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Death by Stereotype: Race, Ethnicity, and California's Failure to Implement *Furman's* Narrowing Requirement

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Death by Stereotype: Race, Ethnicity, and California's
Failure to Implement *Furman*'s Narrowing Requirement*

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ABSTRACT

The influence of race on the administration of capital punishment in the United States had a major role in the United States Supreme Court's 1972 decision in Furman v. Georgia to invalidate death penalty statutes across the United States. To avoid discriminatory and capricious application of capital punishment, the Supreme Court held that the Eighth Amendment requires legislatures to narrow the scope of capital offenses and ensure that only the most severe crimes are subjected to the ultimate punishment. This Article demonstrates the racial and ethnic dimension of California's failure to implement this narrowing requirement. Our analysis uses a sample of 1,900 cases drawn from 27,453 California convictions for first-degree murder, second-degree murder, and voluntary manslaughter with offense dates between January 1978 and June 2002. Contrary to the teachings of Furman, we found that several of California's "special circumstances" target capital eligibility disparately based on the race or ethnicity of the defendant. In so doing, the statute appears to codify rather than ameliorate the harmful racial stereotypes that are endemic to our criminal justice system. The instantiation of racial and ethnic stereotypes into death-eligibility raises the specter of discriminatory intent in the design of California's statute, with implications for constitutional regulation of capital punishment.

I. INTRODUCTION

This Article examines the possible race and ethnic implications of California’s expansive death penalty statute, in light of the Eighth Amendment’s requirement that each state statute narrows the subclass of offenders upon whom a sentence of death may be imposed. The narrowing requirement derives from the holding announced over 45 years ago in *Furman v. Georgia*,¹ when the United States Supreme Court ruled that existing death penalty statutes violated the Eighth Amendment’s prohibition against cruel and unusual punishments. Citing statistics demonstrating arbitrary and capricious application of capital punishment, the Supreme Court held that a death-sentencing procedure is unconstitutional if it provides “no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not.”²

Four years later, in *Gregg v. Georgia*, and the companion cases, the Supreme Court reviewed the subsequently enacted statutes.³ In upholding some of the statutes, the Court in a plurality opinion explained, “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”⁴ Thus, “[t]o pass constitutional muster, a capital sentencing statute must ‘genuinely narrow the class of

¹ 408 U.S. 238 (1972).

² *Id.* at 313 (White, J., concurring); *see also Maynard v. Cartwright*, 486 U.S. 356, 362 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (plurality opinion).

³ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1972); *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁴ *Gregg*, 428 U.S. at 189 (plurality opinion) *see also Zant v. Stephens*, 462 U.S. 862, 878 (1983) (explaining that the purpose of the narrowing requirement is to insure “that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”). The Court invalidated statutes that require the mandatory imposition of a death sentence precisely because they do not permit individualized sentencing decisions. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

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.”⁵ Importantly, the Court has required that the requisite direction and limitation be provided by statute, so that the selection of the persons eligible to be sentenced to death be “circumscribed by . . . legislative guidelines.”⁶ This constitutional guidance was designed to limit the discretion of individual prosecutors to charge capital defendants and sentencers to impose death sentences.

In previous research, we presented empirical findings regarding California’s death penalty scheme.⁷ We found that the scope of death eligibility under California law following the decision in *Furman* was quite expansive: 95% of first-degree murder convictions qualify under the 2008 California statute as eligible for a death sentence.⁸ We also found that that only a fraction of those eligible for a death sentence were actually sentenced to death: Only 4.6% of those persons who have committed a factually eligible capital murder were sentenced to death, a rate that is far lower than the 15-20 percent rate

⁵ *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant*, 462 U.S. at 877).

⁶ *Gregg v. Georgia*, 428 U.S. at 207 (emphasis added); see also *Brown v. Sanders*, 546 U.S. 212, 216, & n. 2 (2006) (“To satisfy the ‘narrowing requirement,’ a *state legislature* must adopt ‘statutory factors which determine death eligibility’ and thereby ‘limit the class of murderers to which the death penalty may be applied.’”) (emphasis added).

⁷ David Baldus, George Woodworth, Michael Laurence, Jeffrey Fagan, Catherine Grosso, & Richard Newell, *Furman at 45: Constitutional Challenges from California’s Failure to (Again) Narrow Death Eligibility* [“*Furman at 45*”] (under review, available from authors on request). These findings previously were submitted on behalf of two California death row inmates who have challenged the constitutionality of the death sentences in part because of the failure of the California statute to satisfy the narrowing requirements of *Furman*. The inmates, Jerry Frye and Troy Ashmus, are challenging their convictions and death sentences in federal habeas corpus proceedings. *Frye v. Warden*, Case No. 2:99-cv-0628 (E.D. Cal.); *Ashmus v. Wong*, Case No. 93-cv-0594 (N.D. Cal.).

⁸ We also found a death-eligibility rate of 59% for those convicted of first-degree and second-degree murder and voluntary manslaughter and that 86% of the factually first degree murder cases are death eligible. *Furman at 45*, *supra* note 7.

that the *Furman* Court viewed as evidence of arbitrariness.⁹

This Article builds on that foundation and shows that, contrary to the teachings of *Furman*, six of California’s “special circumstances” target capital eligibility based on the race or ethnicity of the defendant. In so doing, the statute appears to codify rather than ameliorate the harmful racial stereotypes that are endemic to our criminal justice system.¹⁰

Part II presents a closer look at *Furman v. Georgia* and the jurisprudence around race and capital punishment. Part III examines California’s capital punishment statutes with special attention to the state’s response to the Eighth Amendment narrowing requirements. Part IV turns to the academic literature studying *Furman*’s mandates, before reviewing, in brief, ways in which race and ethnicity have been central to the administration of capital punishment in the United States. Part V explains the details of our empirical study, including coding decisions and challenges. Part VI presents our findings, demonstrating that six of California’s special circumstances apply disparately based on race and ethnicity. Finally, in Part VII, we discuss the importance of these findings in light of *Furman*’s goals and requirements.

⁹ The evidence before the Court in *Furman* was that “15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.” *Furman*, 408 U.S. at 386-87 n.11 (Burger, C.J., dissenting); *id.* at 435-36 n.19 (Powell, J., dissenting) (citing Hugo Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964) (“[B]etween 1916 and 1955, 157 out of 652 persons charged with murder received the death sentence in New Jersey—about 20%; between 1956 and 1960, 13 out of 61 received the death sentence—also about 20%.”)).

¹⁰ April D. Fernandes & Robert D. Crutchfield, *Race, Crime, and Criminal Justice: Fifty Years Since The Challenge of Crime in a Free Society*, 17 CRIM. & PUBLIC POL’Y 397 (2018). See generally THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (Samuel Walker, Cassia Spohn, & Miriam DeLone eds., 2012).

II. *FURMAN*, RACE, AND CAPITAL PUNISHMENT

In *Furman v. Georgia*, the Supreme Court reviewed the application of capital punishment in the United States and held that the then-current death penalty statutes violated the Eighth and Fourteenth Amendment proscriptions against cruel and unusual punishment.¹¹ The opinions of several Justices concurring in the judgment concluded that statutes that allowed the infrequent and seemingly random imposition of the death penalty upon only a small percentage of death-eligible criminal defendants violated the prohibition against cruel and unusual punishments because they permitted the death penalty “to be so wantonly and so freakishly imposed.”¹²

Furman and its progeny made clear that the Eighth Amendment demands that legislatures set forth standards and criteria to regulate its state capital sentencing system to avoid an unconstitutional pattern of arbitrary and capricious sentences.¹³ At a minimum, to “avoid [the] constitutional flaw” of arbitrary and capricious imposition of the death penalty, state death penalty statutes, by rational and objective criteria, “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.”¹⁴

Of concern to several of the Justices in the *Furman* Majority were suggestions that death sentences impermissibly were influenced by race. Justice William Douglas

¹¹ 408 U.S. at 239 (per curiam).

¹² *Id.* at 309-10 (Stewart, J., concurring), 313 (White, J., concurring).

¹³ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) (“*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”).

¹⁴ *Zant*, 462 U.S. at 877; see also *Gregg*, 428 U.S. at 189 (stating the mandate of *Furman*).

cited racial disparities as a basis for striking down the statutes.¹⁵ Justice Potter Stewart similarly concluded that “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”¹⁶ Justice Marshall noted that racial disparities were still prevalent at the time of *Furman*, but acknowledged that the insufficient record before the Court and the Court’s prior decision in *Maxwell v. Bishop*¹⁷ prevented a finding that racial bias infected all death sentences imposed on non-white defendants.¹⁸

Four years after *Furman*, the United States Supreme Court reviewed state death penalty statutes enacted in an attempt to cure the constitutional deficiencies.¹⁹ In *Gregg v. Georgia*, the Supreme Court recognized the relevant statistics relied upon in *Furman*, and reiterated the constitutional rule that legislatures must distinguish “the few cases in which [the death penalty] is imposed from the many cases in which it is not.”²⁰ The Court in *Gregg* upheld the revised Georgia statute, finding that it adequately “narrow[ed] the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances,” which channeled the jury’s discretion and protected against

¹⁵ 408 U.S. at 245. Justice Douglas cited a host of statistical analysis finding that race had a significant role in the imposition of death sentences. *See, e.g., id.* at 249-50 (quoting the 1967 President’s Commission on Law Enforcement and the Administration of Justice, which found that “The death sentence is disproportionately imposed, and carried out on the poor, the Negro, and the members of unpopular groups.”); *id.* at 250 n.15 (quoting Professor Hugo Bedau’s conclusion that “Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference”); *id.* (citing Professor Marvin Wolfgang and his colleagues’ findings that racial basis affected the sentencing and execution of defendants in 439 death cases from 1914-1958).

¹⁶ *Id.* at 310.

¹⁷ 398 U.S. 262 (1970).

¹⁸ 408 U.S. at 449.

¹⁹ *Gregg*, 428 U.S. 153; *Jurek*, 428 U.S. 262; *Proffitt*, 428 U.S. 242.

²⁰ 428 U.S. at 182 n.26; *id.* at 188 (citing *Furman*, 408 U.S. at 313 (White, J., concurring)).

“a jury wantonly and freakishly impos[ing] the death sentence; [in that] it is always circumscribed by the legislative guidelines.”²¹

In his concurrence in *Gregg*, Justice White, joined by Chief Justice Burger and Justice Rehnquist, explained the rationale for requiring statutory narrowing and how an adequately narrowed statute objectively circumscribing the pool of death-eligible offenders would be expected to operate:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries even given discretion not to impose the death penalty will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. There is, therefore, reason to expect that Georgia’s current system would escape the infirmities which invalidated its previous system under *Furman*.²²

Thus, the Supreme Court relies upon the Eighth Amendment’s narrowing principle to assure that the selection of the smaller group of persons actually sentenced to death from among the larger group of persons who could have been so sentenced is regulated by legislatively prescribed criteria of sufficient certainty to guard against arbitrariness and caprice.²³

In 1987, in *McCleskey v. Kemp*, the United States Supreme Court reviewed the

²¹ *Id.* at 196-97, 207.

²² *Id.* at 222 (White, J., concurring); *cf. Zant*, 462 U.S. at 878 (“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.”).

²³ Chelsea Creo Sharon, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 247 (2011) (“The narrowing requirement’s primary aim is to reduce arbitrariness by confining the discretion of jurors and prosecutors to a particularly heinous group of offenders, making it more likely that culpability rather than caprice will drive their decision making.”).

application of the Georgia death penalty statute in light of statistical evidence that Georgia death sentences were impermissibly influenced by racial considerations.²⁴ The Court reaffirmed the holding in *Furman* that the Eighth Amendment is violated where “the death penalty [is] so irrationally imposed that any particular death sentence could be presumed excessive [and] . . . there was no basis for determining in any particular case whether the penalty was proportionate to the crime.”²⁵ Similarly, a “capital punishment system [that] operates in an arbitrary and capricious manner,” violates the Constitution.²⁶

The Court began its Eighth Amendment analysis of Mr. McCleskey’s statistical evidence by reviewing the procedural safeguards adopted by the Georgia Legislature to avoid such unconstitutional results.²⁷ The Court found that “[n]umerous features of the then new Georgia statute met the concerns articulated in *Furman*,” including provisions in the statute that “narrow[] the class of murders subject to the death penalty.”²⁸ As a result of these protections, the Court “lawfully may presume that McCleskey’s death sentence was not ‘wantonly and freakishly’ imposed, and thus that the sentence is not

²⁴ 481 U.S. 279 (1987).

²⁵ *Id.* at 301.

²⁶ *Id.* at 306.

²⁷ The statistical analysis, conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth, examined over 2,000 murder cases that occurred in Georgia during the 1970s. The Court summarized the findings as follows:

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims . . . [faced] 4.3 times [the odds of] . . . receiv[ing] a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

Id. at 286.

