RACE, ETHNICITY, AND THE DEATH PENALTY IN SAN DIEGO COUNTY: THE PREDICTABLE CONSEQUENCES OF EXCESSIVE DISCRETION

Steven F. Shatz, Glenn L. Pierce & Michael L. Radelet*

ABSTRACT

Two Supreme Court cases, *Furman v. Georgia* (1972) and *McCleskey v. Kemp* (1987) provide the framework for the study discussed in this essay, the largest single-county death penalty study. In *Furman*, although the issue of race discrimination in death sentencing was central to the litigation and was discussed by several of the justices, the "holding" addressed the issue only indirectly. The Court held that the discretionary death penalty schemes at issue were unconstitutional under the Eighth Amendment because death sentences were imposed so infrequently as to create too great a risk of arbitrariness. The Court's subsequently developed remedy was to require state legislatures to "genuinely narrow" death penalty schemes and state courts to engage in "meaningful appellate review" of death sentences. In *McCleskey*, the Court rejected a death sentence challenge based on a statistical showing of racial discrimination in the state's administration of the death penalty, but left open the possibility that a sufficiently large single-county study finding such racial

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* Steven F. Shatz is Professor Emeritus at the University of San Francisco School of Law; B.A., University of California, Berkeley; J.D., Harvard Law School. Glenn L. Pierce is Director of the Institute for Security and Public Policy (ISPP) and a Principal Research Scientist for the School of Criminology and Criminal Justice, Northeastern University; B.A., Bates College, M.A. and Ph.D., Northeastern University. Michael L. Radelet is Professor of Sociology and Faculty Affiliate in the Institute of Behavioral Science, University of Colorado, Boulder; B.A., Michigan State University; Ph.D., Purdue University. The data for this study were obtained through the efforts of Professor Elisabeth Semel, Director of the Berkeley Law Death Penalty Clinic, and Clinic staff and students. *See* Weaver v. Superior Court, 168 Cal. Rptr. 3d 864, 869 (2014) (mandating that the District Attorney comply with a Public Records Act request). The authors wish to thank Nina Rivkind for her thoughtful critiques on drafts of this essay and the participants in the symposium for their insightful comments at our presentation.

discrimination could establish an equal protection violation. Our study of capital case charging in San Diego County, California, under California's 1978 Death Penalty Law is just such a study. That law produced a death penalty scheme giving prosecutors the discretion to seek death in the vast majority of murder cases, resulting in a death sentence rate among death-eligible defendants even lower than that of Georgia at the time of *Furman*. Our study, covering a fourteen-and-a-half-year period and using data from 1081 cases in which San Diego prosecutors charged an adult defendant with murder and obtained a homicide conviction, examines whether the race or ethnicity of defendants and/or victims affects how that broad prosecutorial discretion is used. We found that race/ethnicity is a significant factor in whether a defendant is charged capitally and whether the death penalty is sought, with the most substantial disparities occurring in cases with black defendants and white victims.

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INTRODUCTION

In 1972, in the seminal case of *Furman v. Georgia*,[1] the Supreme Court held (5–4) that the Georgia death penalty scheme was, and, by implication, all discretionary state death penalty schemes were, unconstitutional. Because each of the Justices in the majority wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. However, all five Justices focused on the infrequency with which the death penalty was imposed,[2] a conclusion based on evidence that only 15–20% of death-eligible defendants convicted of murder were sentenced to death.[3] Justice Stewart held the death penalty was unconstitutional because it was like being "struck by lightning": only "a capriciously selected random handful" were sentenced to death.[4] Justice White found the death penalty was unconstitutional because "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[5] The opinions of these two Justices came to stand for the holding in *Furman*.[6] In subsequent cases, the Court would hold that to limit the risk of such arbitrary and capricious sentencing, state legislatures would have to "genuinely narrow the class of persons eligible for the death penalty"[7] and state courts would have to engage in "meaningful appellate review" of death sentences.[8]

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1. 408 U.S. 238 (1972).

