregg*, in *Coker v. Georgia*, [FN16] the Court held that the death penalty for rape of an adult woman was disproportionate. [FN17] Subsequently, in *Enmund v. Florida* [FN18] and *Tison v. Arizona*, [FN19] the Court held that the death penalty was not always a proportionate penalty even for murder. [FN20] Both *Enmund* and *Tison* involved defendants who, as accomplices to armed robberies, were convicted of felony-murders and sentenced to death although they were not the “triggermen” and did not intend the killings. [FN21] Together the cases hold that the death penalty is a disproportionate punishment for felony-murder unless the defendant is a major participant in the felony and acts with at least reckless indifference to human life. [FN22]

The *Furman-Zant* “genuine narrowing” principle and the *Enmund-Tison* “proportionality” principle are complementary, although each has a different focus. The *Furman-Zant* principle is state specific, requiring each state to narrow death-eligibility to defendants committing the most aggravated murders, as determined by the particular state. [FN23] The *Enmund-Tison* principle sets a national standard, requiring the states to exclude from death eligibility those defendants who commit murders not deemed sufficiently aggravated by the nation as a whole. [FN24] In combination, the principles require states to limit death-eligibility to defendants who commit “a narrow category of the most serious crimes,” [FN25] the “worst of the \*723 worst,” [FN26] because “the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.” [FN27]

Using California as a case study, this Article examines the application of these two Eighth Amendment principles in the case of defendants who, like William *Furman*, are found guilty of felony-murders in the commission of, or attempted commission of, robbery or burglary. Because the two underlying felonies, robbery and burglary, are generally committed with similar motives and intentions—a substantial proportion of robberies are committed indoors and therefore involve a burglary, and a majority of burglaries are committed for the purpose of theft and become robberies or attempted robberies when force (in this context, lethal force) is used—they will be treated together throughout this Article. This Article refers to a defendant who is found guilty of murder for a killing during the commission of, or attempted commission of, either robbery or burglary as a “robbery-burglary murderer,” [FN28] and this Article will focus on the “ordinary” robbery-burglary murderer—one whose murder involved no more aggravating statutorily defined death-eligibility factor [FN29] than the fact that the murder occurred during a robbery or burglary.

Part II of this Article describes the California death penalty scheme as it applies to the robbery-burglary murderer and discusses the findings of two empirical studies on death-sentencing in California: a study of all murder convictions in Alameda County for murders committed during a twenty-three-year period (the “Alameda County Study”); and a 1997 five-year statewide study based on appellate opinions in murder cases (the “Statewide Study”). [FN30] Part III analyzes the *Furman-Zant* principle and applies it to California robbery-burglary murderers. Part IV analyzes the *Enmund-Tison* principle and applies it to California robbery-burglary murderers. Part V sets the problem of death-eligibility for ordinary robbery-burglary murderers in the larger context of the breadth of death-\*724 eligibility under the California scheme and argues that the overbreadth of states’ death penalty schemes must inevitably lead to arbitrary and disproportionate results and that a first step to address this overbreadth would be to eliminate or substantially narrow death-eligibility for ordinary robbery-burglary murderers.

## II. The California Death Penalty Scheme and the Robbery-Burglary Murderer

In California, as in most death penalty jurisdictions, to sentence a defendant to death the fact-finder must make three determinations: (1) that the defendant committed a first-degree murder; [FN31] (2) that the defendant meets the statutory criteria for death-eligibility; and (3) that, in light of the aggravating and mitigating factors, the defendant deserves the death penalty. In California, the first two determinations are made together at the guilt phase of the trial when the fact-finder decides whether the defendant is guilty of first-degree murder and whether any charged special circumstance is true. [FN32] If the defendant is found guilty and a special circumstance is found true, the case proceeds to a penalty phase, where the fact-finder determines the defendant's sentence. [FN33] At the penalty phase, the fact-finder is directed to take into account a list of eleven factors, the first of which is “[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.” [FN34] The fact-finder will impose the death penalty if the fact-finder concludes that the aggravating circumstances outweigh the mitigating circumstances. [FN35] The list of factors does not \*725 consist of propositional questions but instead directs the sentencer to consider certain subjects, [FN36] and the sentencer is not required to make findings as to any of the factors. [FN37] Nor is the sentencer limited by the direction to weigh aggravation against mitigation; rather, “[e]ach juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider” and to decide whether death is “the appropriate penalty under all the circumstances.” [FN38]

The breadth of death-eligibility under the California scheme is a product of the interplay between the definition of first-degree murder [FN39] and the definition of the special circumstances. [FN40] At present, there are twenty-one categories of first-degree murder, divided into two groups: eight categories of malice-murder, [FN41] and thirteen categories of felony-murder. [FN42] There are thirty-three separately enumerated special circumstances that render a first-degree murderer death-eligible, including twelve felony-\*726 murder special circumstances. [FN43] The California Supreme \*727 Court has held unconstitutional on vagueness grounds the “heinous, atrocious or cruel” special circumstance, [FN44] but all of the remaining special circumstances call for a relatively narrow factual determination by the fact-finder, in contrast with the more open-ended eligibility factors used in other states. [FN45] Thirty of the remaining thirty-two special circumstances—all but the “prior murder” circumstance, and, in rare cases, the multiple-murder circumstance [FN46]—single out purportedly aggravating circumstances of the crime itself. [FN47]

The present California death penalty scheme is a product of the 1978 Briggs Death Penalty Initiative Act, [FN48] which, according to its author, State Senator John V. Briggs, was intended to “give Californians the toughest death-penalty law in the country.” [FN49] That “toughest death-penalty law” has been further expanded on three occasions since 1978, [FN50] and California is generally considered to have one of the broadest death penalty schemes in the country. [FN51] The breadth of the California scheme is a result of two factors: (1) that twelve of the thirteen felonies that would support a first-\*729 degree felony-murder conviction are also carried over (“double-counted”) as special circumstances, without any proof of the defendant's mens rea as to the killing; [FN52] and (2) that California has a virtually unique lying-in-wait special circumstance [FN53] that has been interpreted in such a way as to encompass nearly all premeditated murders. [FN54]

#### A. Death Eligibility for the Robbery-Burglary Murderer

The felony-murder rule—which in its traditional form provides that a participant in a felony is guilty of murder if a killing occurs during the commission of the felony—is of “ancient, though disputed, lineage.” [FN55] At the same time, it is a rule that has been criticized in the strongest of terms. [FN56] Although the rule has been a feature of California criminal law since 1850 when the initial legislature adopted “An Act concerning Crimes and Punishments,” [FN57] its pedigree is dubious. The 1850 Act contained a felony-murder provision, [FN58]

but in the adoption of the 1872 Penal Code (which is still in effect), that provision was deleted. In the 1872 Code, murder was defined as an “unlawful killing . . . with malice \*730 aforethought,” [FN59] malice was defined as being “express or implied,” [FN60] and all murder that was perpetrated in any of the listed manners, including during the perpetration of certain felonies, was first-degree murder. [FN61]

Despite the absence of any express authority for a felony-murder rule in the 1872 Code, the California Supreme Court continued to apply the rule for the succeeding 110 years, referring to the rule as a common-law rule [FN62] and reasoning that malice was presumed or imputed from the commission of the felony. [FN63] In 1983, in *People v. Dillon* [FN64] the California Supreme Court addressed a challenge to the felony-murder rule made on the grounds that California has no common-law crimes [FN65] and that applying a conclusive presumption of malice in the case of murder as defined by statute violated due process. [FN66] The court responded by ignoring several canons of statutory construction and, in its own words, “piling inference on inference” to find that the felony-murder rule was statutory-i.e., that Penal Code § 189 both set the degree for malice-murders and established a felony-murder rule-and that, after all, the rule did not create a conclusive presumption of malice, but rather eliminated malice as an element of felony-murder. [FN67] Under § 189, [FN68] robbery and burglary are two of the felonies that will support a first-degree felony-murder conviction, and robbery and burglary also are special circumstances that make a defendant convicted of first-degree murder death-eligible. [FN69]

### 1. Robbery-Burglary Felony-Murder in California

A defendant is guilty of first-degree murder if he, or an accomplice, kills “in the perpetration of, or attempt to perpetrate” a robbery or burglary. [FN70] When a killing is in the “perpetration” of a felony has been viewed expansively. The California Supreme Court has held that a felony \*731 is still in perpetration during the defendant's escape, so that a defendant who causes a death prior to reaching “a place of temporary safety” has committed a felony-murder. [FN71] Further, the felony-murder rule applies even if the homicide was not committed to further the commission of the felony or the escape. As the court explained, “Under the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction.” [FN72] The felony-murder rule has been applied even in the case where one of several co-felons accidentally kills himself during the felony. [FN73] There are two exceptions to the application of the rule. The first is that, if the homicide is committed by a non-felon, e.g., the victim of the crime or a police officer, in an effort to thwart the felony, the felony-murder rule will not apply. [FN74] The second is that a killing that occurs during a burglary based on an entry to commit felony assault will not constitute a felony-murder because of the “merger” rule. [FN75]

More significantly, while normally the prosecution, to obtain a murder conviction, must prove that the defendant had the subjective mental state of malice-either express or implied-in the case of a killing committed during a robbery or burglary, the prosecution can convict a defendant of first-degree felony-murder without proof of any mens rea with regard to the death.

[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. [FN76]

\*732 This rule is reflected in the standard jury instructions for first-degree felony-murder:

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. The defendant committed [or attempted to commit] \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>;
  2. The defendant intended to commit \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>;
- AND

3. While committing [or attempting to commit] \_\_\_\_\_, \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189> the defendant did an act that caused the death of another person.

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent. [FN77]

This broad felony-murder rule is applied to two crimes that themselves are broadly defined. In California, the definition of robbery generally follows the common-law definition of the crime: “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” [FN78] However, the California Supreme Court has applied the statute in an expansive manner. While at the common law the taking had to be with the intent to permanently deprive the owner of his property, the court has held that even an intent to temporarily deprive the owner supports a theft conviction, [FN79] and, because robbery is theft aggravated by force or fear, [FN80] the same rule applies to robbery as well. The court has held, contrary to the general rule, [FN81] that a theft becomes a robbery if the thief uses force or fear to escape during the asportation of the property. [FN82] The court has given a broad reading to the “immediate presence” element, first holding that if the property is within sight, hearing, or smell of the victim at the \*733 time of the use of force, [FN83] the crime is in the victim's immediate presence, and later holding that immediate presence is satisfied even when the property is beyond the victim's senses if the victim's “relative proximity” to the property would have allowed him to defend it. [FN84] The court has been particularly generous in interpreting the “force” element, finding that any force beyond the minimum necessary to take the property makes the taking a robbery. [FN85]

Burglary in California is a sprawling crime, having little connection to its common-law ancestor. At the common law, burglary was generally defined as “the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony.” [FN86] Under the burglary statute, burglary is not limited to “dwellings” entered at “nighttime” but instead covers a wide range of buildings-including vehicles and even tents-entered at any time of the day or night. [FN87] No “breaking” is required, so that a person entering a building-or any of the other listed structures or vehicles-with the owner's consent will be guilty of burglary if he enters with a wrongful intent, [FN88] so long as the intent is unknown to the owner. [FN89] The statute does not require that the defendant intend to commit a felony-intent to commit any form of petty theft will suffice. [FN90] The defendant does not have to intend to commit the object crime at the time of the entry, [FN91] or even in the entered structure, [FN92] and a “jury need not unanimously decide, or even be certain, which felony defendant intended as long as it finds beyond a reasonable doubt that he intended some felony.” [FN93] Thus, in California, burglary is so sweeping that it is not deemed to be a “forcible and atrocious crime” [FN94] or even a crime of violence. [FN95]

## 2. Robbery-Burglary Special Circumstances

It is a special circumstance that a 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 \*734 attempting to commit,” a robbery [FN96] or a burglary. [FN97] With two relatively minor exceptions, [FN98] if a defendant is guilty of a robbery-burglary felony-murder, the defendant is also thereby death-eligible under the

robbery or burglary special circumstance. [FN99]

In 1983, following the Supreme Court's decision in *Enmund*, the California Supreme Court held, in *Carlos v. Superior Court*, [FN100] that the felony-murder special circumstances required proof that the defendant intended to kill. [FN101] The court reached its decision in large part because it reasoned that to hold otherwise would raise serious constitutional questions. [FN102] The court thought that, although *Enmund* dealt with the constitutionality of the death penalty for an accomplice to a felony-murder, the Supreme Court's reasoning—its focus on “the subjective intent and moral culpability of the defendant” who does not intend a killing—“raise[d] the question whether the death penalty can be imposed on anyone who did not intend or contemplate a killing, even the actual killer.” [FN103] The court also thought that a death penalty scheme that authorized the death penalty for unintentional felony-murders but not for premeditated murders might not meet the Supreme Court's requirement that there be a “meaningful basis” for determining death eligibility. [FN104]

Four years later, following the Supreme Court's decision in *Tison*, the California Supreme Court, in *People v. Anderson*, [FN105] reversed *Carlos*, holding that it was an erroneous interpretation of the California statute. [FN106] \*735 In so doing, the court dismissed the constitutional concerns that had animated the *Carlos* decision, reading (or misreading [FN107]) *Tison* to have held that *Carlos* was wrong in requiring a showing of mens rea for the actual killer. [FN108] Instead, the court held that “intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved.” [FN109] The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: “Now the majority . . . declare[s] that in California a person can be executed for an accidental or negligent killing.” [FN110]

In rejecting challenges to the various felony-murder special circumstances since *Anderson*, the court repeatedly has held, that, in seeking the death penalty based on a felony-murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Mitcham*, [FN111] a robbery felony-murder case, the trial court instructed the jury that, to find true the robbery special circumstance, it would have to find that the defendant had the intent to kill. [FN112] On appeal, the defendant challenged the sufficiency of the evidence of intent to kill. However, the California Supreme Court rejected the challenge, not by finding that the evidence was sufficient, nor by finding that the defendant acted with “reckless disregard,” but by holding that any inquiry into the defendant's mens rea was mooted by the court's decision in *Anderson*. [FN113] To the same effect are *People v. Musselwhite*, [FN114] where the court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice; [FN115] *People v. Earp*, [FN116] where the court rejected the defendant's argument that the felony-murder special circumstance required proof of the defendant's “reckless disregard” and could not be applied to one who killed accidentally; [FN117] and *People v. Smithy*, [FN118] where the court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life. [FN119]

\*736 The robbery and burglary felony-murder special circumstances have been challenged as violating the Eighth Amendment, but the California Supreme Court has consistently rejected challenges that were based on the following: (1) the failure to narrow the death-eligible class; [FN120] (2) the failure of the circumstances to reasonably justify the death penalty when compared with premeditated murderers who are not, without more, made death-eligible; [FN121] or (3) the “triple counting” of the robbery or burglary—as proof of first-degree murder, as a special circumstance, and as an aggravating factor under § 190.3. [FN122]

#### B. Ordinary Robbery-Burglary Murderers: The Empirical Evidence

Whether the death penalty for ordinary robbery-burglary murderers satisfies the Supreme Court's two Eighth Amendment principles requires consideration of empirical evidence about death sentencing. At its core, application of the Furman-Zant principle turns on the frequency (or infrequency) of the imposition of the death penalty, i.e., the death-sentence rate. The lower the death-sentence rate, the greater the risk that the death penalty is being imposed arbitrarily. [FN123] The death-sentence rate is also \*737 central to an evaluation of contemporary values and penological purpose under the Enmund-Tison principle. [FN124] The two studies presented below provide that evidence.