²⁸ *Id.* at 302.

disproportionate within any recognized meaning under the Eighth Amendment.”²⁹

Applying this presumption, the Court declined to accept statistical evidence proffered by Mr. McCleskey as a “constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions.”³⁰ In the more than 30 years since the *McCleskey* ruling, the Court has rarely visited the question of racial bias in death sentencing, in other than narrow holdings to correct case-specific egregious expressions of racial animus at trial.³¹

III. CALIFORNIA’S RESPONSE TO THE COURT’S EIGHTH AMENDMENT PROSCRIPTIONS

California, like several other states, has chosen to implement the narrowing requirement by broadly defining capital offenses and then requiring the sentencer to find at least one statutory aggravating factor that makes the defendant’s crime subject to a death sentence.³² The California death penalty statute defines death eligibility as the commission of a first-degree murder with the presence of one or more enumerated special

²⁹ *Id.* at 308 (citations omitted).

³⁰ *Id.* at 309. The Court also held that the statistical evidence established an equal protection violation:

For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. In *Gregg v. Georgia*, . . . this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.

Id. at 298.

³¹ *See, e.g., Buck v Davis*, 580 U.S. ___, 137 S. Ct. 759, 777 (2017) (finding defense counsel rendered deficient and prejudicial representation by introducing expert testimony Mr. Buck was statistically more likely to act violently in the future because he was Black).

³² *See, e.g., Cal. Penal Code* §§ 189, 190.2 (West 2019) (requiring the finding of the presence of an enumerated “special circumstance” before a defendant is subject to a capital sentence).

circumstances.³³ California defines first degree murder as all murder which is perpetrated by means of:

1. A destructive device,
2. Any other kind of willful, deliberate, and premeditated killing,
3. Committed in the perpetration of arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, or one of several sex crimes, or
4. Discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death.³⁴

The development and application of aggravating factors or “special circumstances” as they are termed in California, unfolded in several discrete stages to create unprecedented levels of death eligibility.³⁵ In 1977, the California Legislature enacted a relatively narrow statute that enumerated several murders as capital crimes.³⁶ A year later, the 1977 statute was replaced with the “Briggs Initiative,” which significantly expanded the scope of California’s special circumstances. The drafters of the Briggs Initiative intended for California’s death penalty to apply to “all homicides committed while the defendant was engaged in, or was an accomplice in, the commission of, the attempted commission of, or the immediate flight after committing or attempting to commit serious felonies, as well as all willful and intentional homicides,” including all

³³ Cal. Penal Code §§ 189, 190.2 (West 2019).

³⁴ Cal. Penal Code § 189 (West 2019). One of the most interesting features of the California statute, which in part creates its breadth, is its treatment of premeditation. “To prove that the killing was “deliberate and premeditated,” it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.” *Id.* § 189(d).

³⁵ After *Furman*, the California Legislature enacted a death penalty statute in 1973 that mandated imposition of the death penalty for individuals found guilty of first-degree murder when one of ten special circumstances were present. 1973 Cal. Stat. c. 719, §§ 1- 5. In 1976, the California Supreme Court invalidated the mandatory statute pursuant to the decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *Rockwell v. Superior Court*, 18 Cal. 3d 420 (1976).

³⁶ 1977-78 Reg. Sess. (Cal. 1977).

first-degree murders.³⁷ Indeed, the sponsors of the Briggs Initiative promised California voters in campaign and ballot materials that the statute would expand the applicability of the death penalty to “every murderer.”³⁸

The Briggs Initiative sought to achieve this result in two ways: first, by more than doubling the number of special circumstances delineated in the prior law, and second, by substantially broadening the definitions of the prior law’s special circumstances, most significantly by eliminating the across-the-board homicide mens rea requirement of the 1977 law.³⁹ This stage lasted approximately six years.

Next, an interim stage lasting nearly four years was created by a California Supreme Court ruling in *Carlos v. Superior Court*,⁴⁰ which held that the felony-murder special circumstances required the state to prove that a defendant possessed the intent to kill during the commission of the felony. The “*Carlos* window,” however, applies only to murders committed between December 12, 1983, the date on which *Carlos* was decided, and October 13, 1987, the date on which it was overruled in *People v.*

³⁷ Declaration of Donald H. Heller, at 1-2, submitted as Exhibit 183, in *Ashmus v. Wong*, Case No. 93-cv-0594 (N.D. Cal.) (statement of drafter of Briggs Initiative); see also W.E. Barnes, *Sen. Briggs: ‘Your Life is in Danger’*, S.F. EXAMINER & CHRONICLE, April 2, 1978, at A10.

³⁸ Declaration of Gerald F. Uelmen, at 7, submitted as Exhibit 33, in *Ashmus v. Wong*, Case No. 93-cv-0594 (N.D. Cal.).

³⁹ See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman*, 72 N.Y.U. L. REV. 1283, 1311-13 (1997); Cal. Penal Code § 190.2 (West 1988). The 1977 expansion of the application of capital punishment in California evoked widespread concern about the constitutionality of the Briggs Initiative, even from those involved in its enforcement. “Members of the law enforcement community and those charged with prosecuting offenders of the laws of California expressed constitutional concerns about the breath of the proposed initiative, with its expansive list of death-eligible crimes.” Declaration of Gerald F. Uelmen, *supra* note 38, at 7-8.

⁴⁰ 35 Cal. 3d 131 (1983). In *Carlos*, decided on December 12, 1983, the California Supreme Court held that the robbery felony-murder special circumstance (Cal. Penal Code. § 190.2(a)(17)(i)) required the state to prove that the defendant had the intent to kill or to aid in a killing. In *People v. Anderson*, 43 Cal. 3d 1104 (1987), decided October 13, 1987, the California Supreme Court overruled *Carlos*, holding that intent to kill is not a requirement to find a felony-murder special circumstance for a person who is the actual killer. *People v. Musselwhite*, 17 Cal. 4th 1216, 1265 (1998) (citations omitted).

Anderson.⁴¹

The fourth stage is the post-*Carlos* period, which continues to the present. Both before and after *Carlos*, the panoply of special circumstances continued to unfold over time in a recurring and cumulative process of ritualized statutory expansion over the course of three decades.⁴² As a result, California Penal Code section 190.2 currently contains thirty-two special circumstances that define death eligibility.⁴³

⁴¹ 43 Cal. 3d 1104 (1987).

⁴² See generally Jonathan Simon & Christina Spaulding, *Token of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 81 (Austin Sarat, ed. 1999).

⁴³ Cal. Penal Code § 190.2 (West 2019). The special circumstances are enumerated in 22 code sections, one of which, Section 17, contains 12 subsections each defining an independent basis for death eligibility. Although Penal Code section 190.2 contains 33 special circumstances, the California Supreme Court invalidated section 190.2(a)(14) as unconstitutional. *People v. Superior Court (Engert)*, 31 Cal.3d 797, 806 (1982).

In 2018, California enacted Senate Bill 1437 that narrowed the application of the state's first- and second-degree felony-murder doctrines to accomplices. 2018 Cal. Stats. c. 1015. Under the modifications to California Penal Code section 189, a person who is not the actual perpetrator of the killing is not culpable by the felony-murder doctrine unless the state proves that the person aided and abetted the killing with the intent to kill or "was a major participant in the underlying felony and acted with reckless indifference to human life." Cal. Penal Code § 189(e) (West 2019). The new standard "does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties." Cal. Penal Code § 189(f) (West 2019). With the exception of the police officer provision, the additional requirements to first-degree felony-murder incorporate the standard that has governed the felony-murder special circumstances contained in California Penal Code section since adoption of Proposition 115 in 1990.

The legislation also narrowed second-degree murder by requiring that the state prove that the defendant acted with malice. It provides that "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." Cal. Penal Code § 188(c) (West 2019). Thus, a defendant's intent to commit an underlying inherently dangerous non-homicide felony, or a finding that homicide was the natural and probable consequence of a non-homicide crime, is no longer sufficient for second-degree culpability. See, e.g., *People v. Chun*, 5 Cal. 4th 1172 (2009) (describing history and application of second-degree felony-murder rule).

Unsurprisingly, this sweeping modification of the state's expansive application of the felony-murder doctrine for murder liability is being challenged in California courts. In particular, prosecutors are arguing that the new law is invalid because it conflicts with Proposition 115, which the voter approved in 1990, a position that has been adopted by one superior court. Bob Egelko, *California Law that Rolled Back Felony-Murder Rule Violates State Constitution, Judge Says*, S.F. CHRONICLE, Feb. 12, 2019, available at <https://www.sfchronicle.com/crime/article/California-law-that-rolled-back-felony-murder-13612142.php>.

The addition of several special circumstances in the mid-1990s and 2000 are of particular concern in this study. In 1995, the California Legislature added special circumstances to Penal Code section 190.2, including murders occurring during the commission of a carjacking⁴⁴ and drive-by shootings.⁴⁵ The author of Senate Bill 9 justified the expansion of the death penalty as necessary to combat gang violence arguing, “In today’s society, gang-related shootings have become commonplace. Frequently, the victim is an unintended target, such as a child, a productive high school student with no gang affiliation, or a young mother who happens to live in the neighborhood targeted by drive-by shooters.”⁴⁶

Opponents to these provisions warned the California Legislature that “the broader the cases that are eligible for the death as a punishment, the greater the risk that the death penalty will be applied in an arbitrary and unconstitutional manner.”⁴⁷ The California Attorney General’s Office expressed concern that the various expansions of the death penalty had resulted in few crimes not covered by the California scheme.⁴⁸

⁴⁴ 1995 Cal. Stat. c. 477 § 1 (S.B. 32). California voters approved Senate Bill 32 with the passage of Proposition 195, effective March 27, 1995; 1995 Cal. Stat. c. 478 (S.B. 9), approved by voters with the passage of Proposition 196, effective March 27, 1995. As a result, the felony murder carjacking special circumstance and the juror killing special circumstance were added to the Penal Code as sections 190.2(a)(17)(L) and 190.2(a)(20), and the felony murder kidnapping special circumstance was expanded to include murders resulting from carjacking kidnapping (Penal Code section 190.2(a)(17)(B)).

⁴⁵ 1995 Cal. Stat. c. 478 (S.B. 9).

⁴⁶ Assembly Bill Analysis, Senate Bill 9 (June 26, 1995), available at http://leginfo.ca.gov/pub/95-96/bill/sen/sb_0001-0050/sb_9_cfa_950626_093857_asm_comm.html. Senate Bill 9 became effective with the passage of Proposition 196, effective March 27, 1995. The drive-by murder special circumstance was added as Penal Code section 190.2(21).

⁴⁷ Senate Committee Bill Analysis, Senate Bill 32 (Feb. 21, 1995) (citing opposition submitted by the American Civil Liberties Union), available at http://leginfo.ca.gov/pub/95-96/bill/sen/sb_0001-0050/sb_32_cfa_950221_155939_sen_comm.html.

⁴⁸ Mike Lewis, *Death Penalty Quietly Moves Into Broader Territory*, S.F. DAILY JOURNAL, Mar. 20, 1996, at 1, 1, 7 (quoting Attorney General’s Death Penalty Coordinator as “it is conceivable, although unlikely, that those who seek to further modify the law eventually could run out of legal territory to carve out.”); Mike Lewis, *Expansion of Capital Crimes Nears Passage*, HERALD RECORDER, Sept. 19, 1995, at 1, 15 (“In the abstract, you could toss a bunch more crap in there, but you have to know your constitutional

Five years later, on March 7, 2000, the voters expanded the statute again by approving Proposition 21, which, *inter alia*, added the gang-related murder special circumstance as Penal Code section 190.2(a)(22).⁴⁹ A ballot pamphlet argument urging its passage stated, “Prop 21 ends the ‘slap on the wrist’ of current law by imposing real consequences for GANG MEMBERS, RAPISTS AND MURDERERS who cannot be reached through prevention or education.”⁵⁰ In effect, the statute delegated discretion for death penalty eligibility to the police definitions of gang-related crime and rosters of persons thought to be gang members.⁵¹ As a result of the expansions of Penal Code section 190.2, preeminent California legal scholar Gerald Uelmen testified that the state of California death penalty law, “imposes no meaningful limitations on the broad discretion of prosecutors and juries to seek and impose the death penalty for first degree murders in California.”⁵² He observed, “There is nothing “special” about the special circumstances in California’s death penalty law; they have been deliberately designed to encompass nearly all first degree murders.”⁵³

Defendants facing the death penalty have challenged the constitutionality of the

limits,’ said George Williamson, chief of the criminal division in the attorney general’ office. ‘You have to be very careful.’”).

⁴⁹ Cal. Penal Code §190.2(a)(22) (West 2019).