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

3. Chief Justice Burger, writing for the four dissenters, cited that statistic, as did Justice Powell, also writing for the four dissenters. *Id.* at 386 n.11, 435 n.19. In turn, Justice Stewart cited the Chief Justice's statement to argue that the imposition of death was "unusual." *Id.* at 309 & n.10. Later, the plurality in Gregg v. Georgia, 428 U.S. 153, 182, n.26 (1976), made reference to the same statistic. Post-*Furman* research indicates that the pre-*Furman* death sentence rate in Georgia was 15%. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 80 (1990) [hereinafter EQUAL JUSTICE].

4. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

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

6. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

7. Zant v. Stephens, 462 U.S. 862, 877 (1983).

8. Parker v. Dugger, 498 U.S. 308, 321 (1990). The Court had earlier held that the required sentence review need not include *intercase* proportionality review unless the capital sentencing scheme was "so lacking in other checks on arbitrariness that it would not [otherwise] pass constitutional muster." Pulley v. Harris, 465 U.S. 37, 51 (1984).

Race was a central issue in the *Furman* litigation.[9] *Furman* and its two companion cases each involved a black defendant and a white victim, and Furman and several of the *amici* argued that the death sentences were the products of racial discrimination.[10] Nevertheless, Justice Stewart only noted this argument before putting it to one side,[11] and Justice White did not even mention it.[12] Justices Douglas and Marshall did discuss the possibility of racial discrimination, and both expressed the view that the discretion afforded by overbroad statutes all but ensured such discrimination.[13] Justice Powell, for the four dissenters, also addressed the claim of racial discrimination, but dismissed it for two reasons that he would later rely on in his majority opinion in *McCleskey v. Kemp*:[14] claims of racial discrimination should be brought under the Equal Protection Clause, not the Eighth Amendment; and past discrimination does not prove present discrimination because "discriminatory imposition of capital punishment is far less likely today than in the past."[15]

Fifteen years later, in *McCleskey*, the Court directly addressed, for the first time, a claim of racial discrimination in death sentencing. McCleskey introduced an extensive and sophisticated empirical study of over 2000 murder cases in Georgia in the 1970s (the "Baldus study").[16] The study, conducted by Professor David Baldus and his colleagues, found statistically significant racial disparities in death sentencing.[17] McCleskey's attorneys did not challenge the Georgia scheme on the ground that it failed to satisfy *Furman*'s narrowing

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9. *See* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 87–91 (2016).

10. *Id.* at 87–88.

11. 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

12. *Id.* at 310–14 (White, J., concurring).

13. *Id.* at 256–57 (Douglas, J., concurring); *id.* at 364–65 (Marshall, J., concurring). Although the focus of the discussion in *Furman* and subsequent cases was on the discretion afforded to juries, as Justice White recognized in *Gregg*, prosecutors make charging decisions on the same basis as juries make sentencing decisions, and the Court's remedy—statutory narrowing of the death-eligible class—would also limit the discretion of prosecutors. Gregg v. Georgia, 428 U.S. 153, 225 (1976) (White, J., concurring). As the Court has repeatedly found in the context of peremptory challenges, prosecutors are not above engaging in racial discrimination. *See*, *e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (showcasing prosecutorial racial discrimination); Miller-El v. Cockrell, 537 U.S. 322 (2003) (same).

14. McCleskey v. Kemp, 481 U.S. 279 (1987).

15. 408 U.S. at 449–50.

16. *McCleskey*, 481 U.S. at 286.

17. *Id.* at 286–87.

requirement.[18] Instead, they argued that his death sentence violated the Eighth Amendment because racial disparities in outcomes proved the *risk* of arbitrariness in the scheme. They also followed Justice Powell's suggestion in *Furman* and challenged McCleskey's sentence under the Equal Protection Clause. Writing for the majority, Justice Powell assumed the validity of the study,[19] but rejected both claims. He rejected the Eighth Amendment claim by minimizing the significance of the study, finding "[t]he discrepancy indicated by the Baldus study is 'a far cry from the systemic defects identified in *Furman*.'"[20] He also argued that recognizing McCleskey's claim would lead to the placing of "unrealistic conditions" on the use of the death penalty, and he specifically rejected Justice Stevens's contention that narrowing of the death-eligible class was a realistic remedy.[21] Justice Powell rejected the Equal Protection claim because McCleskey's statewide statistics about outcomes could not prove discriminatory intent by any particular actor—the legislature, the prosecutors, or the sentencing jurors.[22] The same was true of his county statistics, and, in addition, the Court found that the Fulton County sample was too small to create an inference of discrimination.[23]