The Alameda County Study reviewed 803 Alameda County murder-conviction cases for murders committed during the period from November 8, 1978 to November 7, 2001. [FN125] Alameda County, the seventh largest county in the state, [FN126] is a mixed urban/suburban/rural county with Oakland as its principal city. The county ranks fourth statewide in the number of inmates on death row, [FN127] and it has a death-sentence-to-homicide ratio higher than the state average. [FN128] The 803 cases studied are estimated to constitute more than 96% of the cases during the period and are assumed to be representative of the missing cases. [FN129] The study covered a number of aspects of the cases, [FN130] but the discussion here is limited to one aspect: whether a special circumstance was found or present in each of the cases, i.e., whether the defendant was statutorily death-eligible. [FN131]

\*738 The Statewide Study was a sampling study based on appellate opinions in murder cases decided during the period 1988-1992. The study examined all death penalty decisions of the California Supreme Court, all other published cases, and all unpublished cases of the First District of the Court of Appeal [FN132] to determine the percentage of persons convicted of first-degree murder who were death-eligible under the 1997 version of § 190.2. That percentage was then applied to the overall statewide death-sentence rate for first-degree murderers (the percentage of first-degree murderers sentenced to death during the five-year period) to calculate a death-sentence rate for death-eligible defendants. [FN133] Both studies surveyed samples of the thousands of murder-conviction cases in California since the enactment of the 1978 Death Penalty law, and the reliability of any conclusions about California's death penalty scheme depends on the representativeness of the samples. [FN134] However, the substantial consistency and convergence of the findings drawn from two very different samples strongly argues in favor of their reliability. The data from the two studies yield the following information concerning robbery-burglary murderers.

### 1. Frequency of Robbery-Burglary Murders

Robbery-burglary murders are, by far, the most common form of first-degree felony-murder, and, in both studies, more than half of all first-degree murders were robbery-burglary murders. In both studies, more than half of the death sentences were imposed on robbery-burglary murderers.

### \*739 2. Aggravating Nature of the Various Special Circumstances

The most commonly occurring special circumstances in California murder cases may be grouped in the following four categories: (1) multiple murders-the defendant was previously convicted of murder or was convicted of more than one murder in the proceeding; [FN135] (2) additional serious injury murders-the defendant inflicted or attempted to inflict additional serious harm on the murder victim or another prior to the killing, including kidnapping, rape, sodomy with a minor or by force, sexual molestation of a child, oral copulation with a minor or by force, rape by instrument or torture; [FN136] (3) robbery or burglary murder; [FN137] and (4) lying-in-wait murder. [FN138] The remaining eighteen special circumstances do not fit within the above categories,

and, while some examples, e.g., murder for financial gain [FN139] or murder of a peace officer, [FN140] did appear in the two data sets, they each occurred too infrequently to generate meaningful conclusions. In total, one or more of these eighteen special circumstances appeared in fewer than 15% of the cases surveyed (often in combination with circumstances from the other four categories), and those cases have been excluded for purposes of this analysis.

Because special circumstances may occur alone or in combination with other special circumstances, and because special circumstances from one category may occur with special circumstances from other categories, the relative aggravating effect of the four categories of special circumstances was assessed by means of two comparisons as to each data set. First, using all adult first-degree murder cases in which a special circumstance was found or present, the death-sentence rate was calculated for all cases with \*740 and without a particular category of special circumstances. The results are set out in Figures 1 and 2 below [FN141]:

Figure 1: Alameda County Study

\*741 Figure 2: Statewide Study

Second, the categories were compared in pairs, and the death-sentence rate was calculated for cases in which special circumstances from one category but not the other were present. The results are set out in Figures 3 and 4 below [FN142]:

\*742 Figure 3: Alameda County Study

\*743 Figure 4: Statewide Study

\*744 Despite differences in methodologies and timeframes, the studies are in substantial agreement, and they confirm common wisdom. Special circumstances reflecting multiple murder and additional serious injury are far more aggravating than the robbery-burglary special circumstances, and the lying-in-wait special circumstance is hardly aggravating at all. Where the studies differ is in assessing the relative aggravating weight of multiple murder and additional serious injury. The Alameda County Study suggests that multiple murder is significantly more aggravating than additional serious injury, while the Statewide Study suggests that the two special circumstances are equally aggravating. [FN143]

These findings are entirely consistent with the findings of researchers in other states. Glenn Pierce and Michael Radelet studied death sentencing in Illinois over a ten-year period (1988-1997). [FN144] Their data showed that, of all the statutory aggravating factors, contemporaneous multiple murder showed the highest correlation with death sentencing and that prior murder also showed a relatively high correlation. [FN145] Their two categories of additional serious injury-aggravated sexual assault and aggravated kidnapping-showed a much higher correlation with death sentencing than their five robbery-burglary categories-armed robbery, home invasion, simple robbery, burglary, and residential burglary. [FN146] Because Illinois lacks an equivalent to California's lying-in-wait special circumstance, that factor had no role in the study. David Baldus studied death sentencing among New Jersey death-eligible cases over a thirteen-year period (1983-1995). [FN147] His data revealed a combined death-sentence rate for contemporaneous multiple murder and prior murder that was somewhat higher than the combined rate for sexual assault and kidnapping, both of which were significantly higher than the combined death-sentencing rate for robbery and burglary. [FN148] New Jersey also lacks an equivalent to California's lying-in-wait circumstance, so that factor was not measured.

### \*745 3. Death-Sentence Rate for Ordinary Robbery-Burglary Murderers

Using both first- and second-degree murder conviction cases, a death-sentence rate was calculated for those cases in which the defendant was death-eligible because of a robbery-burglary murder but where no more aggravating special circumstances were found or present, i.e., where, if there was any other special circumstance present, it was lying in wait. In the Alameda County Study, the death-sentence rate for such murderers was approximately 4.5%, and, in the Statewide Study, the corresponding figure was approximately 5.5%. For convenience, the remainder of this Article will assume a death-sentence rate of 5%, the average of the two figures. [FN149]

What is clear from the four figures is that the death sentence for ordinary robbery-burglary murderers is so relatively and infrequently imposed that the conclusion is inescapable that prosecutors and jurors do not consider such murderers the “worst of the worst.” Rather, to use the Court's terms, they are in every way the “average” murderers.

### III. The Furman-Zant Principle and Robbery-Burglary Felony-Murderers

When the Court decided in *Furman* that the death penalty, as then administered by the states, created too great a risk of arbitrariness, it was the Justices' understanding that only 15-20% of death-eligible murderers \*746 were sentenced to death. [FN150] This was the figure cited by Chief Justice Burger, writing for the four dissenters, and he based his estimate on four sources. [FN151] Justice Stewart, in turn, cited to the Chief Justice's statement as support for his conclusion that the imposition of death was “unusual.” [FN152] In *Gregg v. Georgia*, [FN153] 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.” [FN154] It was this fact—that fewer than one in five statutorily death-eligible defendants were being sentenced to death in the absolute discretion of the sentencer—that caused the Justices in *Furman* to find that the death penalty was “exacted with great infrequency,” [FN155] was “so wantonly and so freakishly imposed” as to be like “being struck by lightning,” [FN156] and, consequently, was inescapably arbitrary. [FN157] While the Court did not indicate in *Furman* or *Gregg* what death-sentence rate (actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy *Furman*, it would seem that any scheme \*747 producing a rate of less than 20% would not. [FN158]

In *Furman*, the Justices concluded that the Georgia death penalty scheme was unconstitutional without any empirical evidence that the scheme in fact produced arbitrary results. Conceivably, as Georgia argued, the low death-sentence rate did not herald inevitable arbitrariness but rather reflected “informed selectivity” on the part of prosecutors and juries. [FN159] However, the Justices rejected this argument and instead assumed (perhaps with an eye to the facts of *Furman* itself) that, at a certain level of infrequency, imposition of the death penalty would be necessarily arbitrary. [FN160] The majority's intuition was largely correct. As later empirical research confirmed, the pre-*Furman* Georgia scheme reflected a “high degree of arbitrariness.” [FN161]

Although the main theme of what came to be seen as the *Furman* “holding”—that when a state's death-sentence rate is too low, there is an unconstitutional risk of arbitrariness—Justice White thought infrequent imposition of the death penalty raised an additional constitutional concern. He argued that “when imposition of the death penalty reaches a certain degree of infrequency,” it no longer serves a penological purpose. [FN162] It cannot be thought necessary for retribution or specific deterrence if most who have committed equally atrocious crimes are not sentenced to death. [FN163] Nor can it serve general deterrence because “common sense and experience tell us that seldom enforced laws become ineffective measures for controlling human conduct.”

[FN164]

**\*748** To meet the Court's concerns, Georgia revised its death penalty scheme to narrow the death-eligible class. Under the revised scheme, a murderer would be death-eligible only if the prosecution could prove one of ten "aggravating circumstances." [FN165] The Court found the revised scheme constitutional in *Gregg v. Georgia*, [FN166] and, in *Zant v. Stephens*, [FN167] it addressed the significance of the "aggravating circumstance" requirement:

**\*749** To avoid this constitutional flaw [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. [FN168]

The Court later explained the point of the *Furman-Zant* rule as follows:

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 particularly appropriate . . . [juries] 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. [FN169]

In sum, the measure of narrowing is the death-sentence rate for death-eligible murderers, and the *Furman-Zant* principle requires the states to narrow the death-eligible class so that the death-sentence rate reaches the point (presumably above 20%) where imposition of the death penalty can no longer be characterized as wanton or freakish. [FN170]

In *Furman*, the Court addressed the Georgia scheme as a whole, but the same principle-that when too few are selected from too large a death-eligible class, there is an unconstitutional risk of arbitrariness-can be applied to any particular form of murder made death-eligible. The Court recognized this possibility in *Gregg* when the plurality cited with approval **\*750** the Georgia Supreme Court's understanding that the Eighth Amendment disallows the imposition of the death penalty "when juries generally do not impose the death sentence in a certain kind of murder case." [FN171] On three subsequent occasions, the Supreme Court has held that individual aggravating factors were unconstitutional for failing to narrow the death-eligible class. [FN172] In all three cases, the aggravating factor in question was unconstitutional because its vagueness permitted the fact-finder to apply it to most cases. [FN173]

Two lower court cases, both in the Ninth Circuit, have held unconstitutional the application of the death penalty to particular forms of murder. In *Wade v. Calderon*, [FN174] the court held that California's torture special circumstance was invalid for failing to narrow because it did not require proof of intent to inflict torture. Therefore, the special circumstance "would be capable of application to virtually any intentional, first degree murder." [FN175] In *United States v. Cheely*, [FN176] the court held that the federal death penalty for a killing resulting from interstate transportation of an explosive was invalid for failing to narrow. Because the provision applied even when the defendant's intent was only to injure property, the statute created "a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them." [FN177]

The robbery and burglary felony-murder special circumstances suffer from the same constitutional flaw

identified by Ninth Circuit in both *Wade* and *Cheely*: the circumstances create too broad a death-eligible category from which only a very few are selected for death. As noted above, murders during robberies and burglaries (and not aggravated by the presence of other special circumstances) result in the imposition of the death penalty in, at most, 5% of the cases in which the defendant was death-eligible. [FN178] When the Furman Court found that a death-sentence rate of 15-20% created an unconstitutional risk of arbitrariness, the Court was looking at a general death-sentence rate for death-eligible murderers, [FN179] and the Court has never considered what death-sentence rate for a particular kind of murder would create an unconstitutional risk of arbitrariness. However, the same principle should apply to a particular kind of murder as \*751 to a whole scheme: When many are made death-eligible and few are selected, arbitrariness can be presumed. Because the death-sentence rate for ordinary robbery-burglary murderers is only a fraction of the rate at issue in *Furman*, the conclusion seems inescapable that any such sentence is arbitrary. Nor, when nineteen out of twenty defendants who commit similar murders are sentenced to life imprisonment or less, is there a plausible argument that execution of the twentieth defendant is necessary for retribution. Such a wanton and freakish sentence also fails to serve any deterrent purpose. [FN180]

In theory, the risk of arbitrariness inherent in the legislature's failure to narrow-and the consequent exceptionally low death-sentence rate-might be mitigated by limits on discretion at one or more stages of the prosecution of death-penalty cases. However, the California Supreme Court has failed otherwise to limit the effects of overbroad death-eligibility. Prosecutors have "virtually unfettered discretion" to seek the death penalty. [FN181] Juries possess unlimited discretion in their sentencing decisions. [FN182] Also, the court has consistently refused to engage in comparative intercase proportionality review of death sentences (comparing a defendant's sentence with that of other defendants in like cases) [FN183] and, in recent cases, has refused to engage in comparative intracase proportionality review (comparing a defendant's sentence with that of co-defendants). [FN184] Although ostensibly the court will engage in individual proportionality review, usually referred to as "intracase proportionality review," [FN185] in the well over four-hundred appeals it has \*752 decided under the 1978 Death Penalty Law, it has never found a death sentence to be disproportionate. [FN186]

Because the death penalty is only rarely imposed on ordinary robbery-burglary murderers-with no more evidence of "informed selectivity" than there was in *Furman*-it would seem its imposition in such cases in California [FN187] must violate the Eighth Amendment. [FN188]