⁵⁰ Voter Information Guide for 2000, Primary, at 48, available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2187&context=ca_ballot_props (capitals in original).

⁵¹ See, e.g., Alice Speri, *New York City Gang Database Expanded by Over 70 Percent Under Mayor Bill De Blasio*, THE INTERCEPT, June 11, 2018, available at <https://interc.pt/2y2fIVB>; *People v. James Cramer*, Court of Appeal, Sixth District, California, Santa Clara County Super. Ct. No. 211208 (reversing a conviction for drug sales because of the trial court’s admission of unduly prejudicial gang evidence proffered by police officers based on gang roster data).

⁵² Declaration of Gerald F. Uelmen, *supra* note 38, at 27.

⁵³ *Id.*

California death penalty law regularly throughout its evolution.⁵⁴ The California Supreme Court consistently has held that the California statute satisfied the constitutionally required narrowing function by the use of the special circumstances set forth in California Penal Code section 190.2(a).⁵⁵ As the California Supreme Court held in *People v. Bacigalupo*, under the California 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.”⁵⁶

IV. OVERBREADTH, RACE, AND CAPITAL PUNISHMENT

This section provides a brief context in the literature for the findings presented below. We first review the literature on measuring the success of capital punishment statutes to fulfill the narrowing mandate arising from *Furman*. We then turn to the history of race and capital punishment and review of some of the many ways that race has been a significant concern throughout the history of capital punishment in the United States.

A. Furman’s Failure: Overbreadth in Charging of Capital Murder

Furman, Gregg, and the subsequent cases should have produced, across the states

⁵⁴ Westlaw reports that, as of March 8, 2019, almost 2,000 opinions relating to Cal. Penal Code §190.2 have been published by the California Supreme Court alone and more than 800 have been brought in federal courts.

⁵⁵ Cal. Penal Code §190.2 (West 2019).

⁵⁶ 6 Cal. 4th 457, 468 (1993); *see also id.* at 477 (emphasizing that the section 190.3 aggravating factors used in the selection phase of the California death penalty scheme “do not perform a ‘narrowing’ function”); *see also People v. Visciotti*, 2 Cal. 4th 1, 74-75 (1992) (rejecting the application of the requirement of *Furman* and *Maynard* that the section 190.3 aggravating factors in the selection phase of the California death penalty scheme must limit “open-ended discretion” because they do not perform a narrowing function; rather, under California’s death penalty statute, special circumstances in section 190.2 function “to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty”); *People v. Cornwell*, 37 Cal. 4th 50, 102 (2005) (“The state death penalty scheme meets Eighth Amendment requirements through its listing of special circumstances; the aggravating and mitigating circumstances referred to in section 190.3 do not and need not perform a narrowing function.”).

authorizing capital punishment, a narrow set of cases that could clearly identify those whose crimes are readily distinguished from other “ordinary murders.” The evidence to date, however, suggests that these requirements have not been met. Relatively few studies estimate the rate of death eligibility using research at the case level because of the vast scope of such an undertaking, as demonstrated by this study. The studies that have been done, however, raised serious questions about the ability of the post-*Furman* statutory schemes to narrow meaningfully the class of cases identified by state statutes as death eligible.⁵⁷ A second set of studies provide an estimate of death sentencing among death eligible homicides, again suggesting that the substantial narrowing requirements of *Furman* and *Gregg* have not been applied successfully.⁵⁸

⁵⁷ See, e.g., Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1326 (1997) (finding that 84% of first-degree California murder cases were death-eligible under the statute, and that 9.6% of those cases resulted in a death sentence); David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 268, n.31 (1990) (finding that 86% of murder cases in Georgia in the first five years of the post-*Furman* regime (1988-1992) were death eligible); Justin Marceau & Sam Kamin, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 Colo. L. Rev. 1069, 1098 (2012) (finding that Colorado’s capital sentencing system defined 92% of factually or actually first degree murder cases as death eligible); Raymond Paternoster et al., *Justice by Geography and Race: The Administrative of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. ON RACE, RELIGION, GENDER, & CLASS 1, 18-19 & 52, fig. 1 (2004) (finding that approximately 21% of first and second degree murder cases between August 1978 and September 1999 were death eligible (1311 of approximately 6,000)); David C. Baldus, George Woodworth, Catherine M. Grosso, & Aaron M. Christet, *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, 541 & n.181 (2002) (finding that 25% of homicides (175/ 689) were death eligible under the Nebraska death sentencing system between 1973 and 1999); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131 (2008) (estimating a 3-5% death sentencing rate based on carefully curated Supplemental Homicide Reports on Texas homicides as estimates). But see George Brauchlerd & Rich Ormand, *Lies, Damn Lies, and Anti-Death Penalty Research*, 93 DENV. L. REV. 635 (2016) (presenting the article as “in part, a rebuttal to” Marceau and Kamin).

⁵⁸ See, e.g., Barbara O’Brien, Catherine M. Grosso, George Woodworth, & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. REV. 1997, 2023 & 2024, tbl.2 (2016) (estimating that death-eligible murder cases in North Carolina during the 1990-2009 study period resulted in a death sentence in an estimated 6% of the cases); John J. Donohue, III, *An Empirical Evaluation of the Connecticut Death Penalty System since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities*, 11 J. EMPIRICAL LEGAL STUD. 637, 645-47 tbl.1 (2014) (reporting that the Connecticut capital sentencing scheme between 1993 and 2007 starts from the universe of death eligible homicides and estimates that 5.8% of death eligible homicides resulted in a death

Most importantly for this Article, our earlier findings report that California's death penalty statute fails to comply with the Eighth Amendment's narrowing test. First, we found that the death-eligibility rate among California homicide cases is the highest in the nation during the study period. We found that 95% of all first-degree murder convictions and 59% of all second-degree murder and voluntary manslaughter convictions were death eligible under California's 2008 statute. Second, we documented that a death sentence is imposed in only a small fraction of the death-eligible cases. As a result, the California death sentencing rate of 4.4% among all death-eligible cases is among the lowest in the nation and over two-thirds lower than the death-sentencing rate in pre-*Furman* Georgia.⁵⁹

Although, as presented below, a number of studies of charging and sentencing outcomes have sought to identify potential racial disparities arising from the application of statutes, no previous study has closely examined racial disparities in the application of individual factors in a state death eligibility statute. We address this question in this Article by examining racial disparities in the application of specific statutory special circumstances in California's death statute. As explained below, the extent to which a promiscuously broad statute creates room for arbitrary and capricious charging decisions—which themselves are racially biased—is the focus of our analysis.

sentence (12/205)); Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 7 COLUM. J. RACE & L. 77, 90 (2014) (estimating a death sentencing rate among death eligible homicides of 11.7% (35/298)); David C. Baldus, Catherine M. Grosso, George Woodworth, Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1229 (2011) (reporting a 15% death sentencing rate for cases between July 16, 1984, and October 13, 2005).

⁵⁹ See generally *Furman* at 45, *supra* note 7.

B. Race and Capital Punishment

As a starting point, it is useful to review the death penalty's long association with racism in the United States. This history informs both our analysis of the statutes and the implications of our findings. Racial disparities have been endemic to the administration of capital punishment since the nation's founding.⁶⁰ Although much of the literature focuses on discrimination against Black defendants and victims, a growing body of literature has begun to document and analyze the deep and pervasive history of discrimination against Latinx defendants and victims.⁶¹

Before the Civil War, many Southern states explicitly legislated that slaves—and sometimes free Blacks—could be sentenced to death for crimes punishable by lesser penalties when committed by whites.⁶² Although the Fourteenth Amendment to the Constitution prohibits the imposition of differential penalties by race for the same crime—and explicitly prohibits “the hanging of a black man for a crime for which the white man is not to be hanged”⁶³—the death penalty has continued to be applied predominantly to

⁶⁰ See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT*, 78 (2016); FRANKLIN E. ZIMRING, *CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 89 (2003); Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBS TO THE KILLING STATE* (A. Sarat and C. Ogletree, eds.) 97 (2006); JAMES MARQUART, SHELDEN ECKLAND-OLSEN, & JONATHAN SORENSON, *THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS 1923-1990* (1994); Stephen Bright, *Discrimination, Death and Denial: Race and the Death Penalty*, in *THE MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME* 47 (David Dow & Mark Dow, eds., 2002).

⁶¹ See Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 304-7 (2009) (exploring why the history of Latino lynching is not better known); Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 SOCIAL JUSTICE 242, 242 (2004) (noting that prior research has followed a Black/white dichotomous approach); see generally Camilo M. Ortiz, *Latinos Nowhere in Sight: Erased by Racism, Nativism, and the Black-White Binary, and Authoritarianism*, 12 RUTGERS RACE & L. REV. 29 (2011) (collecting evidence of discrimination against Latinos); JOHN MACK FARAGHER, *ETERNITY STREET: VIOLENCE AND JUSTICE IN FRONTIER LOS ANGELES* 263-280 (2016) (documenting the use of lynching to punish and terrorize Latinx people in Los Angeles and Northern California).

⁶² See, e.g., William Bowers, Glenn L. Pierce, & John F. McDevitt, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* 139-40 (1984); Stuart Banner, *THE DEATH PENALTY: AN AMERICAN HISTORY* 140-42 (2002); DAVID GARLAND, *PECULIAR INSTITUTION* 172 (2010); Franklin E. Zimring, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2004).

⁶³ See Eric Foner, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 244-47, 256-59 (1988) (observing that Civil Rights Act supporters in the 39th Congress, “rejected the entire idea of

Black defendants and those convicted of crimes against white victims throughout the country's history.⁶⁴

A robust literature confirms that racial disparities have infected capital punishment in the modern era.⁶⁵ Between 1930, when official statistics on capital punishment were first issued, and the moratorium in executions in 1972 following *Furman v. Georgia*, almost half the persons executed for murder and 90% of those executed for rape were African American, despite their much lower share of the defendant population for each of those crimes and their share of the United States population.⁶⁶ Those same racial disparities in capital punishment animated the majority concurrences of three of the Justices in *Furman*.

Race as a contested jurisprudential factor in death sentencing and execution reached a watershed in *McCleskey v. Kemp*.⁶⁷ Although the Court concluded in *McCleskey* that the proof of arbitrariness arising from race was inadequate, forty years of

laws differentiating between Black and white in access to the courts and penalties for crimes. The shadow of the Black Codes hung over these debates, and [Congressman Lyman] Trumbull began his discussion of the Civil Rights Bill with a reference to recent laws of Mississippi and South Carolina, declaring his intention 'to destroy all these discriminations').

⁶⁴ See Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211, 212 (Charles J. Ogletree, Jr. & Austin Sarat eds. 2006).

⁶⁵ See Sheri Lynn Johnson, *Race and Capital Punishment*, in BEYOND REPAIR?: AMERICA'S DEATH PENALTY 121 (Stephen P. Garvey, ed. 2003); see generally Symposium, *Race to Execution*, 53 DePaul L. Rev. 1401 (2004); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994); Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C.L. REV. 1997 (2014); Benjamin Fluery-Steiner, Paul Kaplan, & Jamie Longazel, *Racist Localisms and the Enduring Cultural Life of America's Death Penalty: Lessons from Maricopa County, Arizona*, 66 STUD. IN L., POL., & SOC'Y, 63 (2015).

⁶⁶ Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 35 (2007) ("A cardinal feature of the death penalty in the United States has always been its racially biased use.").

⁶⁷ 481 U.S. at 306.

continued study since then have demonstrated that the system is indeed arbitrary. Despite the strong evidence of interracial and intraracial sentencing disparities,⁶⁸ evidence that was not contested by the Court, the *McCleskey* Majority demanded a showing of discriminatory *purpose* to satisfy the evidentiary demands for a discrimination claim.⁶⁹

Both before and after the *McCleskey* decision, research on racial disparities in capital punishment focused attention on charging decisions by prosecutors and sentencing decisions by judges and juries, and found robust and consistent evidence of disparate racial treatment of Black or Latinx defendants or victims.⁷⁰ Studies with varying levels of detail and methodological sophistication have been conducted in numerous states.⁷¹

⁶⁸ See generally David C. Baldus et al., EQUAL JUSTICE AND THE DEATH PENALTY 1990 (presenting the studies underlying McCleskey's claim, in full).

⁶⁹ In a conversation with Professor John Jeffries, Justice Powell's biographer, shortly after he left the Court, Justice Powell expressed his regrets at having written the majority opinion in *McCleskey*. Justice Powell said that given a second chance, he would now join the four dissenters in that case and reverse the majority of death sentences in the United States. Powell went further, saying to Professor Jeffries that "capital punishment should be abolished." John C. Jeffries, *A Change of Mind that Came Too Late*, New York Times, June 23, 1994, at A23.