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18. They may have concluded that such a challenge would not likely succeed because the Court approved the Georgia scheme on its face in *Gregg* and impliedly approved it in *Zant*, the very case that elaborated on the narrowing requirement. Further, the Baldus study itself showed that the post-*Furman* Georgia scheme was significantly narrower than the pre-*Furman* scheme—the death sentence rate rose from 15% (pre-*Furman*) to 23% (post-*Furman*). EQUAL JUSTICE, *supra* note 3, at 88–89.

19. Justice Scalia, in a memorandum circulated to the other justices went so far as to say, "it is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [decisions], is real, acknowledged by the [decisions] of this court and ineradicable, I cannot honestly say that all I need is more proof." Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994) (quoting Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811—McCleskey v. Kemp of Jan. 6, 1987, McCleskey v. Kemp File, in Thurgood Marshall Papers (on file with Library of Congress, Washington, D.C.)).

20. McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (citation omitted).

21. *Id.* at 314–19 & n.45.

22. *Id.* at 291–92.

23. *Id.* at 295 n.15. The Fulton County sample covered 179 cases where the defendant was convicted of murder by plea or verdict, some portion of which did involve defendants who were death-eligible and 19 of which went to penalty trial where the decision on death was made by a jury, not the prosecutor. EQUAL JUSTICE, *supra* note 3 at 89, 337.

The present essay reports on a study that takes up the challenge presented by *Furman* and *McCleskey*. The study is the largest and most comprehensive single-county death penalty study ever done—a study examining all cases where, from 1978 to 1993, the San Diego County District Attorney charged the defendant with murder. The county had a single District Attorney, Edwin Miller, during the entire period, and he personally made all decisions regarding the seeking of the death penalty.[24] The study examines a number of aspects of the cases, but focuses on two decision points: the decision whether to charge special circumstances, thereby making a defendant death-eligible,[25] and the decision whether to seek the death penalty. Part I describes the California death penalty scheme, a scheme which has been characterized as the broadest in the country,[26] and various previous empirical studies of that scheme. Part II describes the present study and findings related to the California scheme. Part III sets out the study's findings regarding racial and ethnic disparities in special circumstances charging and death-charging by the San Diego District Attorney's Office. Finally, this Article concludes that this study both provides the basis for a finding of purposeful discrimination under the Equal Protection Clause and supports a broader constitutional challenge to the California scheme.

I. THE CALIFORNIA DEATH PENALTY SCHEME

The current California death penalty scheme, and the scheme in effect during the study period, was enacted in 1978 by Proposition 7, the so-called "Briggs Initiative." According to its author, State

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24. Declaration of Edwin L. Miller, Jr. at 1, People v. La Twon Weaver, No. CN22688 (San Diego Sup. Ct. June 8, 2011) (on file with the *Columbia Human Rights Law Review*). We note that Miller also declared that he did not "consider the race of the defendant, the race of the victim or any other constitutionally impermissible factor" in making those decisions. *Id.* at 1. We assume that Miller did not personally make other charging decisions, so we refer to those decisions as having been made by "the prosecution" or "prosecutors."

25. CAL. PENAL CODE §§ 190.2–.5 (West 2019). We refer to a case where the prosecution charged special circumstances as a "capital" case and to the defendant as "capitally-charged."

26. 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*, 16 J. EMPIRICAL LEGAL STUD. 693, 729 (2019) [hereinafter Furman *at 45*] ("[T]he rate of death eligibility among California homicide cases is the highest in the nation by every measure. This result is the product of the number and breadth of special circumstances under California law.").

Senator John V. Briggs, the initiative was intended to "give Californians the toughest death-penalty law in the country."[27] The intent was to apply the death penalty to "every murder."[28] The scheme and the various empirical studies of the scheme are described below.