#### IV. The *Enmund-Tison* Principle and Robbery-Burglary Felony-Murderers

Beginning with the plurality's opinion in *Gregg v. Georgia*, [FN189] the Supreme Court has applied a two-part test when assessing whether the \*753 death penalty is a proportionate penalty for particular crimes or particular defendants. [FN190] The first step requires the Court to determine whether the death penalty meets contemporary standards. [FN191] That inquiry focuses on "objective factors to the maximum possible extent." [FN192] The Court looks to legislation as the "clearest and most reliable objective evidence of contemporary values" [FN193] and to the judgments of juries and prosecutors as reflected in the frequency with which the death penalty is in fact imposed. [FN194] More recently, the Court considered professional opinions and international practice as some evidence of contemporary values. [FN195]

The second step requires the Court to make the more subjective determination whether the death penalty serves a penological purpose-deterrence or retribution-or instead "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." [FN196] A year after *Gregg*, the Court applied this test in *Coker v. Georgia*, [FN197] to hold the death penalty unconstitutional for rape of an adult woman. [FN198] The Court based its decision on the fact that Georgia was the only state to au-

thorize the death penalty in this situation, [FN199] that juries in Georgia rarely imposed the death penalty on rapists (only six times in sixty-three cases that went to trial), [FN200] and that rape does not compare to murder “in terms of moral depravity and of the injury to the person and to the public.” [FN201] The Court held that proportionality was to be judged in regard to the capital crime and that Coker's own history of violent crimes was irrelevant to the determination. [FN202]

In Enmund, the Court applied this proportionality test to felony-murderers and held (five to four) that the Eighth Amendment barred the imposition of the death penalty on the getaway driver to an armed robbery murder because he did not “kill, attempt to kill, or intend that a killing take \*754 place or that lethal force [would] be employed.” [FN203] The Court found that the death penalty in such a situation was contrary to contemporary values because only nine states allowed the death penalty to be imposed solely on the basis of felony-murder simpliciter and because the death penalty was only rarely applied to accomplice felony-murderers. [FN204] The Court also considered international opinion and noted that the felony-murder rule had been abolished in England and India, was severely restricted in other Commonwealth countries, and was “unknown in continental Europe.” [FN205] As for penological purpose, the Court was “quite unconvinced” that the death penalty would deter a defendant who had no intent to kill or, given how rarely death occurs during robberies, that it could deter participation in a robbery. [FN206] Nor would retribution be served because retribution depends on the degree of a defendant's culpability, and Enmund's criminal culpability was limited to participating in a robbery. [FN207]

Writing for the four dissenters, Justice O'Connor disagreed with the majority's “curious method of counting the States” and instead counted twenty-three states that would permit imposition of the death penalty on a felony-murderer who neither killed nor intended to kill. [FN208] She also disparaged the majority's statistics about the rarity of the death penalty for accomplices because the data did not indicate how many times the state sought the death penalty against accomplices; the data classified defendants by whether they killed, not whether they intended to kill; and the data might reflect only that juries are “especially cautious” in imposing the death penalty on accomplices. [FN209]

In Tison, the Court addressed whether proof of “intent to kill” was an Eighth Amendment prerequisite for imposition of the death penalty and \*755 held (five to four) that it was not. [FN210] Justice O'Connor, now writing for the majority, engaged in a much more abbreviated proportionality analysis than the Court employed in Gregg, Coker, and Enmund, and her opinion relied on two arguments. First, employing the same counting method she used earlier in Enmund, she determined that “only 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.” [FN211] Second, in analyzing the culpability of a murderer who acts without an intent to kill, she found support in the common law and modern criminal codes for the determination that “reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill.’” [FN212] Justice O'Connor concluded that the Eighth Amendment would be satisfied by proof that the defendant had acted with “reckless indifference to human life” and as a major participant in the underlying felony. [FN213]

Justice Brennan, writing for the dissenters, disagreed with the majority's contemporary standards analysis. [FN214] He argued that “approximately three-fifths of American jurisdictions do not authorize the death penalty for a nontriggerman absent a finding that he intended to kill” [FN215] and that the death penalty is only rarely imposed in such cases. [FN216] He also argued, relying on Enmund, that imposition of the death penalty on one who neither killed nor intended to kill could not serve either deterrence or retribution. [FN217]

\*756 The California Supreme Court has interpreted the Enmund-Tison principle narrowly, holding that it applies only to felony-murder accomplices, not to actual killers. [FN218] As to accomplices, [California Penal](#)

Code § 190.2(d) declares that proof of the mens rea of “reckless indifference” is sufficient to establish death-eligibility, even for an ordinary robbery-burglary murderer. [FN219] Under the Enmund-Tison principle, both rules violate the Eighth Amendment.

#### A. The Enmund-Tison Principle and Actual Killers

Both Enmund and Tison addressed the situation of a non-killing accomplice and did not expressly indicate whether the minimum mens rea requirement of “intent” in Enmund or “reckless indifference” in Tison applied to actual killers. Is there any indication in the two cases that the constitutional minimum mens rea requirement does not apply to actual killers, i.e., that the death penalty could be applied to a felony-murderer who killed negligently or accidentally? Fairly read, both Enmund and Tison apply to actual killers as well as non-killing accomplices.

In Enmund, that inference arises both from the language of the decision and from the earlier positions taken by Justice White, the author of the Enmund majority opinion, in *Lockett v. Ohio*. [FN220] Explaining who was excluded from death-eligibility under the Enmund holding, Justice White described a defendant “who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” [FN221] This list of four possible forms of participation in a murder is plainly not a list of four alternative bases for death-eligibility; rather, it is a list running from most culpable to least culpable conduct, with the minimum requirement for death-eligibility being that the defendant intended that lethal force be employed. [FN222] In other words, Enmund holds the death penalty unconstitutional if applied to a defendant who does not himself intentionally kill, attempt to kill, intend that a killing take place, or even intend that lethal force will be used.

This interpretation is supported by other language in the opinion. Justice White began his analysis of the purposes the death penalty might serve by stating, “It is fundamental that ‘causing harm intentionally must be \*757 punished more severely than causing the same harm unintentionally.’” [FN223] Addressing the issue of deterrence, Justice White said that “it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.’” [FN224] Addressing the issue of retribution, he said, “American criminal law has long considered a defendant's intention-and therefore his moral guilt-to be critical to ‘the degree of [his] criminal culpability,’ and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.” [FN225] Such statements seem plainly incompatible with an interpretation of Enmund that would permit the imposition of the death penalty on a felony-murderer who killed negligently or accidentally.

Justice White's views were even more clearly stated four years earlier in *Lockett*. [FN226] There, he said flatly that the death penalty only could be imposed on defendants who had the intent to kill:

[T]he conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed any perceptible goals of punishment.

This is not to question, of course, that those who engage in serious criminal conduct which poses a substantial risk of violence, as did the present petitioners, deserve serious punishment regardless of whether or not they possess a purpose to take life. And the fact that death results, even unintentionally, from a criminal venture need not and frequently is not regarded by society as irrelevant to the appropriate degree of punishment. But society has made a judgment, which has deep roots in the history of the criminal law, distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy human life.

. . . .  
. . . I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose \*758 of producing death . . . . [FN227]

Further, in his calculation of the frequency of executions for unintended killings, Justice White equated defendants who personally committed murder with intentional murderers, [FN228] suggesting that his later reference to “actually kill” in *Enmund* was a proxy for “actually intentionally kill.” [FN229]

Between *Enmund* and *Tison*, the Court decided *Cabana v. Bullock*, [FN230] relied on by the California Supreme Court in its *Anderson* decision. [FN231] In *Bullock*, the question was whether the finding of death-eligibility under *Enmund* had to be made in the trial court or instead could be made by a state appellate court or federal habeas court. [FN232] Holding that such a finding could be made in the course of state or federal review, Justice White, writing for the Court and without further explanation, simply quoted the standard from *Enmund* forbidding imposition of the death penalty on one “who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” [FN233]

The inference that the *Enmund-Tison* principle was intended to apply to actual killers also emerges from the Court's opinion in *Tison*. [FN234] There, Justice O'Connor explained the rationale of the holding as follows:

[S]ome nonintentional murderers may be among the most dangerous and inhumane of all-the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an “intent to kill.” Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. . . . *Enmund* held that when “intent to kill” results in its logical though not inevitable \*759 consequence-the taking of human life-the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. [FN235]

In choosing actual killers as her examples of “reckless indifference” murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor clearly eschewed any distinction between actual killers and accomplices. In fact, the dissent argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices, [FN236] but the majority rejected this argument. [FN237]

In any event, what was implicit in *Enmund* and *Tison* was made explicit by the Supreme Court in *Hopkins v. Reeves*. [FN238] In *Reeves*, the defendant committed two rape-murders. [FN239] The Eighth Circuit granted habeas relief on the ground that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund* and *Tison*. [FN240] The Supreme Court reversed, holding that the mens rea determination did not have to be made by the jury, even though such a finding had to be made at some point in the case:

The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona* and *Enmund v. Florida* to support its holding. It reasoned that because those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, Nebraska could not

refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a mens rea \*760 requirement with respect to the killing. In *Cabana v. Bullock*, however, we rejected precisely such a reading and stated that “our ruling in *Enmund* does not concern the guilt or innocence of the defendant-it establishes no new elements of the crime of murder that must be found by the jury” and “does not affect the state's definition of any substantive offense.” For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter. [FN241]

All but one lower federal court to consider the issue-before and after the *Reeves* decision-has reached the same conclusion: The *Enmund-Tison* principle establishes a minimum mens rea for the death penalty applicable to all felony-murderers. [FN242]

In light of *Enmund*, *Tison*, and *Reeves*, the California Supreme Court's holding that robbery-burglary murderers, if they are actual killers, are \*761 death-eligible based on felony-murder simpliciter-i.e., absent any proof or finding of intent to kill or reckless indifference to human life-violates the Eighth Amendment. [FN243]

## B. The *Enmund-Tison* Principle and Unintentional Robbery-Burglary Murders

*Tison* did not involve an ordinary robbery-burglary murder but a highly aggravated series of crimes. [FN244] The *Tison* brothers were accomplices to four murders and participated in inflicting additional substantial harm on the victims prior to the killings (kidnapping). [FN245] Thus, *Tison* did not necessarily decide the proportionality of the death penalty for the ordinary robbery-burglary murderer who acts with reckless indifference but without an intent to kill. Application of the Court's two-part proportionality test suggests that the death penalty cannot be imposed in such cases.

### 1. Contemporary Values

In applying the evolving standards of decency test, the Court has emphasized “that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.’” [FN246] As the Court found in *Enmund* and *Tison*, categorizing various death penalty schemes (which of course requires examination of definitions of murder and of death-eligibility factors) is difficult. Of the thirty-nine death penalty jurisdictions (thirty-seven states, the United States, and the United States military), there are at most five states other than California-Florida, Georgia, Idaho, Maryland, and Mississippi-where a defendant may be death-eligible for felony-murder simpliciter. [FN247] Another seven jurisdictions-Arkansas, Delaware, Illinois, \*762 Kentucky, Louisiana, Tennessee, and the United States military-appear to make death-eligible a felony-murderer who acts with a mens rea less than intent to kill, e.g., “reckless indifference.” [FN248] The remaining death penalty jurisdictions either (1) do not make robbery-burglary murder (or, in almost all cases, any felony-murder) a capital crime, [FN249] do not make felony-murder an aggravating circumstance, [FN250] or do not permit the prosecutor to “double count” the felony to prove both the capital crime and the aggravating circumstance; [FN251] or (2) require proof of an intent to kill. [FN252] That at least thirty-nine jurisdictions (thirty-eight states and the federal government)-three quarters of the jurisdictions-do not, without more, make death-eligible a defendant who unintentionally kills during a robbery or burglary reflects a substantially stronger “national consensus against the death penalty” than the Court found sufficient in its most recent proportionality cases, *Atkins v. Virginia* [FN253] (thirty states and the federal government) and *Roper v. Simmons* [FN254]

(thirty states and the federal government).

Although such legislative judgments constitute “the clearest and most reliable objective evidence of contemporary values,” the Court has rightly observed that sentencing decisions also constitute substantial evidence of society's acceptance of the death penalty for certain crimes. [FN255] The problem is that there is no research on death sentencing for unintentional murders, and perhaps no such research is possible given the difficulty for a researcher to determine a defendant's subjective mental state from a \*763 recitation of the facts of a case. In *Enmund*, the Court relied instead on data showing that very few non-killing accomplices were sentenced to death or executed. [FN256] While the two studies discussed here did not attempt to determine a death-sentence rate for unintentional murderers, what is clear from the studies is that California prosecutors and jurors overwhelmingly reject the death penalty for ordinary robbery-burglary murderers, whether their killings were intentional or not. In cases where no more aggravated special circumstance is found or present, robbery-burglary murderers are sentenced to death approximately 5% of the time. [FN257] This figure reflects the death-sentence rate for all robbery-burglary murderers, so (unless the prosecutors and juries of California are utterly perverse) the death-sentence rate for unintentional robbery-burglary murderers must be even lower than 5%. However, even the 5% figure is substantially less than the percentage of rapists sentenced to death in Georgia (9.5%) at the time of *Coker*, a percentage so low that the Court found it to be strong evidence that the death sentence for rape of an adult woman did not comport with contemporary values. [FN258] Of course, evidence that California prosecutors and jurors reject the death penalty for ordinary robbery-burglary murderers does not necessarily establish that prosecutors and jurors elsewhere share that sentiment. However, given the magnitude of the rejection in California and the sentencing data from other states corroborating the fact that robbery-burglary murders are not considered highly aggravated murders, [FN259] there is every reason to believe that prosecutors and jurors, like legislatures, do not support the death penalty for unintentional ordinary robbery-burglary murders.

In its more recent decisions in *Atkins* and *Simmons*, the Court has also considered other evidence of contemporary values not considered in *Tison*: professional opinion within this country and international practice. [FN260] With regard to professional opinion, recent state studies have rejected unintentional felony-murder as a basis for death-eligibility. In Massachusetts, the Report of the Governor's Council on Capital Punishment, which proposed a “model” death penalty law, recommended that death-eligibility be limited to defendants who “committed the murder with deliberately premeditated malice aforethought, with respect to the \*764 victim's death.” [FN261] In Illinois, the Report of the Governor's Commission on Capital Punishment recommended elimination of Illinois's “course of a felony” eligibility factor—a factor far narrower than California's special circumstance because it requires an intent to kill. [FN262] The Commission stated:

Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.