⁷⁰ See Catherine M. Grosso, Barbara O'Brien, Abijah Taylor & George Woodworth, *Race Discrimination and the Death Penalty*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 540 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014) (reviewing the literature).

⁷¹ In alphabetical order by state: Peg Bortner & Andy Hall, *Arizona First-Degree Murder Cases Summary of 1995-1999 Indictments: Data Set II*, Research Report to Arizona Capital Case Commission (2002); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33 (1991); Glenn Pierce & Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005-2006); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227 (2012) (California); Scott Anderson, *As Flies to Wanton Boys: Death-Eligible Defendants in Georgia and Colorado*, 40 TRIAL TALK 9-16 (1991); Stephanie Hindson et al., *Race, Gender, Religion and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549 (2006); Meg Beardsley, et al. *Disquieting Discretion: Race, Geography & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DEN. U. L. REV. 431 (2015) (Colorado); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRIC. L. STUD. 637 (2014); Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans & Martin T Wells, *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2011) (Delaware); David C. Baldus et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (Georgia); Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95 (2018) (Georgia);

Although not universal, the overwhelming majority of these studies indicate that the likelihood of receiving the death penalty are enhanced if the victim is white as opposed to Black, Latinx, or another race.⁷² Subsequent charging and sentencing studies find lower

Glenn L. Pierce & Michael L. Radelet, *Race, Region and Death Sentencing in Illinois, 1988-1997, Report of the Governor's Commission on Capital Punishment, tech. app. I, Report A* (April 14, 2002); Thomas J. Keil & Gennardo F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM. J. CRIM. JUST. 17 (1995); Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 CRIMINOLOGY 971 (2008); Glenn Pierce & Michael Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647 (2010-2011) (Louisiana); David Keys & Teresa Guess, *The Prevailing Injustices in the Application of the Death Penalty in Missouri (1978-1996)*, 32 SOC. JUST. 151 (2005); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305 (2009) (Missouri); Michael Lenza et al., *The Prevailing Injustices in the Application of the Death Penalty in Missouri (1978-1996)*, 32 Soc. Just. 151 (2005); 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 (2002); *State v. Marshall*, 613 A.2d 1059 (N.J. 1992); David S. Baime, *Report to the Supreme Court Systemic Proportionality Review Project 2000-2001 Term (June 1, 2001)* (New Jersey); Leigh Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTG. L. REV. 27 (1988); Barbara O'Brien, et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. Rev. 1997 (2016); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (Pennsylvania); Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. Rev. 245 (1988); Michael Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006); John M. Scheb II et al., *Race, Prosecutors, and Juries: The Death Penalty in Tennessee*, 29 JUST. SYS. J. 338 (2008); Deon Brock et al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. OF CRIM. L. 43 (2000); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131 (2012); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. Rev. 807 (2008); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade after Furman in Texas*, 69 SOC. SCI. Q. 4 (1988) (Texas); and JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, *REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT* (2002) (Virginia).

⁷² See also Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and A Single County Case Study*, 34 CARDOZO L. REV. 1227, 1246-51 (2013) (reviewing the literature on race and capital punishment); Catherine Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California*, 35 J. OF CRIM. JUST. 17, 22 (2007) (reviewing the literature and reporting that “The results replicated previous findings, discovering that defendants in White victim cases . . . faced much greater odds of being charged with a death-eligible offense than did defendants in Black victim cases. This investigation also permitted Hispanic/White comparisons. Defendants in White victim cases faced greater odds of being charged with capital homicide than defendants in Hispanic victim cases.”); Michelle A. Petrie & James E. Coverdill, *Who Lives and Dies on Death Row? Race, Ethnicity, and Post-Sentence Outcomes in Texas*, 57 SOC. PROBS. 630 (2010) (reporting that cases involving minorities—with Black or Latino offenders or victims—have lower hazards of execution than cases in which both offenders and victims are white).

odds but consistent and statistically significant disparities.⁷³

For example, a recent study of capital charging and sentencing decisions in North Carolina between 1990 and 2009 was modeled on the Baldus study of Georgia.⁷⁴ The primary model analyzing death sentencing among all death-eligible cases showed that—even after controlling for multiple measures of culpability—cases with at least one white victim face odds of receiving a death sentence that were 2.17 times the odds faced by all other cases. The evidence further suggested that this effect arises primarily in charging decisions, where prosecutors systematically disregard cases in which Black defendants kill Black victims. The odds of a Black defendant/Black victim case advancing to a capital trial are 2.6 times lower than the odds faced by all other cases. The study found that white victim cases and Black defendant/Black victim cases pulled strongly in opposite directions. In both instances, race—a factor unrelated to culpability and repugnant to the criminal justice system—plays a significant role.⁷⁵

Recent research has documented additional ways that race infects capital decision-making. For example, scholars have tied increased exposure to capital punishment for Latinx defendants to “the pervasive, dehumanizing political rhetoric surrounding immigration reform.”⁷⁶ Maritza Perez collects evidence of negative contacts between Latinos and the criminal justice system to build her case. For example, she notes that documents that Latinos face “[a]pproximately 60 percent of hate crimes

⁷³ See *infra* notes 75-84.

⁷⁴ See David C. Baldus et al., EQUAL JUSTICE AND THE DEATH PENALTY 44-46, 313-32 (1990) (presenting the charging and sentencing study).

⁷⁵ Barbara O’Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. REV. 1997 (2016).

⁷⁶ Maritza Perez, *Los Lazos Viven: California’s Death Row and Systematic Latino Lynching*, 37 WHITTIER L. REV. 377, 378 (2016).

motivated by race or ethnicity,”⁷⁷ “are more likely than their white peers to be arrested,”⁷⁸ “are more likely than white people to be denied bail, required to pay bail, or obligated to pay a higher bail to be released,”⁷⁹ and “during plea bargaining, prosecutors are more likely to offer Latinos punitive deals—which often include a custodial sentence— compared to their white counterparts.”⁸⁰

Professor Jennifer Eberhardt and colleagues used the data from the Baldus study of charging and sentencing in Philadelphia to show that among defendants convicted of murdering a white victim, defendants whose appearance was more stereotypically Black (*e.g.*, darker skinned, with a broader nose and thicker lips) were sentenced more harshly and, in particular, were more likely to be sentenced to death than if their features were less stereotypically Black. This finding held even after the researchers controlled for the many non-racial factors that might account for the results.⁸¹ Analogous stereotypes about Latinx defendants, including stereotypes about dangerousness, create a risk of similar outcomes.⁸²

⁷⁷ *Id.* at 389.

⁷⁸ *Id.* at 394.

⁷⁹ *Id.*

⁸⁰ *Id.*; see also Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 SOCIAL JUSTICE 242, 244-46 (2005) (reviewing data on exposure to the criminal justice process and Latinos).

⁸¹ Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOLOG. SCI. 383 (2006) (reporting results of an experiment on race using data from David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998)).

⁸² See Benjamin Fleury-Steiner & Victor Argoshy, *Lethal ‘Borders’: Elucidating Jurors’ Racialized Discipline to Punish in Latino Defendant Death Cases*, 6 PUNISHMENT & SOCIETY 67, 70 (2004) (“The image of Latino/a Americans as ‘dangerous’ and ‘immoral’ goes back at least as early as Columbus’s voyage to the Greater Antilles in the late 15th Century. Chronicling a series of observations of the New World, Columbus’s grossly inaccurate descriptions of early indigenous peoples as ‘fierce’, ‘immoral’, and ‘cannibalistic’, served as important ‘seeds for the development of racialized stereotypes.’”) (citing Diego O. Castro, *“Hot Blood and Easy Virtue”*: *Mass Media and the Making of Latino/A Stereotypes*, in IMAGES

Studies of jury decisions similarly find evidence of racial bias. Benjamin Fleury-Steiner and Victor Argothy analyzed Capital Jury Project juror interviews from capital cases involving Latinx defendants in Texas and California. The scholars examined responses that jurors in Latino defendant death cases referred to the defendant's or the family of the defendant's appearance and courtroom behavior. The intention was to evaluate how each juror drew on cultural understandings of Latino identity in describing their punishment decisions.⁸³ For example, the scholars identified an exchange in which jurors described defendant family members in the courtroom in a manner that invoked stereotypes of "threatening Latinos," thereby silently "locating the defendant among the 'hard looking Hispanic' group."⁸⁴ The scholars observed that "[j]udging a defendant they know nothing or very little about, former white and Latino capital jurors import ... a racialized discourse from the outside in."⁸⁵

Researchers consistently have found racial disparities in jury selection throughout the country.⁸⁶ The most recent study examined race-based juror selection in trials held

OF COLOR, IMAGES OF CRIME 135 (Coramae Richey Mann & Marjorie S. Zatz eds., 1998)); JOHN MACK FARAGHER, ETERNITY STREET: VIOLENCE AND JUSTICE IN FRONTIER LOS ANGELES 263-280 (2016 (documenting the use of lynching to punish and terrorize Latinx people in Los Angeles and Northern California)).

⁸³ Benjamin Fleury-Steiner & Victor Argothy, *Lethal 'Borders': Elucidating Jurors' Racialized Discipline to Punish in Latino Defendant Death Cases*, 6 PUNISHMENT & SOC'Y 67, 74 (2004) (describing the analytical focus of the research).

⁸⁴ *Id.* at 78.

⁸⁵ *Id.* at 80. In related research, Cynthia Willis-Esqueda and Russ K.E. Espinoza found that European American mock jurors recommended the death penalty significantly more often for low socioeconomic status Latino defendant in a weak mitigation evidence condition. Russ K.E. Espinoza & Cynthia Willis-Esqueda, *The Influence of Mitigation Evidence, Ethnicity, and SES on Death Penalty Decisions by European American and Latino Venire Persons*, 21 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 288 (2015). Additionally, Professor Justin Levinson found that death-qualified jurors harbored stronger racial biases than excluded jurors. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513 (2014).

⁸⁶ See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance*

from 1992 to 2017 in Mississippi’s Fifth Circuit Court District found racial disparities in peremptory strike decisions, even after controlling for race-neutral factors.⁸⁷ A team of data experts and reporters analyzed juror responses in 13 capital trials for about 65 different variables, including the race of the juror, whether the juror was accused of a crime, and whether the juror was hesitant about the death penalty. These researchers built a logistic regression model to determine how individual variables affected the likelihood that a juror was removed by a prosecutor’s peremptory challenge. The report determined that a Black juror in a capital murder trial was 8.65 times more likely to be struck than a similarly situated white juror. “Being Black was the greatest predictor of being struck in capital trials,” the authors wrote, “even more than expressing hesitation about imposing the death penalty.”⁸⁸ Experimental evidence shows much the same bias as shown in the actual juror studies.⁸⁹

Race may also infect capital decision-making prior to the selection of jurors, as early as the arrest of a suspect by police. A forthcoming study examines homicides reported in the FBI’s Supplementary Homicide Reports between 1976 and 2009, finding that homicides with white victims were more likely to be cleared by the arrest of a suspect than homicides with non-white victims. The study also finds that counties with large non-white populations have lower clearance rates than predominantly white

of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 IOWA L. REV. 1531 (2012) (collecting studies).

⁸⁷ Will Craft, *Peremptory Strikes in Mississippi’s Fifth Circuit Court District*, APM Reports (2018), available at https://www.apmreports.org/files/peremptory_strike_methodology.pdf.

⁸⁸ *Id.*

⁸⁹ Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (reviewing the literature and presenting new research).

counties.⁹⁰ Racial disparities in police responses to potentially capital-eligible murders raise serious doubts as to whether the death penalty can be equitably applied. If implicit bias in police agencies produces a biased pool of capital-eligible defendants, the race-infected charging and prosecution of capital-eligible defendants is likely to multiply those biases.⁹¹

In the past decade, research on racial disparities has been dispositive of constitutionally impermissible practices in charging and sentencing under state constitutional law. The Connecticut Supreme Court found the death penalty statute in that state to be infected by invidious racial discrimination, and ruled it unconstitutional in 2015.⁹² Likewise, the Washington Supreme Court invalidated the state death penalty statute because empirical research demonstrated that is imposed in an arbitrary and racially biased manner in violation of state constitutional law.⁹³

⁹⁰ Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 24 BERKELEY J. CRIM. L. (forthcoming 2019).

⁹¹ Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 NYU REV. L. & SOC. CHANGE 777 (1990).

⁹² *State v. Santiago*, 318 Conn. 1, 113 (2015) (“Four members of this court likewise have concluded that the degree of factfinder discretion required by the federal constitution means that the death penalty in Connecticut has been and inevitably will continue to be imposed with a degree of discrimination that is impermissible under the state constitution....invidious discrimination . . . pave[s] a smoother path to execution for a subset of the population.”). In a subsequent 2015 opinion, that Court ruled that the ban on capital punishment would be retroactive. *State v. Santiago*, 319 Conn. 935 (Oct. 30, 2015).