A. Description of the Scheme

California criminal law, which, to a large extent, constitutes a codification of the common law, provides for four categories of criminal homicide: two forms of murder (first-degree and second-degree) and three forms of manslaughter (voluntary, involuntary, and vehicular).[29] Death is a possible penalty only for first-degree murder.[30] First-degree murder in California is broadly defined. At the time of the Briggs Initiative, it encompassed eleven forms of murder: premeditated murder, six forms of felony murder, and four forms of murder by particular means.[31] During the period of this study, first-degree murder was expanded by the addition of one more "means" in 1982[32] and six more felony murders in 1990.[33] The base penalty for first-degree murder during the study period was twenty-five years to life. The Briggs Initiative enumerated twenty-seven special circumstances that would raise the penalty to death or life without the possibility of

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

28. STATE OF CALIFORNIA, VOTER'S PAMPHLET 34 (1978). Under California law, ballot arguments constitute part of the "legislative history" used to interpret initiative measures. *See*, *e.g.*, Long Beach City Emps. Ass'n v. City of Long Beach, 719 P.2d 660, 663 n.5 (Cal. 1986) ("Election ballot arguments have long been used as an aid in construing constitutional amendments adopted via the initiative process.").

29. CAL. PENAL CODE § 192 (West 2019).

30. CAL. PENAL CODE § 190(a) (West 2019).

31. 1970 Cal. Stat. ch. 771, § 3.

32. 1982 Cal. Stat. ch. 950, § 1 (adding murder perpetrated by "knowing use of ammunition designed primarily to penetrate metal or armor").

33. Cal. Proposition 115, § 9 (1990) (adding kidnapping, train wrecking, sodomy, lewd acts with minors, oral copulation, and rape by instrument). In 2018, first-degree murder was narrowed somewhat with regard to accomplices. S.B. 1437 provided that, to convict an accomplice of first-degree murder, the prosecution had to prove, in addition to the other elements of first-degree murder, that the accomplice had the intent to kill or was a major participant in an underlying felony and acted with reckless indifference to human life. CAL. PENAL CODE § 189(e) (West 2019). This change had a limited effect on special circumstances and the death penalty because the special circumstances already required proof of reckless indifference as to an accomplice. *See* CAL. PENAL CODE § 190.2(d) (West 2019).

parole ("LWOP").[34] According to the California Supreme Court, these special circumstances performed the "constitutionally required 'narrowing' function."[35] The scope of the special circumstances underwent two changes during the study period. For the period of December 13, 1983 through October 13, 1987, under the mandate of *Carlos v. Superior Court*, the special circumstances were limited by the requirement that the prosecution had to prove the defendant's intent to kill.[36] By initiative, effective June 6, 1990, two special circumstances were added and the former intent to kill requirement for accomplices was eliminated.[37]

Prosecutors enjoy complete discretion over whether to charge a special circumstance and, if so, whether to seek the death penalty.[38] If the prosecutor charges a special circumstance, and, if the case proceeds to trial, the special circumstance allegation is tried along with the underlying murder charge at the guilt phase of the trial.[39] If the defendant is found guilty of first-degree murder and one or more special circumstances is found true, the case proceeds to a penalty phase if the District Attorney is seeking death. At the penalty phase, additional aggravating and mitigating evidence may be introduced, and the jury is read a list of factors to consider in reaching its sentencing decision.[40] The jury is instructed that it is to weigh the aggravating circumstances against the mitigating circumstances in reaching its decision.[41] If a death judgment is returned, it is reviewed

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34. One of the special circumstances, the catchall "heinous, atrocious, or cruel" circumstance (CAL. PENAL CODE § 190.2(a)(14) (West 2019)), was held unconstitutional in *People v. Superior Court (Engert)*, 647 Cal. P.2d 76 (1982), and was not considered for purposes of this study.

35. People v. Bacigalupo, 862 P.2d 808, 813 (Cal. 1993).

36. 672 P.2d 862 (Cal. 1983), *overruled by* People v. Anderson, 742 P.2d 1306 (Cal. 1987).

37. *See* Cal. Proposition 115 (1990).

38. While special circumstances must be charged in the Information or Indictment and the defendant must enter a plea as to the truth of the circumstances, the prosecution's notice that it intends to seek the death penalty follows no prescribed form, and may be given long after the defendant's arraignment. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 105–06 (N. Cal. Innocence Project Publications, 2008). Nonetheless, for convenience, we refer to the giving of such a notice as "charging death."