A second reason for excluding the “course of a felony” eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal. [FN263]

Academic commentators, with divergent views about the death penalty generally, have joined in rejecting felony-murder as a basis for death eligibility. Professors James Liebman and Lawrence Marshall, death penalty opponents, have argued that felony-murder is an eligibility factor that is “particularly ripe for elimination or narrowing.” [FN264]

[The] permutations (and perversions) of the “accompanying felony” factor make capital-eligible crimes out of thousands of homicides that, even apart from mitigation, will never come close to the aggravated core. Even worse, these statutory schemes then jawbone jurors into treating that single factor as multiple reasons to sentence the offender to die. The opportunities for discrimination, error, arbitrariness, and waste of resources are rife. [FN265]

\*765 Professor Robert Blecker, a death penalty supporter, agrees that felony-murder should not be sufficient to establish death-eligibility:

The fact is that the felony murder aggravator does not belong in any proper death penalty statute. Any time you need to get to the death penalty because the person deserves it—such as rape, which should independently qualify as torture—with a well-drawn statute, you can get there. But, the majority of people on death row are robber-murderers, who did not commit the kind of killings that qualify them as the “worst of the worst.” The felony murder aggravator should be dropped entirely. [FN266]

With regard to international opinion, as the Court observed in *Enmund*:

“[T]he climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant.” It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe. [FN267]

International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights (to which the United States is a party) provides that the death penalty may be imposed only for the “most serious crimes.” [FN268] In 1984, the Economic and Social Council of the United Nations, interpreting this restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, [FN269] which Safeguards were subsequently endorsed by the General \*766 Assembly, [FN270] declared that the death penalty may be imposed only for intentional crimes. [FN271] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term “intentional” should be “equated to premeditation and should be understood as deliberate intention to kill.” [FN272]

## 2. Penological Purpose

Not only is the imposition of the death penalty on one who has killed unintentionally during an ordinary robbery-burglary contrary to evolving standards of decency, but it also arguably fails to serve either of the penological purposes—retribution and deterrence—identified by the Supreme Court. With respect to retribution, the Court has made clear that retribution must be calibrated to the defendant's culpability, which in turn depends on his mental state with regard to the crime. In *Enmund*, the Court stated: “It is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’” [FN273] In *Tison*, a very different majority further explained:

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through “Benefit of . . . Clergy” would be spared. [FN274]

It would seem that treating reckless, negligent, and even accidental killers on a par with intentional killers ignores the fundamental difference in their \*767 level of culpability and therefore fails to serve the purpose of retribution.

Whether the death penalty serves any deterrent purpose whatsoever has been the subject of scholarly debate for at least two generations, [FN275] but, even assuming that it may serve to deter murder in some situations, it is unlikely to deter unintentional ordinary robbery-burglary murders for two reasons. First, although the California Supreme Court apparently believes that the felony-murder rule serves to deter accidental and negligent killings during felonies, [FN276] the Supreme Court has thought otherwise. As the Court said in *Enmund*:

[I]t seems likely that “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,” [FN277] for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicious felony murder will not “enter into the cold calculus that precedes the decision to act.” [FN278]

Second, as Justice White observed in *Furman*, [FN279] when the death penalty is only rarely imposed, it necessarily loses any potential deterrent value, and its imposition on, at most, one out of twenty unintentional ordinary robbery-burglary murderers renders any potential deterrent effect quite implausible. [FN280]

\*768 Because imposition of the death penalty for unintentional robbery-burglary murders is clearly contrary to the judgment of the overwhelming majority of the states, the judgment of prosecutors and juries (as reflected in the two California studies and earlier data from other states), [FN281] recent professional opinion, and international norms, it does not comport with contemporary values. Because imposition of the **death penalty** for unintentional **robbery-burglary** murders also likely serves no penological purpose, it would seem the **penalty** in such cases is disproportionate and cannot satisfy the **Eighth Amendment**.

## V. Conclusion

Although this Article has focused on the constitutionality of imposing the **death penalty** on ordinary **robbery-burglary** murderers in California, the same constitutional arguments apply to other states with broad definitions of **death-eligibility**, particularly those states where felony-murder simpliciter suffices for **death-eligibility**. [FN282] Further, **death-eligibility** for ordinary **robbery-burglary** murderers is only a piece, albeit a substantial piece, of a larger problem—the overbreadth of **death penalty** schemes generally. In *Loving v. United States*, [FN283] the Supreme Court held that a **death penalty** scheme that made **death-eligible** all those who committed premeditated murders or felony-murders would “not narrow the **death-eligible** class in a way consistent with our cases.” [FN284] But that, of course, is the very situation in California today, where twelve of the thirteen forms of first-degree felony-murder are double-counted to establish **death-eligibility**, and virtually all premeditated murderers are made **death-eligible** by the lying-in-wait special circumstance. [FN285]

Overbroad definitions of **death-eligibility** can be seen as the root cause of most of the problems with the **death penalty**. It is such overbroad definitions that allow prosecutors to pursue **death** sentences in cases not involving highly aggravated homicides. The principal conclusion drawn by James Liebman and his associates in their exhaustive nationwide empirical study of the **death penalty** was: “The more often officials use the **death penalty**, the wider the range of crimes to which it is applied, and the more \*769 it is imposed for offenses that are not highly aggravated, the greater the risk that capital convictions and sentences will be seriously flawed.” [FN286] They found that the two most common causes of reversible error in capital cases are “egregiously incompetent defense lawyering” and “prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty.” [FN287] It is in cases involving homicides that are not highly aggravated where incompetent defense lawyering is likely to be prejudicial to the defendant and where prosecutors may feel the need to cut corners to obtain a death verdict. In addition, racial disparities are most pronounced in prosecutions for homicides that are not highly aggravated, [FN288] and, according to a number of studies, significant racial disparities are found in felony-murder cases, in particular. [FN289] The wide discretion given to prosecutors by

overbroad definitions of **death**-eligibility can also lead to substantial geographic disparities in **death** sentencing as some prosecutors pursue **death** sentences more aggressively than others. In their recent study of **death** sentencing in California, Glenn Pierce and Michael Radelet report that, excluding counties with smaller populations, some of the “high **death**” counties have a **death**-sentencing rate (per homicide) five times that of other counties. [FN290] Of course, almost half the counties imposed no **death** sentences at all for the ten-year study period. [FN291] All of these concerns strongly argue for a thorough reexamination and narrowing of the **death**-eligible class in California and other states with similar schemes. [FN292]

\*770 A substantial first step in addressing this overbreadth would be the recognition of the constitutional infirmity of making **death**-eligible ordinary **robbery-burglary** murderers: They are, in every respect, the “average” murderers whose culpability “is insufficient to justify the most extreme sanction available to the State.” [FN293] Under the Furman-Zant “genuine narrowing” principle, the **death penalty** cannot be imposed on ordinary **robbery-burglary** murderers because it is imposed so infrequently-far more infrequently than the **death penalty** was being imposed at the time of Furman-that its imposition in any case can be characterized only as “freakish.” Under the Enmund-Tison proportionality principle, the **death penalty** may not be imposed on any felony-murderers-actual killers or accomplices-without proof of mens rea and, in the case of ordinary **robbery-burglary** murderers, without proof of intent to kill. At a minimum, under the Enmund-Tison holdings, as understood in Reeves, the **death penalty** may not be imposed on ordinary **robbery-burglary** murderers absent proof that the defendant acted with reckless indifference to human life.

Twenty years after Furman, Justice **Stevens**, surveying the safeguards erected by the Court's capital punishment cases, could assert with confidence that the kind of unintentional homicide committed by William Furman could no longer support a **death** sentence. [FN294] It is time, in California and elsewhere, for legislative action or constitutional ruling to make Justice **Stevens's** understanding a reality.

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[FN1]. *Id.* *Furman v. Georgia*, 408 U.S. 238, 295 (1972) (Brennan, J., concurring).

[FN2]. *Furman v. State*, 167 S.E.2d 628, 629 (Ga. 1969), rev'd, 408 U.S. 238 (1972).

[FN3]. See *Furman*, 408 U.S. at 294-95 & n.48 (Brennan, J., concurring); see also *Graham v. Collins*, 506 U.S. 461, 479 (1993) (Thomas, J., concurring).

[FN4]. 408 U.S. 238, 239-40 (1972).

[FN5]. The Supreme Court's principal death-eligibility cases all involve challenges to state death penalty schemes. For convenience, this Article will refer to the Court's Eighth Amendment principles as limiting the states, but, of course, the principles act as a limit on the federal government as well.

[FN6]. See *Furman*, 408 U.S. 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).

[FN7]. *Id.* at 309-10 (Stewart, J., concurring).

[FN8]. *Id.* at 313 (White, J., concurring). Justice Brennan voiced a similar objection: “When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.” *Id.* at 293 (Brennan, J., concurring).

[FN9]. See *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988); *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (plurality opinion).

[FN10]. 462 U.S. 862 (1983).

[FN11]. *Id.* at 876-77.

[FN12]. 428 U.S. 153 (1976).

[FN13]. *Id.* at 212.

[FN14]. *Id.* at 187.

[FN15]. *Id.* at 187 n.35.

[FN16]. 433 U.S. 584 (1977).

[FN17]. *Id.* at 592.

[FN18]. 458 U.S. 782 (1982).

[FN19]. 481 U.S. 137 (1987).

[FN20]. See *Enmund*, 458 U.S. at 827; *Tison*, 481 U.S. at 164; *Tison*, 481 U.S. at 164. More recently, the Court also held that, even apart from the circumstances of the crime, the death penalty is not a proportionate punishment for certain categories of murderers. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the death penalty is disproportionate for a juvenile murderer); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the death penalty is disproportionate for a mentally retarded murderer).

[FN21]. See *Enmund*, 458 U.S. at 784-85; *Tison*, 481 U.S. at 139-42.

[FN22]. See *Tison*, 481 U.S. at 158.

[FN23]. See *supra* notes 9-11 and accompanying text.

[FN24]. *Enmund*, 458 U.S. at 801; *Tison*, 481 U.S. at 158.

[FN25]. *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

[FN26]. *Kansas v. Marsh*, 126 S. Ct. 2516, 2543 (2006) (Souter, J., dissenting); see also *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (indicating that the crime must reflect “a consciousness materially more ‘depraved’ than that of any person guilty of murder”).

[FN27]. *Roper*, 543 U.S. at 571 (quoting *Atkins*, 536 U.S. at 319). As Justice Scalia has put it, “the Court has prohibited the death penalty for all crimes except murder, and indeed even for what might be called run-of-the-mill murders, as opposed to those that are somehow characterized by a high degree of brutality or depravity.” Antonin Scalia, *God’s Justice and Ours*, First Things, May 2002, at 17, 17.

[FN28]. In California, a third recently created felony-murder special circumstance, carjacking, belongs in this category. See *Cal. Penal Code § 190.2(a)(17)(L)* (West 2007). Because carjacking as a crime is barely distinguishable from robbery, and because there are no examples of a carjacking felony-murder that was not a robbery felony-murder in the empirical studies discussed *infra*, carjacking is treated as subsumed within robbery for the purposes of this Article.

[FN29]. See *id.* § 190.2.

[FN30]. The Statewide Study was reported in **Steven F. Shatz & Nina Rivkind**, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283 (1997).

[FN31]. Although some states have authorized the **death penalty** for crimes other than murder, for example, Louisiana, for rape of a child under 13, (LSA-RLa. Rev. Stat. Ann.S. 14:42 (2007)); and Florida, for sexual battery with injury by an adult on a child under 12 (FSA §, *Fla. Stat. Ann.* 794.011(2) (West 2007), the Supreme Court has not, since *Furman*, upheld a death sentence for another crime. See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty disproportionate for rape of an adult woman).

[FN32]. It is the finding, beyond a reasonable doubt, of the special circumstance that makes the defendant death-eligible. See *Cal. Penal Code § 190.2(a)* (West 2007); *People v. Bacigalupo*, 862 P.2d 808, 821-22 (Cal. 1993).

[FN33]. If a defendant pleads not guilty by reason of insanity, *Cal. Penal Code § 1026*, that issue is tried at a separate sanity phase prior to the penalty phase. *Id.* § 190.1.

[FN34]. *Id.* § 190.3. At one time, the California Supreme Court took the position that only factors (a) (circumstances of the crime), (b) (unadjudicated crimes involving the use or threat of force or violence), (c) (prior felony conviction), and (i) (age) could be aggravating and that the remaining factors were mitigating. See *People v. Gallego*, 802 P.2d 169, 220 n.1 (Cal. 1990) (Mosk, J., concurring); *People v. Hamilton*, 774 P.2d 730, 755 (Cal. 1989). Subsequently, the court concluded that none of the factors except factor (k) (any circumstance that extenuates the gravity of the crime) is exclusively aggravating or mitigating. *Bacigalupo*, 862 P.2d at 814.

[FN35]. *Cal. Penal Code § 190.3*.

[FN36]. *Tuilaepa v. California*, 512 U.S. 967, 977-78 (1994).

[FN37]. *People v. Jenkins*, 997 P.2d 1044, 1052-53 (Cal. 2000).

[FN38]. *People v. Brown*, 726 P.2d 516, 541 (Cal. 1985).

[FN39]. See [Cal. Penal Code §§ 187-189](#).

[FN40]. See [id.](#) § 190.2(a).

[FN41]. [Cal. Penal Code § 187\(a\)](#) defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought,” and § 188 defines malice: as follows: “Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” [Id.](#) § 188.

[FN42]. [Cal. Penal Code § 189](#) defines first-degree murder:

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy accomplished with a minor or against the victim's will or in a state prison or jail], 288 [lewd act on child], 288a [oral copulation accomplished with a minor or against the victim's will or in a state prison or jail], or 289 [anal or genital penetration by foreign object for sexual purpose accomplished with a minor or against the victim's will], or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree. [Id.](#) § 189. One scholar has argued that first-degree murder is so broadly defined by statute and so broadly interpreted by the California Supreme Court that there is no longer any meaningful distinction between first- and second-degree murder in California. See Suzanne Mounts, [Premeditation and Deliberation in California: Return to a Distinction Without a Difference](#), 36 *U.S.F. L. Rev.* 261, 268, 327-28 (2002).