The Connecticut court relied on evidence provided by Professor Donohue who studied the 205 death-eligible murders that led to homicide convictions in Connecticut from 1973-2007. He found statistically significant evidence that minority defendants who kill white people are more likely to receive a death sentence than white defendants in comparable cases. Donohue’s findings speak to overbreadth as well as race discrimination. He found that only one of the nine death sentences sustained during the study period actually fell among the most egregious death-eligible cases. He found that there were between 35 and 46 equally egregious death-eligible cases where the defendant did not receive a death sentence among the cases where defendants were sentenced to death. John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 J. EMPIRIC. L. STUD. 637 (2014).

⁹³ *Washington v. Gregory*, 192 Wash. 2d 1, 5, 427 P.3d 621, 627 (2018) (invalidating the state death penalty because empirical research demonstrated that is imposed in an arbitrary and racially biased manner”). The Washington court relied on evidence provided by Katherine Beckett and Heather Evans

V. DATA AND METHODS

This Article reports the second set of findings from a research project designed to evaluate the extent to which the California death penalty law satisfies the constitutional narrowing requirements.⁹⁴ The earlier research, published in *Furman at 45*, concludes that the enormous breadth of California’s statutory special circumstances combined with the state’s extremely low death sentencing rate among death eligible cases fails to comply with *Furman*’s narrowing requirement.⁹⁵ This Article focuses on the application of individual special circumstances and evaluates the extent to which special circumstances target defendants by race or ethnicity. Such racial and ethnic heterogeneity in death eligibility only rarely has been identified, but clearly was on the minds of the *Furman* majority.⁹⁶ This analysis is essential to identify extent of the limitations—if not failures—of states to satisfy *Furman*’s narrowing requirement.

A. The Universe and Sample of Cases

To conduct our analysis of the narrowing effect of California’s post-*Furman* law, we examined the universe as all defendants convicted of first-degree murder, second-degree murder, and voluntary manslaughter, using a machine-readable database produced by the California Department of Corrections and Rehabilitation (CDCR).⁹⁷ This database

showing that jurors are 4.5 times more likely to impose a death sentence when the defendant is Black. Katherine Beckett & Heather Evans, *Race, Death and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 COLUMBIA J. RACE & L. 77, 101-104 (2016)

⁹⁴ Cal. Penal Code § 190.3 (West 2019).

⁹⁵ *Furman at 45*, *supra* note 7.

⁹⁶ See, e.g., Sherod Thaxton, Disentangling Discrimination, *supra* note 71.

⁹⁷ The state was directed by the federal district courts in the underlying habeas corpus proceedings to produce the database used to construct the stratified random sample and probation reports for the cases that we identified as part of the sample.

includes information on 27,453 cases with a date of offense between January 1, 1978, and June 30, 2002.⁹⁸ The database includes 32% first-degree murder cases, 29% second-degree murder cases, and 39% voluntary manslaughter.

From this universe, we derived a 6.9% (1,900/27,453) sample. We stratified the sample on three dimensions to produce a more representative sample of the cases than would have been produced by a random sampling method. The first dimension, the crime of conviction, provides proportionate representation for the first-degree, second-degree, and voluntary manslaughter conviction cases.

The second dimension is the population density of the county of prosecution.⁹⁹ We designed this dimension with four levels to obtain a representative sample of smaller and more rural counties. Our goal was 25% of the sample from Los Angeles (which accounts for 42% of the cases in the universe), and 25% of the sample from each of the three other groups of counties ranked in terms of population density.¹⁰⁰

Third, we stratified the sample on the basis of four time periods that would enable us to over-represent in the sample cases from the *Carlos Window*,¹⁰¹ during which time the

⁹⁸ For each case, the CDCR database includes information on the date of offense, crime of conviction, county of prosecution, county court case number, CDCR case number, date of conviction, and the gender and age of the defendant.

⁹⁹ The data source was *County Population Per Square Mile: 2000 - Department of Finance, California Statistical Abstract*, Sec. A, Table A-1 (county land square miles), Sec. B, Table B-3 (county population) (2001).

¹⁰⁰ The counties in the four population density levels from low (1) to high (4) density are as follows. Level 1 has 41 counties with a population density per square mile of fewer than 200 people (Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, San Benito, San Bernardino, San Luis Obispo, Santa Barbara, Santa Clara, Sierra, Siskiyou, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba). Level 2 has nine counties with a population per square mile larger than 200 and smaller than 700 (Marin, Riverside, San Diego, San Joaquin, Santa Cruz, Solano, Sonoma, Stanislaus, and Ventura). Level 3 has seven counties with a population per square mile between 700 and 3400 people (Alameda, Contra Costa, Orange, Sacramento, San Francisco, San Mateo, and Santa Clara). Level 4 is Los Angeles.

¹⁰¹ See *supra* note 40.

two habeas corpus petitioners raising the narrowing challenge to the California statute were sentenced to death.¹⁰² Our goal was a sample with 57% of the cases from this time period.

Our methods produced a stratified random sample of cases consisting of 48 strata: 3 offense categories x 4 county population density categories x 4 time periods. For each stratum, we weighted the cases in the sample on the basis of the ratio of the number of cases in the universe and the sample. For example, if a stratum contained 100 cases in the universe and 20 cases in the sample, the weight for each case in the sample from that stratum would be 5.0 (100/20).

Table 1 presents the final sample and estimated universe, by conviction and by sentence outcome. Each line of information includes the number of cases in the 1,900 case sample and in the 27,453 case estimated universe. Line 1 reports that the sample includes 61 death sentenced cases, 193 resulting in life without parole (LWOP), and 1,646 resulting in a sentence less than LWOP. Lines 2-4 report the distribution of these sentencing outcomes by conviction. Column F reports that 764 of the cases in the sample resulted in a first-degree murder conviction, 491 in a second-degree murder conviction, and 645 in a voluntary manslaughter conviction.

¹⁰² See *supra* note 7. The four time periods are January 1, 1978 to December 11, 1983, December 12, 1983 to October 13, 1987 (the Carlos Window), October 14, 1987 to December 31, 1992, and January 1, 1993 to June 30, 2002.

Table 1. Description of the Sample by Sentence Outcome

	A	B	C		D		E		F
			Death		LWOP		Term of Years		Total
1.	Total	<i>Sample</i>	3%	61	10%	193	87%	1,646	1900
		<i>Weighted</i>	3%	705	9%	2,364	89%	24,384	27,453
2.	First degree murder conviction	<i>Sample</i>	8%	61	25%	193	67%	510	764
		<i>Weighted</i>	8%	705	27%	2,364	65%	5,642	8,711
3.	Second degree murder conviction	<i>Sample</i>	-	0	-	0	100%	491	491
		<i>Weighted</i>	-	0	-	0	100%	7,900	7,900
4.	Voluntary manslaughter conviction	<i>Sample</i>	-	0	-	0	100%	645	645
		<i>Weighted</i>	-	0	-	0	100%	10,842	10,842

B. Data Sources for Cases

The primary source of information on each case was the probation report prepared by the county probation officer with jurisdiction over the case. California law requires the preparation of a probation report in each homicide regardless of the crime of conviction and sentence.¹⁰³ The purpose of the report is to justify the probation officer’s recommendation on the appropriateness of probation as a sentencing alternative in the case. These reports, routinely relied upon by California courts, are subject to examination and correction by both the prosecuting authorities and defendants.¹⁰⁴

One limitation of the probation reports is that they are often prepared pre-trial so that the ultimate crime of conviction may not be noted in the report. When that occurred, we consulted the crime of conviction reported in the CDCR database. On other occasions, the probation report contained insufficient procedural information because it failed to report the crime charged and/or the basis of the conviction (by guilt trial verdict or guilty plea), information that may be essential to assess the death eligibility of a case.

A number of probation reports also included insufficient substantive information

¹⁰³ Cal. Penal Code § 1203 (West 2019).

¹⁰⁴ Cal. Penal Code § 1203.01 (West 2019).

about the facts of the crime. Missing procedural or substantive information occurred in 16% of the cases for which we received a probation report from the state. The Habeas Corpus Resource Counsel (HCRC) cured the insufficiency in 106 cases, thus reducing the percentage of cases with missing information to 11%.¹⁰⁵

As noted above, the state's obligation to provide probation reports was defined by court orders. Some, however, were not produced by the state or contained no usable information. When we encountered these situations, we replaced the probation report with a substitute report that was selected in random order from the sampling lists.

C. The Coding Process for Individual Cases

Each case was coded into the data collection instrument (DCI) based primarily on the probation reports. The information in the probation reports provided the basis for the final coding decisions unless an information insufficiency was present and we obtained additional information from the HCRC. We also consulted appellate judicial opinions when applicable. The coding of the data collection instrument for the cases in the sample was conducted by thirteen University of Iowa law students and eight recent University of Iowa law graduates.¹⁰⁶

The DCI documents charging and sentencing decisions and, if the case was capitally charged, any special circumstances alleged, found, or rejected. It also documents

¹⁰⁵ The HCRC represented one of the underlying petitioners in the federal habeas corpus proceedings. HCRC consulted trial and appellate court records in the case and report the missing information if it was available. When the HCRC was able to provide us with documents containing the information needed about a case, it was coded accordingly and the case was returned to the active sample of cases.

¹⁰⁶ The Iowa law students were Sadad Ali, Peter D'Angelo, John Magana, Jacob Natwick, Fangzhou Ping, Thomas Farrens, Folke Simons, Erin Snider, Jason Stoddard, James Vaglio, Porntiwa Wijitgomen, Fei Yu, and Weiyan Zhang. The recent law graduates were Rebecca Bowman, Edward Broders, Theresa Dvorak, David Franker, Luke Hannan, Beth Moffett, Amanda Stahle, and Kristen Stoll.

sentencing outcomes reported in the probation report. The DCI also assesses liability for first-degree murder and the factual presence of each special circumstance under pre-*Furman* Georgia law, and post-*Furman* *Carlos* Window California law, and 2008 California law. A final section of the DCI summarizes the coder's judgments of the death eligibility of the case under each of the three legal regimes. We evaluate the application of special circumstances under the third regime, 2008 California law.

1. Identifying liability for first-degree murder and the factual presence of special circumstances in the cases

The HCRC provided a detailed summary of the law concerning the elements of murder liability to the Iowa coding team.¹⁰⁷ When legal questions arose under the terms of the coding protocol, the coders certified legal questions to HCRC counsel to which HCRC replied in writing.

We applied two core principles of interpretation to assess the factual death eligibility of each case. The first principle is the “controlling fact finding” rule, which limits the coders’ discretion to override authoritative fact findings of juries and judges in particular cases.¹⁰⁸ The rule stipulates that if an authoritative fact finder (judge or jury) with responsibility for finding a defendant liable for first-degree murder convicts the defendant of second-degree murder or voluntary manslaughter, that finding is considered to be a controlling fact and the coder must code the case at the reduced level of homicidal

¹⁰⁷ These summaries were provided to the California Attorney General’s Office, which represents California in the federal habeas corpus proceedings, and were also entered into evidence at the evidentiary hearing conducted by the district court in *Ashmus v. Wong*.

¹⁰⁸ David Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Catherine M. Grosso, *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues* in *THE FUTURE OF AMERICA’S DEATH PENALTY AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 153, 164-65 (C. Lanier, W. Bowers, and J. Acker eds., 2009) (explaining the rationale of the CFF rule).

liability in the absence of overwhelming evidence of jury nullification. The rule also holds that an authoritative fact finding of first-degree murder or a first-degree murder guilty plea is a controlling fact, and the case will be coded at that level of liability. The same rule applies with respect to allegations and findings of the presence or absence of special circumstances in the case and defendant admissions of their presence.¹⁰⁹

The second core principle of interpretation, known as the legal sufficiency standard, assesses whether a California appellate court would affirm a jury conviction for first-degree murder or a jury's finding of the presence of a special circumstance in the case if a jury had made either of those findings and the finding was challenged on appeal for a lack of sufficient evidence. In the application of this principle, exculpatory evidence offered by the defendant is given no weight, but incriminating evidence offered by the defendant is credited.

Coders relied on three forms of authority to support their judgments whether the facts satisfied the legal sufficiency test. The strongest level of authority was a factually comparable case in which a jury or trial court's first-degree murder or special circumstance finding of fact was sustained or reversed by a California appellate court when challenged with a claim of evidentiary insufficiency. The second level of authority was a factually comparable case in this study in which a fact finder returned a finding of fact on first-degree murder liability or the presence of a special circumstance that was not disturbed on appeal. The third level of authority was the case law and legal memorandum provided by HCRC.