39. CAL. PENAL CODE § 190.4(a) (West 2019).

40. CAL. PENAL CODE § 190.3 (West 2019).

41. The instruction as to how the jury was to conduct this weighing process changed mid-way through the study period. *See* Boyde v. California, 494 U.S. 370, 375 n.3 (1990). Since 1988, to bring in a judgment of death, each juror "must be persuaded that the aggravating circumstances are so substantial in comparison

first by the trial court,[42] and then on automatic appeal to the California Supreme Court where the court, in addition to considering claimed legal errors, may review the proportionality of the death penalty.[43]

B. Previous Empirical Studies

There have been several studies, covering different time periods and using different samples and methodologies, that have measured the degree to which the California death penalty scheme "narrows" the death-eligible class. The first was a study conducted in 1997 by one of the present authors, using a sample of appellate first-degree murder cases decided in the period from 1988 to 1992.[44] The study estimated that 87% of convicted first-degree murders were factually death-eligible, but that only approximately 11.4% of such death-eligible murders resulted in a death sentence.[45] A more comprehensive study of all first-degree convictions during the period from 2003 to 2005, some 1299 cases, reported a death eligibility rate of 84.6% and a death-sentence rate of only 5.5%.[46] The most recent statewide narrowing study was conducted by Professor Baldus and his colleagues ten years ago.[47] Using a 1900-case stratified sample of convictions for non-negligent homicides during the period from 1978 to 2002, the study found a death eligibility rate, under the 2008 version of the state scheme, of 95% for first-degree murderers and 59% for

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with the mitigating circumstances that it warrants death instead of life without parole." Cal. Jury Instructions (CALJIC) No. 8.88 (2010).

42. CAL. PENAL CODE § 190.4(e) (West 2019).

43. People v. Dykes, 200 P.3d 1, 71–73 (Cal. 2009); *see* Steven F. Shatz, *The Meaning of "Meaningful Appellate Review" in Capital Cases: Lessons from California*, 56 SANTA CLARA L. REV. 79, 94–108 (2016) (evaluating the use of "meaningful appellate review" derived from *Furman v. Georgia* in death penalty cases).

44. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1338–43 (1997) (arguing that the California death penalty scheme subverts the Supreme Court's holding in *Furman* and is unconstitutional).

45. *Id.* at 1330–32. Subsequently, this death eligibility figure was adopted by the California Commission on the Fair Administration of Justice in its review of the death penalty. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 38, at 131.

46. *See* Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 93 (2012). Because both studies used only cases resulting in a first-degree murder conviction, they necessarily overstated the death-sentence rate because they excluded all those defendants who were death-eligible by statute but who were able to plead to a lesser charge.

47. Furman *at 45*, *supra* note 26.

those convicted of second-degree murder and voluntary manslaughter, and an overall death-sentence rate of 4.3%.[48]

Statewide studies have also documented various aspects of arbitrariness in the California scheme. Two of the present authors studied the effects of race and geography on death sentencing in California during the period from 1990 to 1999 and found "glaring differences in the rate of death sentences across categories of victim race/ethnicity."[49] Comparing death sentences and homicides per county in light of both the racial/ethnic demographics of the county and its population density, that study also found substantial geographic disparities and concluded that "death sentencing rates are lowest in counties with the highest non-white population."[50] The 2003–2005 study mentioned above found substantial gender-of-victim disparities in death sentencing. In single-victim first-degree murder cases, "factually death-eligible defendants convicted of killing women were more than seven times as likely to be sentenced to death as factually death-eligible defendants who killed men."[51]

There have been three previous county-level studies of race/ethnicity and the death penalty in California. One, covering the period from 1977 to 1986, examined death-eligible charging in 128 San Joaquin County cases involving Hispanic defendants or victims.[52] Using a logistic regression model incorporating a number of factors, the study found a pattern of racial and gender discrimination in the charging of special circumstances—a defendant charged with killing a white victim and/or a woman victim was significantly more likely to be

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48. *Id*. at 1. There has been one study of the other *Furman* requirement, meaningful appellate review, conducted by one of the present authors. It found that (as of 2014), the California Supreme Court had never set aside a death sentence as disproportionate or excessive. Shatz, *supra* note 43, at 140–41 ("[T]his 'inexorable zero' establishes that . . . the court simply does not engage in appellate review (meaningful or otherwise) of death sentences.") (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977)).