[FN43]. [Cal. Penal Code § 190.2\(a\)](#) provides:

The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

- (1) The murder was intentional and carried out for financial gain.
- (2) The defendant was convicted previously 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, in this proceeding, has 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 or her act or acts would create a great risk of death to one or more human beings.
- (5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting 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 or her act or acts would create a great risk of death to one or more human beings.
- (7) The victim was a peace officer . . . who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer . . . or a

former peace officer . . . , and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter . . . who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile 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 or any other state, or of a federal prosecutor's office, and the murder was intentionally 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 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.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, 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 used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her 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:

- (A) Robbery . . . .
- (B) Kidnapping . . . .
- (C) Rape . . . .
- (D) Sodomy . . . .
- (E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years . . . .
- (F) Oral copulation . . . .
- (G) Burglary . . . .
- (H) Arson . . . .
- (I) Train wrecking . . . .
- (J) Mayhem . . . .
- (K) Rape . . . .
- (L) Carjacking . . . .

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(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.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . , and the murder was carried out to further the activities of the criminal street gang.

[Cal. Penal Code § 190.2\(a\)](#). According to the California Supreme Court, the special circumstances' function "is to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty." [People v. Visciotti](#), 825 P.2d 388, 430 (Cal. 1992); accord [People v. Bacigalupo](#), 862 P.2d 808, 813 (Cal. 1993) ("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.").

[FN44]. See [People v. Super. Ct. \(Engert\)](#), 647 P.2d 76, 77-78 (Cal. 1982); accord [People v. Wade](#), 750 P.2d 794, 804 (Cal. 1988).

[FN45]. See, e.g., [Idaho Code Ann. § 19-2515\(g\)\(6\) \(2007\)](#) ("defendant exhibited utter disregard for human life"); [Va. Code Ann. § 19.2-264.2 \(2007\)](#) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society").

[FN46]. Generally, a multiple-murder special circumstance is alleged on the basis of homicides committed during a single event; much less frequently, the special circumstance allegation is based on separate and discrete homicides.

[FN47]. See [Cal. Penal Code § 190.2\(a\)](#).

[FN48]. Initiative Measure Proposition 7 (approved Nov. 7, 1978).

[FN49]. California Journal Ballot Proposition Analysis, Calif. J., Nov. 1978, Special Section, at 5. The state has taken the position that, by "toughest" death penalty law, the proponents meant the law "which threatens to inflict that penalty on the maximum number of defendants." [Carlos v. Super. Ct.](#), 672 P.2d 862, 871 n.13 (Cal. 1983).

[FN50]. See Initiative Measure Proposition 115 § 9 (approved June 5, 1990); 1995 Cal. Stat. 478, enacted by Proposition 196, § 2 (approved Mar. 26, 1996); 1998 Cal. Stat. 629, enacted by Proposition 18 (approved Mar. 7, 2000); Initiative Measure Proposition 21, § 11 (approved Mar. 7, 2000).

[FN51]. See, e.g., [Tuilaepa v. California](#), 512 U.S. 967, 994 (1994) (Blackmun, J., dissenting) (noting that California's special circumstances create "an extraordinarily large death pool"); Symposium, [Report of the Massachusetts Governor's Council on Capital Punishment](#), 80 Ind. L.J. 1, 9 (2005) (citing California and Illinois as having exceptionally broad definitions of death-eligibility).

[FN52]. The only type of first-degree felony-murder that is not a felony-murder special circumstance is torture,

and there is a separate special circumstance covering intentional murders involving the infliction of torture. See [Cal. Penal Code § 190.2\(a\)\(18\)](#).

[FN53]. [Id.](#) § 190.2(a)(15).

[FN54]. According to the California Supreme Court, lying in wait requires proof that 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. [People v. Morales](#), 770 P.2d 244, 260-61 (Cal. 1989). Because the court has interpreted the second element to require only that the duration of the watching and waiting be “such as to show a state of mind equivalent to premeditation or deliberation,” [People v. Edelbacher](#), 766 P.2d 1, 24 (Cal. 1989) (emphasis omitted) (quoting [Cal. Jury Instructions: Criminal \(CALJIC\) 8.25](#)), a premeditated murder is a lying-in-wait murder so long as the murderer does not notify the victim in advance of his murderous intent. See [Morales](#), 770 P.2d at 273 (Mosk, J., concurring in part and dissenting in part) (stating that lying-in-wait is “so broad in scope as to embrace virtually all intentional killings”).

[FN55]. Richard A. Rosen, [Felony Murder and the Eighth Amendment Jurisprudence of Death](#), 31 B.C. L. Rev. 1103, 1104 (1990).

[FN56]. See, e.g., [Tison v. Arizona](#), 481 U.S. 137, 159 (1987) (Brennan, J., dissenting) (“This curious doctrine is a living fossil from a legal era in which all felonies were punishable by death . . . .”); [People v. Phillips](#), 414 P.2d 353, 360 (Cal. 1966) (stating that the felony-murder rule “anachronistically resurrects from a bygone age a ‘barbaric’ concept that has been discarded in the place of its origin”); [People v. Aaron](#), 299 N.W.2d 304, 307 (Mich. 1980) (noting that felony-murder is an “anachronistic remnant, ‘a historic survivor for which there is no logical or practical basis for existence in modern law’”) (quoting Roy Moreland, [Kentucky Homicide Law with Recommendations](#), 51 Ky. L.J. 59, 82 (1962))).

[FN57]. 1850 Cal. Stats., ch. 99, p. 229.

[FN58]. Section 25 provided: “where [an] involuntary killing shall happen in the commission of an unlawful act, which . . . is committed in the prosecution of a felonious intent, the offence shall be deemed and adjudged to be murder.” [Id.](#)

[FN59]. [Cal. Penal Code § 187](#) (West 2007).

[FN60]. [Id.](#) § 188.

[FN61]. [Id.](#) § 189.

[FN62]. [People v. Washington](#), 402 P.2d 130, 133 (Cal. 1965).

[FN63]. See [People v. Ireland](#), 450 P.2d 580, 589 (Cal. 1969) (“The felony-murder rule operates . . . to posit the existence of malice aforethought . . . .”); [Washington](#), 402 P.2d at 133 (“The felony-murder doctrine ascribes malice aforethought to the felon . . . .”); [People v. Coefield](#), 236 P.2d 570, 572 (Cal. 1951) (“[M]alice is shown by the nature of the attempted crime . . . .”).

[FN64]. 668 P.2d 697 (Cal. 1983).

[FN65]. 64. 668 P.2d 697 See 708-09 (Cal. 1983) Penal Code § 6.

[FN66]. The defendant argued that, under *In re Winship*, 397 U.S. 358 (1970), due process required that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime. *Dillon*, 668 P.2d at 708-09, 715.

[FN67]. *Id.* at 718.

[FN68]. Cal. Penal Code § 189 (West 2007).

[FN69]. *Id.* § 190.2(a)(17)(A), (G).

[FN70]. *Id.* § 189.

[FN71]. *People v. Young*, 105 P.3d 487, 502 (Cal. 2005).

[FN72]. *Id.*

[FN73]. See *People v. Billa*, 79 P.3d 542, 547 (Cal. 2003).

[FN74]. *People v. Washington*, 402 P.2d 130, 133 (Cal. 1965) (“The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. This purpose is not served by punishing them for killings committed by their victims.” (citation omitted)).

[FN75]. *People v. Wilson*, 462 P.2d 22, 28 (Cal. 1969) (“Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.”).

[FN76]. *People v. Dillon*, 668 P.2d at 697, 719 (Cal. 1983).

[FN77]. Criminal Jury Instructions (CALCRIM) 540A (Judicial Council of Cal. 2006). Because both robbery and burglary themselves are specific intent crimes, the required finding that the defendant “intended to commit [the felony]” is superfluous with regard to those crimes. See *id.* Similar instructions are given if the particular defendant is alleged to be a participant in the felony but not the actual perpetrator of the murder. See *id.* at 540B, 540C.

[FN78]. Cal. Penal Code § 211 (West 2007); see also *People v. Tufunga*, 987 P.2d 168, 174 (Cal. 1999). The one significant difference is that the common law required that the taking be “from the person,” while the statute requires that the taking be from “the person or immediate presence.” Compare *Tufunga*, 987 P.2d at 174, with Cal. Penal Code § 211.

[FN79]. *People v. Avery*, 38 P.3d 1, 6 (Cal. 2002).

[FN80]. See *Tufunga*, 987 P.2d at 175.

[FN81]. 2 B.E. Witkin & Norman L. Epstein, California Criminal Law § 95 (3d ed. 2000).

[FN82]. *People v. Hill*, 952 P.2d 673, 688-89 (Cal. 1998).

[FN83]. *People v. Lavender*, 31 P.2d 439, 440-41 (Cal. 1934).

[FN84]. *People v. Webster*, 814 P.2d 1273, 1288-89 (Cal. 1991).

[FN85]. See *People v. Griffin*, 94 P.3d 1089, 1095 (Cal. 2004) (citing cases).

[FN86]. *People v. Gauze*, 542 P.2d 1365, 1366 (Cal. 1975) (quoting Rollin M. Perkins, *Criminal Law* 192 (2d ed. 1969)).

[FN87]. Cal. Penal Code § 459 (West 2007).

[FN88]. *People v. Barry*, 29 P. 1026, 1027 (Cal. 1892).

[FN89]. *People v. Super. Ct. (Granillo)*, 253 Cal. Rptr. 316, 320 (Cal. Ct. App. 1988).

[FN90]. See Cal. Penal Code § 459.

[FN91]. *People v. Kwok*, 75 Cal. Rptr. 2d 40, 47 (Cal. Ct. App. 1998).

[FN92]. *People v. Griffin*, 109 Cal. Rptr. 2d 273, 279 (Cal. Ct. App. 2001).

[FN93]. *People v. Hughes*, 39 P.3d 432, 473 (Cal. 2002).

[FN94]. *People v. Ceballos*, 526 P.2d 241, 246 (Cal. 1974).

[FN95]. *People v. Le*, 39 Cal. Rptr. 3d 146, 150 (Cal. Ct. App. 2006).

[FN96]. Cal. Penal Code § 190.2(a)(17)(A) (West 2007).

[FN97]. *Id.* § 190.2(a)(17)(G).

[FN98]. Under *People v. Green*, 609 P.2d 468, 505 (Cal. 1980), the special circumstance does not apply if the felony was only incidental to the murder. Under Cal. Penal Code § 190.2(d), in the case of an accomplice to the killing, the special circumstance will apply only if the defendant was a major participant in the felony and acted with reckless indifference to human life. In one respect, however, the robbery and burglary special circumstances are broader than the felony-murder rule because they cover a species of implied malice murders—so-called “provocative act” murders. See *People v. Kainzrants*, 53 Cal. Rptr. 2d 207, 213-14 (Cal. Ct. App. 1996).

[FN99]. See *People v. Hayes*, 802 P.2d 376, 410 (Cal. 1990) (stating that the reach of the special circumstances is as broad as the reach of felony-murder, and both apply to a 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*, 755 P.2d 1017, 1037 (Cal. 1988)).

[FN100]. 672 P.2d 862 (Cal. 1983).

[FN101]. *Id.* at 876.

[FN102]. *Id.* at 876-77.

[FN103]. *Id.* at 875.

[FN104]. *Id.* at 875-76 (citing *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)).

[FN105]. 742 P.2d 1306 (Cal. 1987)

[FN106]. *Id.* at 1325. Consequently, for murders committed during the four-year period between Carlos and Anderson (December 12, 1983 to October 13, 1987), intent to kill was an element of the felony-murder special circumstances, but Carlos has no application to prosecutions for murders occurring either before or after this Carlos “window period.” *People v. Johnson*, 859 P.2d 673, 697-98 (Cal. 1993).

[FN107]. See *infra* Part IV.A.

[FN108]. *Anderson*, 742 P.2d at 1325-27. The court also relied on *Cabana v. Bullock*, 474 U.S. 376 (1986), discussed *infra* at notes 229-32230-33 and accompanying text.

[FN109]. *Anderson*, 742 P.2d. at 1325.

[FN110]. *Id.* at 1334 (Broussard, J., concurring in part and dissenting in part).

[FN111]. 824 P.2d 1277 (Cal. 1992).

[FN112]. See *id.* at 1285.

[FN113]. *Id.* at 1295.

[FN114]. 954 P.2d 475 (Cal. 1998).

[FN115]. *Id.* at 505.

[FN116]. 978 P.2d 15 (Cal. 1999).

[FN117]. *Id.* at 66 & n.15.

[FN118]. 978 P.2d 1171 (Cal. 1999).

[FN119]. *Id.* at 1223. Two examples, using the facts of actual cases, might convey the breadth of death-eligibility for robbery-burglary murderers. The first case arose out of a purse-snatching incident. See *People v. Scott*, No. 179796 (Santa Clara Super. Ct. filed Dec. 19, 1994), described in Sandra Gonzales, *Murder Charge in Purse-Snatching Case*, San Jose Mercury News, Dec. 20, 1994, at 1B. Jaye Scott yanked a purse from a woman's arm outside a supermarket and fled. The woman, who suffered from coronary artery disease, began chasing Scott, but she collapsed and subsequently died from “cardiac arrest brought on by ‘acute emotional stress.’” Scott had committed a robbery by using force (yanking the purse from the victim's arm); he was guilty of felony-murder because the death occurred in one continuous transaction with the felony; and he was death-eligible under the robbery felony-murder special circumstance. Scott was charged with murder, but, perhaps because he was already subject to California's “three strikes” law, he was allowed to plead no contest to involuntary manslaughter, and was sentenced to thirty-five years to life. See Bill Romano, *Manslaughter Plea in Purse-Snatch Death*, San Jose Mercury News, Dec. 22, 1995, at 7B. The second case began with a shoplifting. See *People v. Weddle*, 2 Cal. Rptr. 2d 714, 715 (Cal. Ct. App. 1991). Terry Weddle entered a department store and stole some clothes. *Id.* Driving away from the store with the clothes, he ran a red light and accidentally hit another car, killing a passenger. *Id.* Weddle had committed a burglary by entering the store with the intent to steal clothes; he was guilty of felony-murder because he committed the homicide while escaping from the burglary; and he was death-eligible under the burglary felony-murder special circumstance. Weddle was convicted of first-degree murder with a special circumstance and sentenced to life in prison without possibility of parole. *Id.* at 720. That a purse-snatcher who accidentally causes a death because his victim has a heart condition, or a

shoplifter who negligently kills while driving away from the scene of his theft, is death-eligible clearly demonstrates how far the California scheme has strayed from singling out the “worst of the worst” for the death penalty.