We measured the presence of individual special circumstances under each of the three

¹⁰⁹ Prosecutors are not viewed as controlling fact finders in the same way as jurors and judges.

legal regimes. (The analysis in this Article relies on the assessments under 2008 California law.) Coding assessments allowed coders to identify situations in which the presence of a special circumstance was close call. Close call classifications arose when the special circumstance classification was not determined by a controlling finding of fact and the circumstances of the offense were not sufficiently well understood to support clear coding. When we were uncertain how an appellate court would rule on finding a special circumstance in the case, we coded it a close call.

These distinctions produced two measures of death eligibility – a conservative measure that limited death eligibility to “clearly present” classifications and a liberal measure that classified a case as death eligible if that status was clearly present or a close call. In *Furman at 45*, we note these distinctions and report both the conservative and liberal estimates. They did not make a substantive difference in that analysis. For this reason, for the purposes of this article, we rely only upon the liberal measure. That is the analysis present below considers a special circumstance present when the coders coded “clearly present” or found a “close call.”

2. Coding Defendant and Victim Race and Ethnicity

Limited and missing information for race or ethnicity presented a significant issue in this study. The original sources used to code this database did not regularly report race or ethnicity of the defendants or name, race, or ethnicity of the victims. The coders were instructed to code race and ethnicity when it was available in the probation reports. HCRC consulted trial and appellate court records in the case and identified victim names, and defendant and victim race and ethnicity, where available. As starting point, the

initial coding here reflects all of the limitations in the race or ethnicity designations of the court and prison officials.¹¹⁰

The initial coding process identified 81% of defendant race or ethnicity (1,546/1,900), but only 33% of victim race or ethnicity (630/1,900). As noted, the probation reports often omitted victim names, as well as race or ethnicity. This was particularly true for second-degree murder and voluntary manslaughter cases.

In 2018, we employed seven Columbia University law students to search for missing victim names.¹¹¹ The students were provided lists including defendant names, county, sentencing and offense dates, and case numbers. We instructed them to find the missing names using internet search engines, online newspapers local to the underlying homicide, Westlaw, Lexis, the California Department of Corrections websites, and a compilation of San Francisco Homicides, 1849-1993 compiled by Kevin J. Mullen at the Ohio State University Criminal Justice Research Center.¹¹² This effort identified missing victim names in 134 cases, leaving 129 cases with no information on the name of the victim.

With a more complete list of names, our next step was to estimate missing race by applying a verified and commonly-used method that assigns the probability of race or ethnicity using Census data.¹¹³ The Census Bureau used self-reported race or ethnicity

¹¹⁰ See Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 SOCIAL JUSTICE 242, 247 (2004) (“Not all states keep race and ethnicity of inmates under a sentence of death, other than ‘whites’ and ‘blacks,’ and most states do not differentiate between the different Latino groups. Record-keeping methods also vary widely across states. As a result, information on Latinos, especially for specific Latino groups, is scant and unreliable.”).

¹¹¹ The Columbia law student researchers were Greg Bernstein, Melissa Castillo, Ed Costikyan, Andrew Howard, Mary Marshall, Olivia Morrison, and Andrew Pai.

¹¹² Available from the authors upon request.

¹¹³ The current analysis used the 2010 Census surname list B. See United States Census Bureau, “Frequently Occurring Surnames from the Census 2010, File B: Surnames Occurring 100 or more times,”

data to compile a list of over 160,000 surnames occurring 100 or more times from the 2010 United States Census. Combining these names with the self-reports of race and ethnicity, the Census Bureau computed the probability of a person living in the United States with that name being white, Black, Native American or Pacific Islander, Asian, or Latinx.¹¹⁴ Studies comparing this procedure with other algorithms for assigning race or ethnicity groups suggested comparably high accuracy, sensitivity, and positive predictive value when compared with self-reports.¹¹⁵

For each of these racial or ethnicity groups, we coded these classifications at three levels of probability: 60%, 75%, or 90%. There were no overlaps; that is, if a person whose name had a probability of 60% or more of being Latinx, they had no other probability above 60%. Accordingly, that person was classified as Latinx. We did the same for each of the other categories. Persons whose names did not meet the 60% threshold for any of the population groups were coded as missing on the race/ethnicity

available at <https://www2.census.gov/topics/genealogy/2010surnames/names.zip>.

This method has been applied and accepted to identify Hispanic ethnicity in a 2013 case in the U.S. District Court for the District of Arizona alleging racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Findings of Fact and Conclusions of Law, Melendres*, 07-CV-2513, Dkt. 579 at 79 (May 24, 2013). “Dr. Taylor’s statistics in this respect were, apparently, more sophisticated than those provided in the 1980 census list of Spanish surnames.” *Id.* at 79 n.69. “Dr. Taylor relied on independent U.S. Census data correlating the likelihood that a person with any given name self-identified as Hispanic. He did a differential analysis that focused particularly on names whose owners identified as Hispanic more than 90% of the time, more than 80% of the time, and more than 70% of the time. He also included names whose owners self-identified as Hispanic at a 60% threshold as ‘a type of robustness analysis.’”

¹¹⁴ *Id.*

¹¹⁵ Francis P. Boscoe et al., *Heuristic Algorithms for Assigning Hispanic Ethnicity*, 8 *PloS One*, <https://doi.org/10.1371/journal.pone.0055689> (2013). *See also*, David L. Word et al., *Demographic Aspects of Surnames from Census 2000*, Unpublished manuscript, Retrieved from <http://citeseerx.ist.psu.edu/viewdoc/download> (2008); Anurag Ambekar et al., *Name-Ethnicity Classification from Open Sources*, in *PROCEEDINGS OF THE 15TH ACM SIGKDD INTERNATIONAL CONFERENCE ON KNOWLEDGE DISCOVERY AND DATA MINING* 49-58 (ACM 2009), available at <https://www3.cs.stonybrook.edu/~skiena/lydia/names.pdf>; Mikhail Bautin & Steven Skiena, *Concordance-Based Entity-Oriented Search*, 4 *WEB INTELL. & AGENT SYS.: AN INT’L J.* 303 (2009).

variable. Our main estimates of race and ethnicity effects for defendant used the 60% classification threshold. At this threshold, we reduced the rate of defendant missing race to 4% (81 cases).¹¹⁶ The other thresholds were used in sensitivity analyses.

Even after undertaking this level of effort to identify the missing information, however, we continued to have 20% missing information for the race of victim (400 cases), at the 60% confidence level.¹¹⁷ We evaluated the possibility of imputing the missing information but determined that the information is not missing at random. Race of defendant and two special circumstances (multiple victims and gang membership) are statistically significantly related to the likelihood of missing the race of the victim.

VI. FINDINGS ON THE ROLE OF RACE AND ETHNICITY IN THE REACH OF SPECIAL CIRCUMSTANCES

Table 2 presents the study sample and weighted universe by conviction (in rows) and race and ethnicity of the defendant (in columns). The top row presents the sample overall, with the next three rows showing the distribution among first and second degree murder, and voluntary manslaughter cases. Columns A, B, and C, show that Black, white, and Latinx defendants compose roughly equal and large portions of the sample, and combined account for 92% of the sample.

¹¹⁶ The 75% threshold yielded 9% missing (173 cases) and the 90% threshold yielded 14% missing (267 cases).

¹¹⁷ The 75% threshold yielded 36% missing (686 cases) and the 90% threshold yielded 50% missing (965 cases).

Table 2. Description of the Sample by Race or Ethnicity of Defendant and Conviction

		A		B		C		D		E		F
		Black		White		Latinx		Other		Missing		Total
Total	<i>Sample</i>	26%	498	37%	696	28%	540	4%	80	4%	81	1,900
	<i>Weighted</i>	30%	8,374	29%	7,873	33%	9,029	4%	1,177	3%	942	27,453
M1 conviction	<i>Sample</i>	28%	212	39%	301	24%	184	4%	29	5%	36	764
	<i>Weighted</i>	33%	2,896	31%	2,682	18%	2,336	5%	390	5%	362	8,711
M2 conviction	<i>Sample</i>	21%	103	39%	192	30%	146	5%	26	5%	21	491
	<i>Weighted</i>	26%	2,041	31%	2,429	35%	2,760	5%	397	3%	260	7,900
VM conviction	<i>Sample</i>	28%	183	31%	203	33%	210	4%	25	4%	24	645
	<i>Weighted</i>	32%	3,436	25%	2,762	36%	3,934	4%	390	3%	320	10,842

We next estimate the scope of the special circumstances identified in the California statute by race and ethnicity. The results demonstrate how the California death penalty statute’s expansive special circumstances not only fail to meaningfully narrow death eligibility, but also do so in a manner that targeted defendants of some race or ethnicity differently than others. Although many of special circumstances appear to apply evenly across race and ethnicity, we identified six, however, that appear to affect different races or ethnicities differently. The analyses below focus on those six circumstances: multiple victims,¹¹⁸ lying in wait,¹¹⁹ robbery/burglary,¹²⁰ torture,¹²¹ drive by shooting,¹²² and gang membership,¹²³ and identify racial and ethnic disparities associated with each.

We base our conclusions on four levels of analysis presented in three sections.

Section A presents the simple distribution of the cases in which each of the six special circumstances is found or present by race or ethnicity. Section B focuses more sharply

¹¹⁸ Cal. Penal Code §190.2(3) (West 2019).

¹¹⁹ Cal. Penal Code §190.2(15) (West 2019).

¹²⁰ Cal. Penal Code §190.2(17)(A) & (17)(G) (West 2019). Although these two special circumstances may be separately charged and found, given the overlapping nature of the two, we combined them for the purposes of this Article.

¹²¹ Cal. Penal Code §190.2 (18) (West 2019).

¹²² Cal. Penal Code §190.2 (21) (West 2019).

¹²³ Cal. Penal Code §190.2(22) (West 2019).

on the risk faced by each race or ethnicity regardless of the number of cases in the study. The results report the percent of the total cases in each race or ethnicity in which each special circumstance is present or found. Neither of these results consider the possibility that relative culpability of cases would explain the disparate application of the special circumstance. Section C presents results of two sets of analysis in which we introduce culpability and time controls.

Table 3. Sample Distribution by Race and Selected Special Circumstances
(*representation rate, number of observations, weighted count*)

	Special Circumstance	Black	White	Latinx	Other	Unknown	Total
1.	Representation in the Sample Overall	30% 498 8,374	29% 696 7,873	33% 540 9,029	4% 80 1,177	4% 81 942	1,900 27,453
2.	Multiple Victims ($p < .04$) ¹²⁴	24% 25 396	34% 55 544	23% 32 366	10% 6 160	9% 10 149	128 1,616
3.	Lying in Wait (n.s.)	27% 134 2,188	29% 236 2,363	37% 188 3,014	4% 21 289	3% 24 244	603 8,098
4.	Robbery/Burglary ($p < .01$)	43% 160 2,400	26% 166 1,462	24% 97 1,338	3% 16 179	5% 17 260	456 5,639
5.	Torture ($p < .01$)	24% 42 570	44% 96 1,027	19% 35 455	6% 13 150	6% 13 132	199 2,334
6.	Drive by Shooting ($p < .02$)	30% 21 365	6% 8 71	53% 26 633	8% 4 99	3% 2 35	61 1,203
7.	Gang Membership ($p < .001$)	32% 46 990	6% 8 199	57% 69 1,756	4% 5 125	1% 1 27	129 3,097

A. Distribution of Cases in Select Special Circumstances by Race or Ethnicity

Table 3 lists these special circumstances and presents the distribution of the cases in the sample and the weighted universe by race or ethnicity for each one. The first line presents the overall distribution of cases in the sample from Table 2. This distribution

¹²⁴ The statistical significance value report the corrected weighted Pearson chi square statistic from STATA survey tabulate for each line of the table. [Note to editors: This belongs at the bottom of the table.]

provides one useful point of comparison to the distribution of individual special circumstances in the remaining rows of the table. Rows 2-7 present the distributions among cases where each special circumstance was present or found.

Row 2 shows that white defendants represent 34% of the cases involving multiple victims,¹²⁵ whereas Black defendants represent 24% and Latinx 23% of the cases. The white defendant representation is higher than the white defendant representation in the study and statistically significantly higher than the representation of other race or ethnicities in the study ($p < .04$). Row 5 shows a similar but greater disparity among cases in which the torture special circumstance was found or present.¹²⁶ White defendant cases compose 44% of this population, compared to 24% of Black defendants and 19% of Latinx defendants. The white defendant representation in cases where this special circumstance is present or found is more than twice that of Black and Latinx defendants, in contrast to the roughly equal representation in the study overall.

Line 4 combines cases in which the special circumstance for robbery or burglary was found or present.¹²⁷ Here, Black defendant cases represent a disproportionate share of the cases, at 43%, compared to 26% for white defendant cases and 24% for Latinx cases. Black defendants are overrepresented these felony murder cases in comparison to their representation in the study on line one (43% vs. 30%).