49. Glenn Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides 1990–1999*, 46 SANTA CLARA L. REV. 1, 19 (2005).

50. *Id.* at 38.

51. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1252 (2013) (citing Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 107 (2012)).

52. Catherine Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California*, 35 J. CRIM. JUST. 17, 19–20 (2007).

capitally charged.[53] A study of 473 cases where the defendant was convicted of first-degree murder in Alameda County during the period from 1978 to 2001 disclosed substantial "race of neighborhood" disparities in death charging and death sentencing.[54] The county was divided roughly in half according to census tracts, and the two halves had very different racial/ethnic makeups: the population of North County had a white/black ratio of approximately 3:2, while the white/black ratio in South County was almost 19:1.[55] Using a logistic regression model with a number of variables, the study found the District Attorney was more likely to seek death, and a death sentence was more likely to be imposed, for South County murders.[56] The most recent of the single county studies was a study of Los Angeles County willful homicide cases during the period from 1990 to 1994.[57] The study examined special circumstances in charging and death charging and found that "cases with minority victims are treated more leniently than those with White victims at multiple stages of the death penalty process . . . producing a Whiter pool of victims at each phase."[58]

II. THE PRESENT STUDY AND FINDINGS REGARDING THE CALIFORNIA SCHEME

The present study of murder prosecutions in San Diego County was based on data obtained by attorneys for the defendant in *People v. La Twon Weaver*.[59] Our universe of cases was murder prosecutions for homicides committed on or after November 8, 1978 (the effective date of the Briggs Initiative) with prosecutions begun during or before May 1993 (the month the defendant in *Weaver* was sentenced to death).[60]

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53. *Id.* at 21–22.

54. *See* Shatz & Dalton, *supra* note 51, at 1275.

55. *Id.* at 1263.

56. *Id.* at 1265, 1267. The finding that the death sentence rate was significantly lower for North County murders corresponds with the Pierce & Radelet finding mentioned above that death sentence rates were lowest in counties with a high non-white population.

57. Nick Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities*, CRIM. JUST. REV. 2017, at 1, 15.

58. *Id.* at 15.

59. 273 P.3d 546 (Cal. 2012).

60. Our database of murder prosecutions allows us to analyze post-charge decision-making for bias, but, of course, it provides no information about decision-making at earlier stages of the criminal justice process. The universe of cases and the facts we have regarding those cases may have been affected by the bias of various actors, including the police who investigated the crime and decided whether

A. Data Collection and Methodology

The primary data used to code cases in this study consists of two sets of documents: (a) charging documents during the relevant time period for cases in which a violation of California Penal Code section 187(a) (murder) was alleged, provided by the District Attorney's Office in response to a Public Records Act request; and (b) the pre-sentence reports ("PSRs") for defendants in those cases who suffered a conviction, provided by the Superior Court pursuant to petitions filed under California Penal Code section 1203.05(b). This data from the charging documents and PSRs was supplemented with information from the State of California Department of Justice Willful Homicide Charts, the Federal Bureau of Investigation Supplementary Homicide Reports, appellate court opinions, and newspaper accounts of the crimes or prosecutions.

Data were obtained on 1647 cases. We eliminated cases from the data set if the case was outside the relevant time period; the defendant was not charged with murder or was charged on the basis of facts that could not have supported a first-degree murder conviction; the defendant was a juvenile; the defendant was not convicted of a homicide; the case was still pending;[61] or significant information concerning the case was unobtainable.[62] After eliminating these cases, 1081 cases remained for analysis—cases in which, during the relevant time period, an adult defendant was charged with a violation of Penal

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to make an arrest, and the prosecutor who decided whether to file murder charges. This type of bias can arise in systems wherein actors who are responsible for making key decisions (e.g., charging) are also responsible for collecting and producing information that forms the basis for their decisions. Under these conditions, actors may bias the way they collect, organize, disseminate, present or interpret information in order to achieve expected or predetermined outcomes. As a result, at least some of the information used by us to evaluate the charging decisions may itself be biased and thus may obscure evidence of arbitrariness or discrimination. *See generally* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Criminal Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985) (finding patterns of evidence enhancement related to the race of victims and offenders); Glenn L. Pierce, Michael L. Radelet, Chad Posick & Tim Lyman, *Race and the Construction of Evidence in Homicide Cases*, 39 AM. J. CRIM. JUST. 771 (2014) (finding that the amount of evidence submitted to defense attorneys by prosecutors during discovery in homicide cases is strongly associated with the race and gender of victims).