[FN120]. See, e.g., [People v. Musselwhite](#), 954 P.2d 475, 505-06 (Cal. 1998).

[FN121]. See, e.g., [People v. Kennedy](#), 115 P.3d 472, 505 (Cal. 2005).

[FN122]. See, e.g., [People v. Webster](#), 814 P.2d 1273, 1299 (Cal. 1991); [People v. Marshall](#), 790 P.2d 676, 696-97 (Cal. 1990).

[FN123]. See *infra* Part III.

[FN124]. See *infra* Part IV.B.

[FN125]. The beginning date of the study is the effective date of California's current death penalty statute. The end date was chosen to permit the conclusion of prosecutions brought for murders committed late in the study period.

[FN126]. For a comparison of population estimates for California counties, see Population Division, U.S. Census Bureau, Annual Estimates of the Population for Counties of California: April 1, 2000 to July 1, 2004, <http://www.census.gov/popest/counties/tables/CO-EST2004-01-06.xls> (reporting the population data from the 2000 census) (last visited July 17, 2007).

[FN127]. Glenn L. Pierce & Michael L. Radelet, [The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999](#), 46 *Santa Clara L. Rev.* 1, 26 (2005).

[FN128]. *Id.* at 27. Consequently, treating the Alameda County death-sentence rate for ordinary robbery-burglary murderers as representative tends to favor a finding of constitutionality.

[FN129]. The cases were initially identified from a list of all murder prosecutions produced by the Alameda County District Attorney's Office in response to a California Public Records Act request. The District Attorney list, when checked against other partial lists of Alameda County cases, appeared to omit approximately twelve percent 12% of the cases, but in a random fashion. Most of the missing cases were identified and included in the study, but some cases were not identified and other cases were identified but were not surveyed because the case files were missing or incomplete.

[FN130]. Analysis of other data might raise additional concerns about the administration of the death penalty in Alameda County. For example, the data disclose that, dividing the county roughly in half (as the county was until recently for the purposes of murder case filings), death-sentence rates differ substantially. The death-sentence rate during the study period for North County death-eligible murderers is 9.1%, while for South County death-eligible murderers, the rate is 25.3%. Because North County (which includes Oakland) has a percentage of African-American residents more than four times that of South County, U.S. Census Bureau, California 2000, Summary Population and Housing Characteristics 70-71 (2002), the disparity in death-sentence rates suggests a “race of community” effect, raising the concern addressed by Randall Kennedy that “underprotection” of African-American communities—the consistent failure of criminal justice officials to treat as seriously criminal conduct in those communities—“is one of the most destructive forms of oppression that has been visited upon African-Americans.” Randall Kennedy, *Race, Crime, and the Law* 29 (1997).

[FN131]. A portion of the special circumstances murder cases involved juvenile murderers who were not eligible for the death penalty, see [Cal. Penal Code § 190.5](#) (West 2007), and those cases were not included.

[FN132]. The First District, one of six appellate districts comprising the California Court of Appeal, includes twelve of California's fifty-eight counties in the western part of the state, from just south of San Francisco to the Oregon border. The district is comprised of both large and small counties and includes the major cities of San Francisco and Oakland, as well as smaller cities and rural areas. All decisions of the California Supreme Court are published, but only a small percentage of Court of Appeal decisions in criminal cases are published. At the time of the study, the courts published their decisions in approximately 10.5% of the non-death-judgment first-degree-murder-conviction appeals. Shatz & Rivkind, *supra* note 30, at 1331 n.264.

[FN133]. This calculation, based on an overall statewide death-sentence rate of 9.6% of first-degree murderers, *id.* at 1328, also favors the constitutionality of the California scheme because the current statewide rate, as measured for the period 2001-2005, is a substantially lower 5.8%. Compare the California Supreme Court's list of death sentences (on file with the author), with Cal. Dep't of Corrs. & Rehab., *Characteristics of Felon Admissions to Prison (1998-2006)*, available at <http://www.corr.ca.gov/ReportsResearch/OffenderInfoServices/Annual/Achar1Archive.html> (listing annual reports of convictions in California, including first-degree murder).

[FN134]. The Alameda County Study performs two functions: (1) it provides a sample from which conclusions may be drawn about the operation of the death penalty statewide, and (2) it also provides comprehensive data about the death penalty "as applied" in Alameda County.

[FN135]. [Cal. Penal Code §§ 190§ 190.2\(a\)\(2\), \(3\)](#) (West 2007).

[FN136]. *Id.* §§ 190§ 190.2(a)(17)(B), (17)(C), (17)(D), (17)(E), (17)-(F), (17)(K), (18).

[FN137]. *Id.* §§ 190§ 190.2(a)(17)(A), (G), including, in the Alameda Study after 1996, carjacking. *Id.* § 190.2(a)(17)(L). See *supra* note 28.

[FN138]. [Cal. Penal Code § 190.2\(a\)\(15\)](#), including, in the Alameda County Study after 1996, drive-by murders. *Id.* § 190.2(a)(21). As is the case with robbery and carjacking, there is a very substantial overlap between these two circumstances and virtually no examples of drive-by murders from the five years are included in the study.

[FN139]. *Id.* § 190.2(a)(1).

[FN140]. *Id.* § 190.2(a)(7).

[FN141]. In deriving the figures used in Figures 1 and 3, no attempt was made to exclude cases where death-eligibility under former versions of [Cal. Penal Code § 190.2\(a\)](#) required proof of intent to kill and there was no substantial evidence of such an intent on the part of the defendant. During the first half of the study period covered by the Alameda County Study (1978-1990) and the entire study period of the Statewide Study, the prosecution was required to prove intent to kill for a defendant who was not the actual killer rather than "reckless indifference to human life," the standard after June 6, 1990. Shatz & Rivkind, *supra* note 30, at 1315. During the four-year Carlos window period, see *supra* note 106, the prosecution was required to prove intent to kill for the actual killer. The inclusion of the few accomplices who could be found to have acted with reckless indifference but not an intent to kill, and a few actual killers who could not be found to have intended to kill, results in an understatement of the death-sentence rate. However, that understatement is more than offset by the inclusion of this older data. The recent substantial decline in the death-sentence rate statewide, see *supra* note 133, which is

mirrored in a decline in the Alameda County death-sentence rate for death-eligible murderers from a pre-1990 rate of 14.8% to a post-1990 rate of 10.0%, means that use of the older data actually favors the constitutionality of the California scheme.

[FN142]. Figures 3 and 4 compare the special circumstances categories in pairs, reporting the death-sentence rate when the circumstance in the chart's title is present but the other specified circumstance is not. For example, in Figure 3 the death-sentence rate for defendants who committed a robbery-burglary but did not inflict additional serious injury is 10%.

[FN143]. The studies did not control for other factors that might have influenced the sentencing decisions in the cases, but other studies have established that statutory aggravating factors play the major role in the death-sentencing decision. See, e.g., David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 Neb. L. Rev. 486, 548-50 (2002) (describing how statutory aggravators have a statistically significant effect on explaining death-sentencing outcomes, but mitigating factors do not).

[FN144]. Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 Or. L. Rev. 39 (2002).

[FN145]. *Id.* at 61.

[FN146]. *Id.* at 81-86.

[FN147]. David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 Seton Hall L. Rev. 1582, 1601-03 (1996).

[FN148]. *Id.* Compare N.J. Stat. Ann. § 2C:11-3 (West 2007), with Cal. Penal Code § 190.2 (West 2007).

[FN149]. For several reasons, using 5% as the estimated death-sentence rate necessarily overstates the actual death-sentence rate, perhaps substantially. First, with regard to the 5.5% estimate from the Statewide Study, the calculations leading to that figure were based on a statewide death-sentence rate for convicted first-degree murderers of 9.6%: the rate during the five-year study period 1988-1992. Shatz & Rivkind, *supra* note 30, at 1327-28. However, the death-sentence rate for convicted first-degree murderers from the most recent five-year period is only 5.8%. See *supra* note 1323. Furthermore, the Statewide Study was based only on appealed murder-conviction cases. Since a higher percentage of defendants in unappealed cases are **death**-eligible than defendants in appealed cases, using only appealed cases overestimates the **death**-sentence rate. See *Shatz & Rivkind*, *supra* note 30, at 1335. Second, the Alameda County Study estimated **death**-sentence rate of 4.5% is probably higher than the statewide rate because, at least during the 1990s, Alameda County had a higher than average **death**-sentence-to-homicide ratio. Pierce & Radelet, *supra* note 1267, at 27. Third, with regard to both studies, calculating the **death**-sentence rate from defendants convicted of murder overestimates the actual rate because it ignores those cases in the studies where defendants who were factually **death**-eligible because of their major participation in a **robbery-burglary** murder were convicted of lesser crimes, usually as a result of a plea bargain and often in return for their agreement to testify. See, e.g., *People v. Leopold*, A084798 (Cal. Ct. App. 2000) (involving two co-defendants in robbery-murder special circumstances case allowed to plead guilty to manslaughter and robbery, one of them testifying against remaining defendant); *People v. Bowie*, A082399 (Ct. App. 1999) (involving accomplice to robbery-murder testifying against defendant and apparently never being charged); *People v. Fulgham*, A021190 (Ct. App. 1985) (involving jailhouse “snitch” facing robbery-murder charges allowed to plead guilty to manslaughter after testimony against defendant). (Copies of these opinions

are on file with the author.)

[FN150]. *Furman v. Georgia*, 408 U.S. 238, 386 n.11 (Burger, C.J., dissenting). Although in *Furman* and *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court referred to the percentage of those convicted of murder who were sentenced to death, both cases involved the Georgia scheme, which did not divide murder into degrees and made all murderers death-eligible. See *Gregg*, 428 U.S. at 163 n.4 (citing Ga. Code Ann. § 26-1101 (1972)). In fact, the Justices were concerned with the number of statutorily death-eligible murderers who were sentenced to death. See *Furman*, 408 U.S. at 435 n.19 (Powell, J., dissenting) (referring to the percentage of cases in which “death was a statutorily permissible punishment”); see also *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976) (plurality opinion) (referring to the frequency of death verdicts in first-degree-murder-conviction cases). Thus, in states such as California that divide murder into degrees and make only first-degree murderers death-eligible, *Cal. Penal Code §§ 189, 190* (West 2007), the relevant statistic would be the percentage of convicted first-degree murderers sentenced to death.

[FN151]. The Chief Justice cited to the following sources: Richard A. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 Fed.Prob. Probation, No. 2 June 1964, pp.at 11, 12 (1964);; Hugo A. Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1, 30 (1964); Florida Division of Corrections, *Seventh Biennial Report (July 1, 1968 to June 30, 1970)*, at 82 (1970).; H. Kalven & H. Zeisel, *The American Jury* 435-36 (1966). *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).

[FN152]. *Id.* at 309 & n.10 (Stewart, J., concurring).

[FN153]. 428 U.S. 153 (1976).

[FN154]. *Id.* at 182 n.26 (plurality opinion). In *Woodson*, the plurality relied on the same statistic. See *Woodson*, 428 U.S. at 295 n.31 (plurality opinion). Post-*Furman* research indicates that the pre-*Furman* death-sentence rate in Georgia was about fifteen percent15%. See David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 80 (1990). California's pre-*Furman* death-sentence rate also approximated fifteen percent15%. See Brief for Petitioner, app. F at 4f-5f, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027) (citing the estimate of the former Director of California Department of Corrections as well as statistics from 1967 and 1969).

[FN155]. See *Furman*, 408 U.S. at 313 (White, J., concurring).

[FN156]. *Id.* at 309-10 (Stewart, J., concurring).

[FN157]. *Id.* at 293 (Brennan, J., concurring).

[FN158]. The Court's reliance on the pre-*Furman* death-sentence rate is noted in Baldus et al., *supra* note 1534, at 233, 267 n.9. See also Raymond Paternoster, *Capital Punishment in America* 167-68 (1991) (“[I]f a death sentence is imposed in fewer than [twenty] percent20% 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.”).

[FN159]. See *Furman*, 408 U.S. at 293-94 (Brennan, J., concurring). Several Justices have put forward a variation of this argument in cases challenging the death penalty on grounds of disproportionality. In *Enmund v. Florida*, 458 U.S. 782 (1982), Justice O'Connor suggested that a low death-sentence rate, rather than serving as compelling evidence that the death penalty was being inflicted arbitrarily and that society rejected the penalty for a certain class of offenses, might reflect only that the sentencers were “especially cautious” about imposing

the death penalty. See *id.* at 819 (O'Connor, J., dissenting). In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia sounded the same theme—that a low death-sentence rate for juvenile offenders did not necessarily indicate that prosecutors and juries rejected the penalty in such cases but instead indicated that prosecutors and juries were appropriately accounting for age. *Id.* at 373-74.

[FN160]. See *Furman*, 408 U.S. at 392-94 (Brennan, J., concurring).

[FN161]. Baldus et al., *supra* note 1534, at 87-88.

[FN162]. *Furman*, 408 U.S. at 311 (White, J., concurring).

[FN163]. See *id.*

[FN164]. *Id.* at 312. Recently, James Liebman and Lawrence Marshall have argued that the Supreme Court's post-Furman death penalty jurisprudence reflects a fundamental difference between Justice White and Justice Stewart (and later Justice Stevens) as to the meaning of Furman. See James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *Fordham L. Rev.* 1607, 1609-12 (2006).

Justices Stewart's and White's diagnoses and solutions were contradictory. Justice Stewart believed the penalty was imposed too indiscriminately and that the solution was “narrowing”: less death sentencing as a result of more carefully limiting the categories of offenders who were eligible for the death penalty. Justice White believed the penalty was imposed too sparingly and that the solution was “numerousness”: more death sentencing.