Lines 6 and 7 present the most recent special circumstances, those marking cases

¹²⁵ Cal. Penal Code §190.2 (a)(5) (West 2019).

¹²⁶ Cal. Penal Code § 190.2(a)(18) (West 2019).

¹²⁷ Cal. Penal Code § 190.2(a)(17)(A) & (G) (West 2019).

involving drive-by shootings¹²⁸ and gang membership.¹²⁹ Latinx defendants represent more than one-half of the cases in which either of these special circumstances were present or found. More precisely, Latinx defendants represent 53% of cases with evidence of a drive-by shooting and 57% of cases where the defendant was involved in a “criminal street gang.” This substantial overrepresentation dwarfs the significantly underrepresented white defendants with a ratio of 8-9: 1 (57%/6% or 53%/6%).¹³⁰

B. Rate at Which Select Special Circumstances are Present or Found by Defendant Race or Ethnicity

Table 4 and Figure 1 present the unadjusted rate at select special circumstances are found or present controlling for race or ethnicity. This “selection rate” provides a standard measure of the disparity between the frequency with which each race or ethnicity appears in the overall study and the frequency with which is present or found in each special circumstance. The measurement of interest is the percent of the cases in each race or ethnicity in which a given special circumstance is present or found. Unadjusted means these findings do not take into consideration (or control for) the relative culpability of the cases.

¹²⁸ Cal. Penal Code § 190.2(a)(21) (West 2019).

¹²⁹ Cal. Penal Code § 190.2(a)(22) (West 2019).

¹³⁰ The discussion and tables in the remainder of the paper present only weighted analyses for ease of presentation. The complete table above provides a reference point to the size of the underlying sample and the importance of the weights.

Table 4. Selection Rates: Unadjusted Rate at Which Special Circumstances are Present or Found, by Defendant Race or Ethnicity¹³¹

		Black		White		Latinx		<i>p</i> -value
		%	<i>n</i>	%	<i>n</i>	%	<i>N</i>	
1.	Multiple Victims	5%	396	7%	544	4%	366	< .04
2.	Lying in Wait	26%	2,188	30%	2,363	33%	3,014	n.s.
3.	Robbery/Burglary	29%	2,400	19%	1,462	15%	1,338	< .01
4.	Torture	7%	570	13%	1,027	5%	455	< .02
5.	Drive by Shooting	4%	365	1%	71	7%	633	< .01
6.	Gang	12%	990	2%	199	17%	1,756	< .01
7.	Totals		8,374		7,873		9,030	

Figure 1. Application of Special Circumstance by Defendant Race

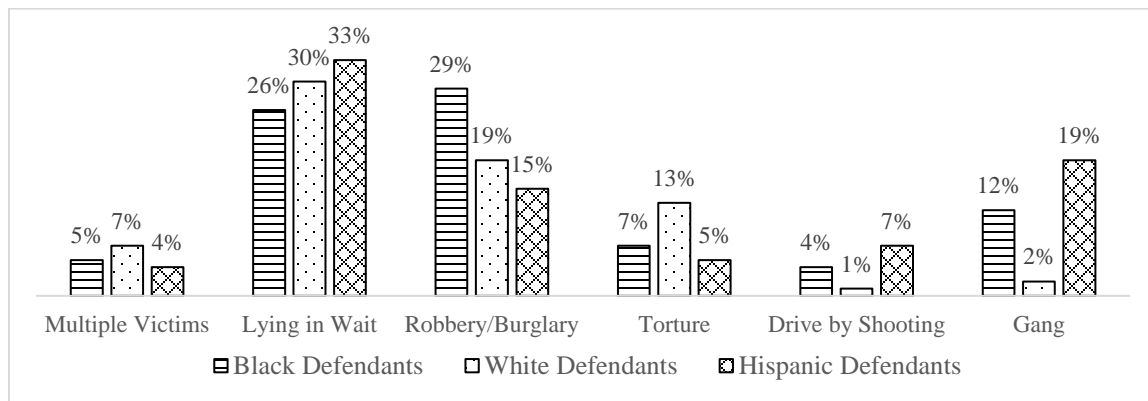


Figure 1 presents the data in Table 4 graphically, showing three bar graphs for each special circumstance, one each for the selection rate for Black, white, and Latinx defendants. The first set of columns presents selection rates by race and ethnicity for cases in which the multiple victims special circumstance was found or present. The first column reports that 5% of Black defendant cases have this special circumstance present or found. The second column reports that 7% of white defendant cases include this

¹³¹ Each line in the table reports the selection rate for each race or ethnicity (number of that race or ethnicity where the special circumstance was present or found divided by the total number of defendants of that race or ethnicity) as reported in a crosstab of the special circumstance and a race variable that separately coded Black, white, Latinx, other, and missing. The total defendants by race or ethnicity are reported in line 7. The *p*-value is based on the chi2. [Note to editors: This could also go at the bottom of the table.]

special circumstance. The third, reports that 4% of Latinx defendant cases have evidence that the multiple victims special circumstance was found or present. The underlying number for each set of columns appears in Table 4.

These selection rates do not take into account the culpability of the defendant in the case or the year the case originated. They are unadjusted fractions. Nonetheless, the sets of columns from left to right make clear that race and ethnicity matter. Note that white defendants have the highest selection rate in the first line and first set of columns, present above, and in the fourth line and set of columns for the torture special circumstance finding.

Black defendants have the highest selection rate in only the third line and third set of cases which combining cases with the felony aggravator for burglary and robbery. Here Black defendants at 29% (2,400/8,374) face a rate almost twice as high of that Latinx defendants at 15% (1,338/9,030) and one and one-half times as high of that of white defendants at 19% (1,462/7,873). This finding is consistent with the overrepresentation of Black defendants in cases with these special circumstances presented above.

Latinx defendants face the highest selection rates in the remaining three sets of columns. The fifth and sixth columns present selection rates for the drive-by shooting and street gang murder special circumstances where Latinx defendant cases represent the majority of cases. Even when controlling for representation, these special circumstances affect Latinx defendants at a statistically significant higher rate than Black or white defendants.

The drive by shooting special circumstance was present or found in 7% of Latinx defendant cases (633/9,030), compared to 4% of Black defendant cases (365/8,374) and

less than 1% of white defendant cases (71/7,873). The street gang murder circumstance was present or found in 19% of Latinx defendant cases compared with 12% of Black defendant cases and less than 2% of white defendant cases (199/7,873).

Finally, our earlier research showed the lying in wait special circumstance to expand the reach of the death penalty more than any other special circumstance. The selection rates by race are closer for this special circumstance, but Latinx defendants again face the highest rate (33%), compared to 30% for white defendants, and 26% for Black defendants.¹³²

The analysis to this point suggested that the selected special circumstances applied disparately by race and ethnicity. It remained possible, however, that disparity could be explained by the relatively culpability of different sets of cases. The following analyses introduce culpability controls.

C. Controlled Analyses of Disparate Application of Select Special Circumstances by Race and Ethnicity

The final section presents two different methods of controlled analysis. The first used logistic regression to control for alternate explanations, in this case culpability. The second uses what is commonly referred to as a “doubly robust” estimation.¹³³ In both sets of analysis, we introduce a five-level race-purged culpability scale to control for the underlying facts in each case.¹³⁴

¹³² We replicated the analysis presented above but limited the universe to factually first-degree murder cases. While selection rates were slightly lower, the disparities remained constant. Similarly, we replicated the analyses using race of defendant estimates at the 75% and 90% thresholds and observed no meaningful differences.

¹³³ Greg Ridgeway & John M. MacDonald, *Doubly Robust Internal Benchmarking and False Discovery Rates for Detecting Racial Bias in Police Stops*, 104 J. AM. STAT. ASS’N 661 (2009); Tamar Sofer et al., *Control Function Assisted IPW Estimation with a Secondary Outcome in Case-Control Studies*, 27 STAT. SINICA 785-804 (2017), available at doi: [10.5705/ss.202015.0116](https://doi.org/10.5705/ss.202015.0116).

¹³⁴ We created the culpability scale in a multi-step process. The scaling process begins with by

For the first analysis, we specified a simple logistic model for each special circumstance identified to show disproportionate racial or ethnic application in our unadjusted analyses. Logistic regressions provide estimates of the odds that a special circumstance will be found or present for a person of each race or ethnicity.¹³⁵ Logistic regression is well-suited for analysis of dichotomous outcomes, such as selection into a specific category or program. The results show the log odds and 95% confidence intervals of being selected into the category of interest, adjusted for the effects of other variables entered into the regression. The odds ratio for each predictor is its exponentiated coefficient.

The model defined the special circumstance as the outcome measure, and included the culpability scale, a fixed effect for offense year, three distinct race or ethnic variables (identifying Black defendants, Latinx defendants, and white defendants), and one variable identifying Black and Latinx defendants together.¹³⁶ We also included a variable

producing a culpability index produced by a logistic model that produced a predicted probability of a death sentence for each case. This model included variables for the fact of four special circumstances being present found or present [3 (multiple victims), 5 (for the purpose of avoiding arrest), 10 (witness victim), and 16 (victim race motive)], the number of special circumstances in the case, kidnapping, that defendant was not the killer, the presence of co-perpetrators, and a scale for the age of the defendant. The model produced a predicted probability of a death sentence for each pre-*Furman* case. Those cases were ranked according to those predictions and divided into a five level culpability scale. We then estimated a racial disparity within each cell and combined those disparities to compute a weighted average of the disparities across all of the cells. This was used to purge the race effects from the index. Mantel-Haentzel is the procedure we use to create these overall estimates. See Nathan Mantel & William Haenszel, *Statistical Aspects of the Analysis of Data from Retrospective Studies of Disease*, 22 J. NAT'L CANCER INST. 719 (1959) (establishing this method).

¹³⁵ See generally DAVID W. HOSMER JR, & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* (2004); see also SCOTT MENARD, *APPLIED LOGISTIC REGRESSION ANALYSIS* (2002) (discussing the assumptions of a logistic regression model and its difference from ordinary multiple (least squares) regression models).

¹³⁶ We evaluated the importance of controlling for county by replicating the analysis for Los Angeles County alone and the study without Los Angeles County cases. Neither analysis produced meaningfully different results. This is not surprising as the study design considered county carefully.

measuring the presence of at least one white victim in this analysis when possible.¹³⁷ We then specified the model by removing any variable that was not at least marginally statistically significant in the model, starting with the variable the farthest from significance and stopping when all variables showed significance. The culpability scale remained highly statistically significant throughout the analysis.

Table 5. Race Disparities by Special Circumstance, Controlling for Culpability (*Each line presents findings from a separate logistic regression model with a single special circumstance as the outcome variable.*)

	A	B	C	D	E	F	G
	Special Circumstance	Freq. ¹³⁸	Race of Defendant	Odds Ratio	St. Err.	95% conf. int.	p-value
1.	Multiple Victims	1,616	Latinx	0.4	0.20	(0.2, 1.1)	= .10
2.	Lying in Wait	8,098	Latinx	1.6	0.30	(0.9, 1.9)	< .02
3.	Robbery & Burglary	5,639	Black	2.2	0.42	(1.5, 3.2)	< .01
4.	Torture	2,334	White	2.3	0.57	(1.4, 4.3)	< .01
5.	Drive by Shooting (<i>model 1</i>)	1,203	Latinx & Black	3.5	1.6	(1.3, 7.7)	< .01
6.	Drive by Shooting (<i>model 2</i>)	1,203	Latinx	2.5	1.0	(1.2, 5.0)	< .02
7.	Gang	3,097	Latinx Black	7.8 4.8	2.9 2.0	(3.7, 16.2) (2.1, 10.8)	< .01 < .01

Table 5 presents results from the analysis of each special circumstance in which at least one race variable remained in the fully specified model. Column A lists the special circumstances. These are the same special circumstances presented in the unadjusted analysis. Column B presents the frequency with which each special circumstance is present or found in the study. Column C presents the race or ethnicity of defendants found to face disparate treatment. Column D presents the odds ratio for the extent of disparate treatment reported in Column C, and Columns E-G present measures of

¹³⁷ This analysis set the missing information to zero. Doing so undercounted the presence of cases with at least one white victim. Even then, this analysis was only possible on a limited basis. Recall that race of defendant and two special circumstances (multiple victims and gang membership) are statistically significantly related to the likelihood of missing the race of the victim.

¹³⁸ Frequency reports the number of cases in the estimated universe recorded as having this special circumstance found or present.

significance. The results largely confirm the unadjusted findings.

A number of special circumstances apply disparately by race or ethnicity, but not all point in the same direction. The largest disparities concern the criminal gang member special circumstance in Line 7. Both Latinx and Black defendants face a disparate exposure to this special circumstance. A model of the likelihood that the gang member special circumstance would be found or present reported that Latinx defendants faced 7.8 higher odds than other similarly situated defendants and Black defendants face 4.8 higher odds than other similar situated defendants even after controlling for culpability and year.