*Id.* at 1609-10. Plainly, as it later developed, there was a fundamental disagreement between Justices Stewart and Stevens and Justice White about whether the Eighth Amendment required the sentencer to consider mitigating evidence or required that the sentencer be given broad discretion to select a sentence. Compare *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (finding in an opinion joined by Justices Stewart, Powell, and Stevens, that a statute was unconstitutional because it failed to allow consideration of relevant factors before the imposition of a death sentence), and *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (concluding in an opinion by Chief Justice Burger, joined by Justices Stewart, Powell, and Stevens, that the Eighth Amendment requires the sentencer to consider mitigating factors), with *Roberts v. Louisiana*, 428 U.S. 325, 346, 356-58 (1976) (White, J., dissenting) (arguing that unfettered jury discretion in applying the death penalty led to invalidation in *Furman* and that a separate consideration of mitigating factors is not required), and *Lockett v. Ohio*, 438 U.S. 586, 621-23 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment) (disagreeing with the holding that imposing the death penalty is constitutional only if the sentencer is allowed discretion to consider all mitigating circumstances). However, the Justices were in complete agreement on the point central to the argument here—that *Furman* required that a substantial narrowing of the death-eligible class. See Liebman & Marshall, *supra*, at 1641. Justice White authored the plurality opinion (joined by Justices Stewart and Stevens) in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the Eighth Amendment barred the death penalty for rape), and the majority opinion (joined by Justice Stevens) in *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding that the Eighth Amendment barred the death penalty for a getaway driver in a felony-murder), and he joined that portion of Justice Stevens' opinion in *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (holding that states had to “genuinely narrow” the death-eligible class). See *id.* at 891-93 (White, J., concurring in part and concurring in the judgment).

[FN165]. Ga. Code Ann. § 27-2534.1(b) (1973) (current version at *Ga. Code Ann.* § 17-10-30(b) (West 2007)). The 2006 amendment added one more aggravating circumstance. *Ga. Code Ann.* § 17-10-30(b)(11) (2007) (adding a previous conviction for rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery as an aggravating circumstance).

[FN166]. 428 U.S. 153, 207 (1976). The death-sentence rate rose to twenty-three percent<sup>23%</sup> under the revised Georgia scheme. Baldus et al., *supra* note 1534, at 89.

[FN167]. 462 U.S. 862 (1983).

[FN168]. *Id.* at 877-78.

[FN169]. *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (quoting *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring)).

[FN170]. Concededly, the Court itself has not referred to the death-sentence rate in its post-Furman “genuine narrowing” cases. *Lowenfield v. Phelps*, 484 U.S. 231 (1988), is the only case to consider a genuine narrowing challenge to a death penalty scheme as a whole. See *id.* at 241. There, the defendant argued that the Louisiana scheme failed to narrow because the aggravating circumstances duplicated elements of first-degree murder-i.e., there was no narrowing of the death-eligible class at the penalty phase. *Id.* The Court, without reference to any empirical data, held that the definition of first-degree murder itself-a killing in one of five specific circumstances when “the offender has a specific intent to kill or to inflict great bodily harm”-was sufficiently narrow to satisfy the genuine narrowing principle. *Id.* at 246.

[FN171]. See *Gregg*, 428 U.S. at 205-06.

[FN172]. See *Shell v. Mississippi*, 498 U.S. 1, 1 (1990) (per curiam); *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 433 (1980).

[FN173]. See *Shell*, 498 U.S. at 3 (Marshall, J., concurring); *Maynard*, 486 U.S. at 363-64; *Godfrey*, 446 U.S. at 428-29.

[FN174]. 29 F.3d 1312 (9th Cir. 1994).

[FN175]. *Id.* at 1320 (quoting *People v. Davenport*, 710 P.2d 861, 871 (Cal. 1985)).

[FN176]. 36 F.3d 1439 (9th Cir. 1994).

[FN177]. *Id.* at 143-44.

[FN178]. See *supra* note 1489 and accompanying text.

[FN179]. See *supra* note 14950 and accompanying text.

[FN180]. Although the class of ordinary robbery-burglary murder encompasses a wide range of individual culpability, even a narrower class, e.g., limited to those who kill intentionally, would not satisfy the Furman-Zant principle. It is reasonable to assume that the majority of felony-murderers killed intentionally. See *Lockett v. Ohio*, 438 U.S. 586, 625 n.7 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment) (calling unintentional killings by triggermen “rare”). While presumably the death-sentence rate for intentional robbery-burglary murderers is higher than for unintentional robbery-burglary murderers, given that the five percent<sup>5%</sup> death-sentence rate is the rate for a class already primarily composed of intentional murderers, limiting the class to intentional murderers would have only a minimal effect on the rate.

[FN181]. See, e.g., *People v. Ramirez*, 139 P.3d 64, 117 (Cal. 2006); *People v. Gray*, 118 P.3d 496, 543 (Cal. 2005).

[FN182]. See [Tuilaepa v. California](#), 512 U.S. 967, 978-79 (1994).

[FN183]. [People v. Leonard](#), 157 P.3d 973, 1014 (Cal. 2007); [People v. Frye](#), 959 P.2d 183, 262 (Cal. 1998).

[FN184]. See, e.g., [People v. Box](#), 5 P.3d 130, 174 (Cal. 2000); [People v. Riel](#), 998 P.2d 969, 1017-18 (2000). But see [People v. Avena](#), 916 P.2d 1000, 1032 (Cal. 1996) (engaging in intracase proportionality review but declining to find death sentence disproportionate). The court has been inconsistent in its labeling of this form of review. Compare [People v. Viera](#), 106 P.3d 990, 1014 (Cal. 2005) and [Box](#), 5 P.3d at 174 (labeling it as “intracase” proportionality review), with [Riel](#), 998 P.2d at 1017-18, and [People v. Ramos](#), 938 P.2d 950, 982 (Cal. 1997) (labeling it as “intercase” proportionality review).

[FN185]. See, e.g., [People v. Lenart](#), 88 P.3d 498, 609-10 (Cal. 2004) (explaining that defendants who request individual proportionality review are entitled to it); [People v. Lawley](#), 38 P.3d 461, 508-09 (Cal. 2002).

[FN186]. See, e.g., [Lenart](#), 88 P.3d at 610; [People v. Navarette](#), 66 P.3d at 1182, 1222 (Cal. 2003); [Lawley](#), 38 P.3d at 509; [People v. Anderson](#), 22 P.3d at 387; [Crittenden](#), 885 P.2d at 932, 347, 387 (Cal. 2001); [People v. Crittenden](#), 885 P.2d 887, 932 (Cal. 1994).

[FN187]. As noted above, the application of the Furman-Zant principle is state-specific. See *supra* note 11 and accompanying text. The fact that California prosecutors and jurors rarely impose the death penalty on ordinary robbery-burglary murderers may suggest, but certainly cannot establish, that prosecutors and jurors in Georgia or Idaho, for example, are similarly inclined. What is needed is empirical research on death-sentence rates for particular kinds of murder in those states.

[FN188]. Applying the same analysis, the lying-in-wait special circumstance is even more clearly unconstitutional: the death-sentence rate for lying-in-wait murders unaccompanied by more aggravating circumstances was zero percent in the Alameda County Study and very close to zero percent in the Statewide Study. Nevertheless, a divided panel of the Ninth Circuit recently came to the opposite conclusion regarding the constitutionality of the circumstance. See [Morales v. Woodford](#), 388 F.3d 1159, 1175 (9th Cir. 2004). The panel majority framed the issue as whether the lying-in-wait circumstance was so broad that it embraced all first-degree murders. *Id.* at 1175-76. Citing to the facts from four first-degree-murder cases (and three imagined scenarios), the majority concluded that it was not so broad. *Id.* However, the issue is not whether the lying-in-wait circumstance is congruent or substantially congruent with first-degree murder—it plainly is not because most first-degree felony-murders (and all unintentional first-degree felony-murders) are not lying-in-wait murders. The issue is to what extent the lying-in-wait special circumstance excludes from death eligibility first-degree murderers who are not otherwise death-eligible. For that reason, three of the four cases cited by the majority are irrelevant because the defendants in those cases were otherwise death-eligible. See [People v. Batts](#), 68 P.3d 357, 361-62 (Cal. 2003) (gang killing); [In re Andrews](#), 52 P.3d 656, 658-59 (Cal. 2002) (multiple-murder and robbery); [People v. Anderson](#), 50 P.3d 368, 370 (Cal. 2002) (kidnapping and torture). The fourth case, [People v. Reynoso](#), 74 P.3d 852 (Cal. 2003), might be a first-degree (premeditated) murder case that is not a lying-in-wait case, but the facts stated in the opinion are insufficient to make that determination. See *id.* at 855. Nevertheless, “genuine narrowing” cannot be satisfied if only a rare defendant is rendered death-ineligible by the aggravating factor. What the panel needed to know, but never determined, is what percentage of premeditated murders are not lying-in-wait murders, and what percentage of lying-in-wait murderers are sentenced to death. The answer is that very few premeditated murders are not also lying-in-wait murders, and virtually no lying-in-wait murderers, who are death-eligible for that reason alone, are sentenced to death.

[FN189]. 428 U.S. 153 (1976).

[FN190]. See *id.* at 173; *Atkins v. Virginia*, 536 U.S. 304, 311-13 (2002).

[FN191]. See *Gregg*, 428 U.S. at 173.

[FN192]. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

[FN193]. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

[FN194]. *Coker*, 433 U.S. at 596 (“The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.”) (quoting *Gregg*, 428 U.S. at 181); *Enmund v. Florida*, 458 U.S. 782, 796 (1982) (“[I]t would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive . . .”).

[FN195]. See *Roper v. Simmons*, 543 U.S. 551, 569-71, 575-78 (2005); *Atkins*, 536 U.S. at 316 & n.21.

[FN196]. *Enmund*, 458 U.S. at 798 (quoting *Coker*, 433 U.S. at 592).

[FN197]. 433 U.S. 584 (1977).

[FN198]. *Id.* at 592.

[FN199]. *Id.* at 595-96.

[FN200]. *Id.* at 596-97.

[FN201]. *Id.* at 598.

[FN202]. *Id.* at 599.

[FN203]. *Enmund v. Florida*, 458 U.S. at 782, 784, 797 (1982).

[FN204]. *Id.* at 792-93.

[FN205]. *Id.* at 796 n.22.

[FN206]. *Id.* at 798-99.

[FN207]. *Id.* at 801.

[FN208]. *Id.* at 822 (O'Connor, J., dissenting). The “curious counting” arose because the majority and dissent were answering different questions. For the majority, the question was how many states authorized the death penalty for felony-murder simpliciter, i.e., without proof of mens rea or other statutory aggravating circumstance. For the dissent, the question was how many states authorized the death penalty without proof of intent to kill on the part of the defendant. This difference led to different “counting” of the states that authorized the death penalty for felony-murderers, without proof of intent to kill, but with proof of an additional aggravating circumstance or at least major participation in the felony. This difference in counting was reprised in *Tison*. See Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 *Ariz. L. Rev.* 819, 825-33 (1990) (analyzing in detail the two approaches to counting the states).

[FN209]. *Enmund*, 458 U.S. at 818-19 (O'Connor, J., dissenting). Justice O'Connor's first point raises questions

about the dissenters' understanding of the basic premises of Furman. She implied that the concern about the risk of arbitrariness was a concern about juries alone rather than a concern about the combined actions of prosecutors and juries. The majority rightly rejected this suggestion. *Id.* at 796 (majority opinion).

[FN210]. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987). Justice White, who wrote the majority opinion in *Enmund*, cast the fifth vote for the majority in *Tison* without any explanation of how Justice O'Connor's opinion could be harmonized with his views in *Enmund*. The four other members of the *Enmund* majority dissented in *Tison*. See *Enmund*, 458 U.S. at 782; *Tison*, 481 U.S. at 137.

[FN211]. *Tison*, 481 U.S. at 154.

[FN212]. *Id.* at 157. Justice O'Connor, in effect, adopted the common law-law implied-malice standard, a standard recognized as a basis of murder in California. See *People v. Estrada*, 904 P.2d 1197, 1202 (Cal. 1995). While she was correct that, at the common law, no distinction was made between intentional murders (express malice) and reckless indifference murders (implied malice), current penal codes, including that of California, distinguish between premeditated (intentional) murder and reckless indifference murder, making only the former first-degree murder. See *Cal. Penal Code* § 189 (West 2007).

[FN213]. *Tison*, 481 U.S. at 158. Although Justice O'Connor asserted that there are some felonies as to which major participation necessarily exhibits reckless indifference, in remanding the case to the Arizona courts for consideration of the issue of reckless indifference, she necessarily determined that robbery—even armed robbery—was not such a felony. See *id.* at 158 & n.12.

[FN214]. *Id.* at 174-75 (Brennan, J., dissenting).

[FN215]. *Id.* at 175.

[FN216]. *Id.* at 176.

[FN217]. *Id.* at 172-74, 173 n.11.

[FN218]. See *supra* Part II.A.

[FN219]. See *People v. Mora*, 46 Cal. Rptr. 2d 99, 105 (Cal. Ct. App. 1995).

[FN220]. See 438 U.S. 586, 621 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment).

[FN221]. *Enmund v. Florida*, 458 U.S. at 782, 797 (1982).

[FN222]. For example, consider “attempt to kill” and “intend to kill.” Because an attempt to kill necessarily includes an intent to kill, it makes no sense to read these as alternative bases for death-eligibility because one subsumes the other.

[FN223]. *Enmund*, 458 U.S. at 798 (quoting H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 162 (1968)).

[FN224]. *Id.* at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

[FN225]. *Id.* at 800 (alteration in original) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

[FN226]. See [Lockett v. Ohio](#), 438 U.S. 586, 621 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment).

[FN227]. *Id.* at 626, 628 (citation omitted).

[FN228]. See *id.* at 624-25 & n.7 (explaining that cases where “triggermen” lacked an intent to kill “will of necessity be rare”).

[FN229]. Although Justice White, in *Tison*, clearly retreated from his position in *Lockett* and *Enmund*—that the Eighth Amendment required proof of intent to kill—it seems highly unlikely that he would have retreated so far as to permit the imposition of the death penalty for a negligent or accidental killing.

[FN230]. 474 U.S. 376 (1986).

[FN231]. See [People v. Anderson](#), 742 P.2d 1306, 1326 (Cal. 1987).

[FN232]. [Bullock](#), 474 U.S. at 377.

[FN233]. *Id.* at 378 (quoting [Enmund v. Florida](#), 458 U.S. 782, 797 (1982)).

[FN234]. [Tison v. Arizona](#), 481 U.S. 137 (1987).

[FN235]. *Id.* at 157-58.

[FN236]. *Id.* at 168-73 (Brennan, J., dissenting).

[FN237]. *Id.* at 157-58 (majority opinion).