Lines 5 and 6 reports two different models for the likelihood that drive by shooting special circumstance would be found or present. In model one, the combined variable for Black and Latinx defendants faced odds 3.2 higher than the odds faced by similarly situated defendants of other race or ethnicities. In the second, Latinx defendants alone faced odds 2.4 higher than similarly situated defendants of other race or ethnicity.

Line 1 reports that Latinx defendants face less than half the odds of a having multiple victim special circumstance found or present than other similarly situated defendants. This finding is only marginally significant. Line 2 shows, however, that by holding culpability constant it become clear that Latinx defendants face odds of having the special circumstance for lying in wait found or present that are 1.6 the odds of similarly situated defendants of other race or ethnicities ($p < .02$).

Lines 3 and 4 report similar sized disparities by for different groups of defendants. Line 3, reporting on the felony special circumstance for robbery or burglary, reports that Black defendants face odds 2.2 times higher than the odds faced by other defendants. Line 4, reporting on the torture special circumstance, reports that white defendants face

odds 2.3 times higher than other similarly situated defendants.

We conducted additional tests for discrimination in the application of the select special circumstances using four comparisons of race and ethnicity effects. These tests use a first model to predict “treatment” status, and a second model that predicts the outcomes based on the adjusted probability of “treatment.” This is “doubly robust” estimation measures the contribution of each subject in one group, and that contribution is weighted for subjects in the second group by the inverse of its selection probability into the sample.¹³⁹ Here, race is regarded as a “treatment”, and the models estimate the effects of the treatment on being found or present for individual specific special circumstances. The model applies Augmented Inverse Probability Weighting (AIPW) to estimate the two stages of the analysis.¹⁴⁰ The estimates of disparities are shown as “average treatment effects” (ATE) for the differences in the probability of selection by race (or effect sizes) between the reference and test categories.¹⁴¹

We estimate four models to identify specific forms of potential discrimination. The first model compares the presence of special circumstances for white defendants compared to all other defendants. The second compares white with Black defendants,

¹³⁹ Greg Ridgeway & John M. MacDonald, *Doubly Robust Internal Benchmarking and False Discovery Rates for Detecting Racial Bias in Police Stops*, 104 J. AM. STAT. ASS’N 661 (2009); Tamar Sofer et al., *Control Function Assisted IPW Estimation with a Secondary Outcome in Case-Control Studies*, 27 STAT. SINICA 785-804 (2017), available at [10.5705/ss.202015.0116](https://doi.org/10.5705/ss.202015.0116).

¹⁴⁰ Heejung Bang & James M. Robins, *Doubly Robust Estimation in Missing Data and Causal Inference Models*, 61 BIOMETRICS 962 (2005); see also Michele Jonsson et al., *Doubly Robust Estimation of Causal Effects*, 173 AM. J. EPIDEMIOLOGY 761 (2011); James R. Carpenter, Michael G. Kenward, & Stijn Vansteelandt, *A Comparison of Multiple Imputation and Doubly Robust Estimation for Analyses with Missing Data*, 169 J. ROYAL STAT. SOC’Y: SERIES A (STATISTICS IN SOCIETY) 571 (2006).

¹⁴¹ Alberto Abadie et al., *Implementing Matching Estimators for Average Treatment Effects in Stata*, 4 STATA J. 290 (2003); see also Alberto Abadie & Guido W. Imbens, *Large Sample Properties of Matching Estimators for Average Treatment Effects*, 74 ECONOMETRICA 235 (2006); Keisuke Hirano, Guido W. Imbens, & Geert Ridder, *Efficient Estimation of Average Treatment Effects Using the Estimated Propensity Score*, 71 ECONOMETRICA 1161 (2003).

excluding other racial and ethnic categories. The third compares white with Latinx defendants, excluding all others. And the fourth compares white defendants to both Black and Latinx defendants, again excluding all others. Each model estimates first the (inverse) probability of being white in this sample relative to the reference group (Others, Black, Latino, Black or Latino), and then the probability of being found or present for each factor. The models also include as a parameter the culpability scale described above.¹⁴² Table 6 shows the results.

Table 6. AIPW Estimates of Race and Ethnicity on Charging or Finding of Specific Aggravators (ATE, SE, p)

	(1) White-Others	(2) White-Black Only	(3) White-Latinx Only	(4) White-Black or Latinx
Multiple Victims	.009*** (.002)	-.003 (.002)	.018*** 0.002	.011*** (.002)
Lying in Wait	.010* (.006)	-.037*** (.007)	-.029*** (.007)	-0.002 (.006)
Robbery/Burglary	-.025*** (.005)	.103*** (.007)	.040*** (.006)	.029*** (.005)
Torture	.065*** (.004)	-.060*** (.005)	-.081*** (.004)	-.071*** (.004)
Drive By Shooting	-.049*** (.002)	.035*** (.002)	.061*** (.003)	.047*** (.002)
Gang	-.122*** (.003)	.094*** (.004)	.167*** (.004)	.133*** (.003)
N	1,900	1,194	1,236	1,734

Significance: * = $p < .05$, ** = $p < .01$, *** = $p < .001$

Models 2-4 show effects compared to Whites. All models estimated with fixed effect for offense year and the culpability scale as a covariate.

For each of the special circumstances, the race- or ethnicity-specific model results vary depending on comparisons with specific subgroups of defendants. For example, white defendants are more likely to have the multiple victim homicides special

¹⁴² See *supra* note 133.

circumstance found or present in each of the three race- or ethnicity-specific models. For lying in wait, white defendants are less likely than Black defendants to have this special circumstance found or present, but more likely than Latinx defendants. For torture, white defendants are more likely have the special circumstance found or present than others. But they are less likely to have this particular special circumstance found or present in subgroup-specific comparisons.

Other special circumstances show patterns that reflect race-specific crime patterns. White defendants are less likely to have the robbery/burglary factor found or present, but the other models suggest that specific combinations of Black and Latinx defendants are more likely to be have this special circumstance found or present. The same pattern is true for drive-by-shooting and gang crimes.

We tested the sensitivity of the estimates in Table 6 to the inclusion of victim race, especially white victims. In previous studies, estimates of charging and sentencing were sensitive to the inclusion of White victim parameters, with consistent evidence of a greater probability of death sentencing and charging in cases with White victims.¹⁴³ This privileging of White victim cases extends to police investigations of potentially capital-eligible murders.¹⁴⁴ To test the sensitivity of the estimates in Table 6 to the inclusion of White Victim effects, we re-estimated those regressions adding that parameter. The results were nearly identical. Parameter estimates changed only at the third decimal

¹⁴³ See Catherine M. Grosso, Barbara O'Brien, Abijah Taylor & George Woodworth, *Race Discrimination and the Death Penalty*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 540 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014) (reviewing the literature).

¹⁴⁴ Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 24 BERKELEY J. CRIM. L. (forthcoming 2019).

place, and significance remained unchanged.¹⁴⁵

The results overall confirm the heterogeneity of the application of special circumstances. This in turn suggests that models that examine non-special circumstance-specific racial disparities are likely to mask statistically significant disparities by race and ethnicity. A rich analysis of racial and ethnic disparities can only accurately identify disparities though a similar attention to disaggregation and decomposition of death-eligibility.

VI. CONCLUSIONS

This Article examined whether the overbreadth of California’s death penalty statute results in disproportionate death eligibility by race and ethnicity. We found that individual special circumstances disproportionately target defendants by race or ethnicity even after controlling for case culpability and other relevant factors. This targeted and disparate application of the death penalty statute corresponds to Justice William Douglas’s reasoning for striking down the death penalty statutes in *Furman*. He concluded, “it is ‘cruel and unusual’ to apply the death penalty ... selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular.”¹⁴⁶

In particular, we found that the most recently added special circumstances for

¹⁴⁵ Data available from the authors.

¹⁴⁶ 408 U.S. at 245. Justice Douglas cited a host of statistical analysis finding that race had a significant role in the imposition of death sentences. *See, e.g., id.* at 249-50 (quoting the 1967 President’s Commission on Law Enforcement and the Administration of Justice, which found that “The death sentence is disproportionately imposed, and carried out on the poor, the Negro, and the members of unpopular groups.”); *id.* at 250 n.15 (quoting Professor Hugo Bedau’s conclusion that “Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference”); *id.* (citing Professor Marvin Wolfgang and his colleagues’ findings that racial basis affected the sentencing and execution of defendants in 439 death cases from 1914-1958).

gang membership and drive by shootings fulfill the predictions of previous scholars who raised concerns that they would legislate “vengeance” rather than culpability¹⁴⁷ and ran a risk of being “easy to apply to minority defendants.”¹⁴⁸ The stereotype of Latinx defendants as dangerous “has a longstanding and stubborn cultural life” in the United States.¹⁴⁹ Indeed, the patterns of lynching in the American South were present for Latinx people in California during the same decades.¹⁵⁰ These special circumstances run the risk of providing legitimacy and the actions that follow to those stereotypes.

We also found that the sweep of felony murder special circumstances for robbery and burglary,¹⁵¹ as well as the notoriously broad special circumstance for lying in wait¹⁵² applied disproportionately to Black and Latinx defendants. Finally, the torture special circumstance applies disproportionately to white defendants.

These special circumstances play significant roles in the implementation of capital punishment in California. *The Death Penalty*, a report prepared for the California

¹⁴⁷ Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 96 (Austin Sarat ed., 1999).

¹⁴⁸ *Id.* at 100.

¹⁴⁹ Benjamin Fleury-Steiner & Victor Argothy, *Lethal ‘Borders’: Elucidating Jurors’ Racialized Discipline to Punish in Latino Defendant Death Cases*, 6 *PUNISHMENT & SOC’Y* 67, 77 (2004) (citing Diego O. Castro, “Hot Blood and Easy Virtue”: Mass Media and the Making of Latino/A Stereotypes, in *IMAGES OF COLOR, IMAGES OF CRIME* 135 (Coramae Richey Mann & Marjorie S. Zatz eds., 1998); Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 *Chicano-Latino L. Rev.* 118 (1995); Gadalupe T. Luna, *Beyond/Between colors: On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 *U. MIAMI L. REV.* 691 (1999); MIRANDÉ, ALFREDO, *GRINGO JUSTICE* (1987).

¹⁵⁰ John Mack Faragher, Eternity Street, *supra* note 61.

¹⁵¹ See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman*, 72 *N.Y.U. L. REV.* 1283, 1321 (1997) (describing and illustrating the “sweep of the robbery and burglary special circumstances).

¹⁵² See Furman at 45, *supra* note 7, at [mss. p. 53 at note 122] (reporting that a “major contribution to [the California statute’s] over breadth is California’s lying in wait (LIW) special circumstance”); Shatz & Rivkind, *supra* note XX, at 1322-23 (noting the lying in wait special circumstances makes “most premeditated murders potential death penalty cases”).

Commission on the Fair Administration of Justice, reports the statutory basis for every person receiving a death sentence in California between 1977 and 2007.¹⁵³ Two of the six special circumstances found to have disparate application—robbery and multiple murders—are the two most frequently used special circumstances in cases that resulted in a death sentence during the Commission’s study period. Robbery was at least one of the special circumstances in 48% of the death sentences studied. Multiple murder was found in 41% of the cases. Burglary was third most frequently found at 22%.

In addition, according to the Commission’s report, five of the six special circumstances identified here as targeting defendants by race or ethnicity have provided the sole basis for California death sentences.¹⁵⁴ Multiple murders appeared as the only special circumstance in the case 118 times or in 36% of the cases in which it appears as a special circumstance. Robbery appears alone in 91 cases, or 24% of the cases in which found, burglary in 10 (6%), torture in 13 (24%), and gang membership in 1 (25%).¹⁵⁵

This article demonstrates that the California death penalty statute is not only unconstitutionally broad but also “cruel and unusual” in its selective and targeted application. Rather than mitigating the influence of race, it seems—at least in part—to have codified the underlying stereotypes and perhaps given them a veneer of legitimacy. Although courts in the past have relied on evidence across a range of statutory aggravators in responding to claims of Eighth Amendment violations, research that demonstrates disparity by race across aggravators may well have masked strong

¹⁵³ Ellen Kreitzberg, *The Death Penalty*, California Commission on the Fair Administration of Justice (Jan. 7, 2008) at 32, tbl. d1.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

disparities for specific aggravators. Showing the extent and specificity of the sources of disparities and the populations affected, and knowing the stereotypes activated by many of these aggravators, could lead to different conclusions about the extent and nature racial and ethnic disparity, and a different path for litigation about discriminatory intent to challenge these statutes.