[FN238]. 524 U.S. 88 (1998).

[FN239]. *Id.* at 91.

[FN240]. See [Reeves v. Hopkins](#), 102 F.3d 977, 978, 984 (8th Cir. 1996), *rev'd*, 524 U.S. 88 (1998).

[FN241]. [Hopkins](#), 524 U.S. at 99-100 (citations and footnotes omitted) (emphasis added). Whether the Court's holding—that the *Enmund-Tison* finding need not be made by a jury, nor even in the trial court—survives [Ring v. Arizona](#), 536 U.S. 584, 588 (2002) (holding that a defendant is entitled to a jury trial of any fact that increases the maximum punishment), is yet to be determined.

[FN242]. See [Lear v. Cowan](#), 220 F.3d 825, 828 (7th Cir. 2000); [Reeves v. Hopkins](#), 102 F.3d 977, 984-85 (8th Cir. 1996), *rev'd* on other grounds, 524 U.S. 88 (1998); [Woratzek v. Stewart](#), 97 F.3d 329, 335 (9th Cir. 1996); [United States v. Cheely](#), 36 F.3d 1439, 1443 n.9 (9th Cir. 1994); [Loving v. Hart](#), 47 M.J. 438, 443 (C.A.A.F. 1998).; Ssee also [State v. Middlebrooks](#), 840 S.W.2d 317, 345 (Tenn. 1992). But see [Murray v. Delo](#), 34 F.3d 1367, 1376 (8th Cir. 1994). In *Loving*, a pre-*Reeves* case, the court provided a thoughtful analysis of *Enmund* and *Tison*:

As highlighted by Justice Scalia in the *Loving* oral argument [referring to [Loving v. United States](#), 517 U.S. 748 (1996)], the phrase “actually killed” could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, expressing his

view that “it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.” Without speculating on the views of the current membership of the Supreme Court, we conclude that when Enmund and Tison were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, “actually killed,” as used in Enmund and Tison, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

[Loving](#), 47 M.J. at 443 (citations omitted).

[FN243]. Even were it not abundantly clear from the decisions of the Supreme Court and lower federal courts that the Enmund-Tison principle applies to actual killers, application of the Court's two-part proportionality analysis would dictate such a result. See *infra* Part IV.B. The conclusion that California cannot constitutionally impose a death sentence for felony-murder simpliciter applies as well to the handful of other states that follow the same rule. See *infra* note 2467 and accompanying text.

[FN244]. See [Tison v. Arizona](#), 481 U.S. 137, 139-41 (1987).

[FN245]. *Id.*

[FN246]. [Atkins v. Virginia](#), 536 U.S. 304, 312 (2002) (quoting [Penry v. Lynaugh](#), 492 U.S. 302, 331 (1989)).

[FN247]. [Fla. Stat. Ann. §§ 782.04, 921.141\(5\)\(d\)](#) (West 2007); [Ga. Code Ann. §§ 16-5-1, 17-10-30\(b\)\(2\)](#) (2007); [Idaho Code Ann. §§ 18-4003\(d\), 19-2515\(9\)\(g\)](#) (2007); [Md. Code Ann., Crim. Law §§ 2-201, 303](#) (West 2007); [Miss. Code Ann. §§ 97-3-19\(2\)\(e\) & \(f\), 99-19-101\(5\)\(d\)](#) (2007). The position of Florida is not altogether clear because the Florida Supreme Court has applied the Enmund-Tison principle to actual killers, see [Stephens v. State](#), 787 So. 2d 747, 759-61 (Fla. 2001), and has apparently never upheld a death sentence on the basis of a felony-murder aggravator alone. Hon. O.H. Eaton, Jr., [Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida](#), 34 *Stetson L. Rev.* 9, 50 (2004). The position of Mississippi also is not clear because its supreme court stated, in a case involving an actual killer:, its supreme court stated, “[T]o the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty, pursuant to [Enmund v. Florida](#), 458 U.S. 782, 796 (1982).” [West v. State](#), 725 So. 2d 872, 895 (Miss. 1998).

[FN248]. See [Ark. Code Ann. § 5-10-101\(a\)\(1\)](#) (2006); [Del. Code Ann. tit. 11, § 4209\(e\)](#) (2007); [720 Ill. Comp. Stat. Ann. 5/9-1\(6\)\(b\)](#) (West 2007); [Ky. Rev. Stat. Ann. §§ 532.025, 507.020](#) (West 20067); [La. Rev. Stat. Ann. § 14:30\(A\)\(1\)](#) (20067); [Tenn. Code Ann. §§ 39-13-202, 39-13-204\(i\)\(7\)](#) (2007); [Manual for Courts-Martial, United States, R.C.M. 1004\(c\)](#) (2005).

[FN249]. See, e.g., [Mo. Rev. Stat. § 565.020](#) (2007); [N.J. Stat. Ann. § 2c:11-3](#) (West 2007).

[FN250]. E.g., [Ariz. Rev. Stat. Ann. § 13-703\(F\)](#) (2006); [S.D. Codified Laws § 23A-27A-1](#) (2006).

[FN251]. E.g., [McConnell v. State](#), 102 P.3d 606, 620-24 (Nev. 2004); [State v. Gregory](#), 459 S.E.2d 638, 665 (N.C. 1995).

[FN252]. E.g., [Ohio Rev. Code Ann. § 2903.01\(D\)](#) (West 2007); [Tex. Penal Code Ann. § 19.03\(a\)\(2\)](#) (Vernon 2007).

[FN253]. 536 U.S. 304, 314-16 (2002) (finding a national consensus against the execution of mentally retarded offenders).

[FN254]. 543 U.S. 551, 564 (2005) (finding a national consensus against the death penalty for juveniles).

[FN255]. See supra notes 192-93193-94 and accompanying text.

[FN256]. *Enmund v. Florida*, 458 U.S. 782, 794-95 (1982). Of course, without evidence of how many non-killing accomplices were death-eligible and were not sentenced to death, these data fell short of “proving” that prosecutors and juries rejected the death penalty for such defendants. See Finkel, supra note 2078, at 841-43 (arguing that the evidence is “so flawed” that nothing can be concluded about the sentiments of prosecutors or jurors).

[FN257]. See supra note 1489 and accompanying text.

[FN258]. *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977).

[FN259]. See supra Part II.B.3.

[FN260]. See *Roper v. Simmons*, 543 U.S. 551, 569-78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

[FN261]. Symposium, Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report, 80 *Ind. L.J.* 1, 5 (2005).

[FN262]. Report of the Governor's Commission on Capital Punishment 72 (Apr. 15, 2002), available at [http://www.state.il.us/defender/report/complete\\_report.pdf](http://www.state.il.us/defender/report/complete_report.pdf).

[FN263]. *Id.* at 72-73. See also the recommendation of the bipartisan Constitution Project that Tison be abandoned in favor of *Enmund*. The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 14-15 (2001), available at <http://www.constitutionproject.org/pdf/mandatoryJustice1.pdf>.

[FN264]. Liebman & Marshall, supra note 1634, at 1668.

[FN265]. *Id.* at 1671.

[FN266]. Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 *Pace L. Rev.* 107, 176 (2003).

[FN267]. *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)).

[FN268]. International Covenant on Civil and Political Rights, art. 6(2), adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Jan. 3, 1976); see also American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 4(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[FN269]. E.S.C. Res. 1984/50, U.N. ESCOR, 1984 Sess., Supp. No. 1, U.N. Doc. E/1984/84 (1984). The safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding, they provide strong evidence of an international consensus on this point. “[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting

for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight.” [Restatement \(Third\) of the Foreign Relations Law of the United States § 103](#) cmt. c (1986).

[FN270]. G.A. Res. 39/118, 2, U.N. Doc. A/RES/39/118 (Dec. 14, 1984).

[FN271]. E.S.C. Res. 1984/50, supra note 2689, 1.

[FN272]. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission Resolution 1997/61 21, U.N. Doc., E/CN.4/1998/68/Add.3 (Jan. 22, 1998), available at [http://www.extrajudicialexecutions.org/reports/E\\_CN\\_4\\_1998\\_68\\_Add\\_3.pdf](http://www.extrajudicialexecutions.org/reports/E_CN_4_1998_68_Add_3.pdf).

[FN273]. *Enmund v. Florida*, 458 U.S. at 782, 798 (1982) (quoting Hart, supra note 2223, at 162).

[FN274]. *Tison v. Arizona*, 481 U.S. 137, 156 (1987). The deeply ingrained distinction between those who kill intentionally and those who kill unintentionally can be traced to the Old Testament, which authorized the death penalty for those who killed intentionally but permitted those who killed unintentionally to obtain sanctuary. Exodus 21:12-14; Deuteronomy 19:4, 19:11-12. This distinction made by Mosiac Law was incorporated into English law more than 1,000 years ago. 1 James F. Stephen, *A History of the Criminal Law of England* 55 (London, MacMillan 1883).

[FN275]. Relying on empirical data and econometric models, some scholars have recently argued that the death penalty has some deterrent effect. See, e.g., H. Naci Mocan & R. Kaj Gittings, [Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment](#), 46 *J.L. & Econ.* 453, 453-56 (2003); Joanna M. Shepherd, [Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States](#), 104 *Mich. L. Rev.* 203, 204 (2005). The argument that the data demonstrate any deterrent effect has been criticized as based on faulty assumptions and methodological errors. See, e.g., Richard Berk, [New Claims about Executions and General Deterrence: Deja Vu All Over Again?](#), 2 *J. Empirical Legal Stud.* 303, 303-04 (2005); John J. Donohue & Justin Wolfers, [Uses and Abuses of Empirical Evidence in the Death Penalty Debate](#), 58 *Stan. L. Rev.* 791, 794 (2005).

[FN276]. See *People v. Smith*, 678 P.2d 886, 891 (Cal. 1984) (“[T]he ostensible purpose of the felony-murder rule is not to deter the underlying felony, but instead to deter negligent or accidental killings that may occur in the course of committing that felony.”). But cf. *People v. Robertson*, 95 P.3d 872, 877 (Cal. 2004) (holding that the purpose of the felony-murder rule is to deter felonies as well as negligent and accidental killings in the course of felonies).

[FN277]. *Enmund*, 458 U.S. at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

[FN278]. *Id.* at 798-99 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)); accord *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

[FN279]. *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (stating that “common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct”).

[FN280]. Even those scholars who argue that the death penalty has a deterrent effect under certain circumstances, concede that, to achieve such an effect, the state must execute a sufficient number of people. See, e.g., Shepherd, supra note 2745, at 248 (“[T]o achieve deterrence, states must generally execute many people. If a

state is unwilling to establish such a large execution program, it should consider abandoning capital punishment.”).

[FN281]. See *supra* Part II.B.3.

[FN282]. See *supra* note 2456 and accompanying text.

[FN283]. 517 U.S. 748 (1996).

[FN284]. *Id.* at 755-56.

[FN285]. See *supra* notes 52-54 and accompanying text. It should be noted that the Supreme Court has never passed on the validity of California's definition of death-eligibility. See *Tuilaepa v. California*, 512 U.S. 967, 993-94 (1994) (Blackmun, J., dissenting) (noting that the California scheme creates “an extraordinarily large death pool” and observing that the Court had never given the scheme “a clean bill of health”).

[FN286]. James S. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It, at i (2002), available at <http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii.html>.

[FN287]. James S. Liebman et al., A Broken System, Part I: Error Rates in Capital Cases, 1973-1995, at 6 (2000), available at <http://www.thejusticeproject.org/press/reports/liebman-part-1.html>.

[FN288]. *McCleskey v. Kemp*, 481 U.S. 279, 287 n.5 (1987).

[FN289]. See Rosen, *supra* note 55, at 1117-20 (collecting studies).

[FN290]. Pierce & Radelet, *supra* note 1267, at 38.

[FN291]. *Id.* at 27-28.

[FN292]. Nonetheless, despite the apparent overbreadth of the California death penalty scheme and the concerns it raises, the California Supreme Court, in dozens of cases over the last twenty years, has rejected “no-narrowing” challenges to the scheme, usually without explanation. See, for example, *People v. Avila*, 133 P.3d 1076, 1160 (Cal. 2006), in which the court cited *People v. Frye*, 959 P.2d 183, 261 (Cal. 1998), in which the court had relied on *People v. Bacigalupo*, 862 P.2d 808, 811-813 (Cal. 1993), a case which did not address the no-narrowing issue. In a few cases, the court has offered reasons for rejecting the challenges, including: (1) Section 190.2 “provides some criteria that may narrow the class of death-eligible persons,” *People v. Michaels*, 49 P.3d 1032, 1066 (Cal. 2002); (2) the defendant adduced no data in support of his “no-narrowing” claim, *People v. Crittenden*, 885 P.2d 887, 930 (Cal. 1994); (3) the defendant (who did produce data) relied only on published appellate case decisions when unpublished and unappealed decision might have shown a greater narrowing effect, *People v. Jones*, 70 P.3d 359, 384-85 (Cal. 2003); and (4), in any case, narrowing is not quantitative: “[r]ather the governing statutes must rationally narrow the death-eligible class in a qualitative manner-as California's statutes do,” *People v. Burgener*, 62 P.3d 1, 39 n.7 (Cal. 2003). Recently, the court offered up its most far-reaching rationale for rejecting a no-narrowing challenge: “[A]lthough at one time the United States Supreme Court suggested that a constitutionally valid death penalty law must exclude most murders from eligibility for the death penalty, that is no longer the case.” *People v. Beames*, 153 P.3d 955, 974 (Cal. 2007). In other words, in the view of the California Supreme Court, the Furman-Zant principle has been abandoned sub silentio.

State supreme courts in other states also have rejected “no-narrowing” challenges to their state's death pen-

alty scheme. See, e.g., [State v. Young](#), 853 P.2d 327, 352 (Utah 1993); [State v. Wagner](#), 752 P.2d 1136, 1157-58 (Or. 1988), vacated, 492 U.S. 914 (1989). However, all such challenges objected to schemes narrower than California's and were not based on empirical evidence of the state's death-sentence rate.

[FN293]. See [Roper v. Simmons](#), 543 U.S. 551, 571 (2005) (quoting [Atkins v. Virginia](#), 536 U.S. 304, 319 (2002)).

[FN294]. [Graham v. Collins](#), 506 U.S. 461, 501, 502 n.2 (1993) (Stevens, J., dissenting).

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