61. Pending cases were those where the defendant had fled and was not recaptured.

62. There were 78 cases (4.7%) with insufficient information, most due to the County Clerk's inability to locate a PSR.

Code section 187(a) and was convicted of a homicide (first- or second-degree murder; voluntary or involuntary manslaughter).

Each case was coded for a variety of factors concerning the defendant, the victim, the crime and the prosecution. The initial coding was done by attorneys and students trained and supervised by Professor Shatz. Since our focus was on the death penalty, each case was coded for the presence or absence of the special circumstances set forth in Penal Code section 190.2(a) that would have made the defendant death-eligible. A special circumstance was coded as present if the circumstance was found by a fact-finder or admitted by the defendant, or if the facts of the case were such that a reasonable fact-finder could have found the circumstance true beyond a reasonable doubt.[63] We determined that 493 of the 1081 cases had a proved or provable special circumstance (hereinafter, "special circumstances cases"). Those 493 cases resulted in 218 defendants being convicted of first-degree murder and 275 convicted of lesser homicides. For purposes of our analysis, we aggregated the special circumstances into eight categories:[64] (1) multiple murders;[65] (2) sexual assault;[66] (3) torture and kidnapping;[67] (4) theft felonies;[68] (5) designated victims;[69]

63. If a factfinder determined that no special circumstance was proved, we treated that finding as controlling.

64. All subsequent references to "special circumstances" refer to these categories. For example, a statement that the District Attorney charged a single special circumstance means that he charged circumstances from a single category even if he charged multiple circumstances within that category.

65. Prior murder and multiple murder. *See* CAL. PENAL CODE § 190.2(a)(2), (3) (West 2019).

66. Rape, sodomy (forcible or with a minor), lewd act with minor, oral copulation (forcible or with a minor), and rape by instrument. *See* CAL. PENAL CODE § 190.2(a)(17)(C), (D), (E), (F), (K) (West 2019). During the period of the study, the felony-murder special circumstances in § 190.2(a)(17) were identified with Roman numerals. They are currently designated with capital letters. For convenience here and in subsequent footnotes, the current citations are used.

67. *See* CAL. PENAL CODE § 190.2(a)(18), (a)(17)(B) (West 2019).

68. Robbery and burglary. *See* CAL. PENAL CODE § 190.2(a)(17)(A), (G) (West 2019).

69. Peace officer, federal law enforcement officer, firefighter, witness, prosecutor, judge, and elected or appointed official. *See* CAL. PENAL CODE § 190.2(a)(7)–(13) (West 2019).

(6) financial gain;[70] (7) lying in wait;[71] and (8) miscellaneous.[72] A special circumstance, if found, not only makes a defendant death-eligible, it is also an "aggravating factor," a circumstance of the crime that can be considered by the sentencer at the penalty phase.[73]

In addition, we coded for other circumstances of the crime: whether there was a vulnerable victim (a child or elder); whether the victim was a stranger or was known to the defendant; whether the role played by the defendant in the killing was as a principal or non-killing accomplice or co-conspirator; whether a firearm was used; and whether the defendant caused injuries to persons other than the homicide victim. We also coded for the other two statutory aggravating factors: prior felony convictions[74] and other proved or provable crimes involving violence or the threat of violence.[75] We coded for two non-statutory factors about the defendant that may have influenced the charging decision: whether the defendant was on parole or probation at the time of the crime and whether the defendant was a gang member. Lastly, we coded for the race/ethnicity and gender of the defendant and the victim(s).[76]

B. General Findings

Before addressing the issue of race/ethnicity and charging in potential death penalty cases, we set forth some general findings to give context to that discussion. Table 1 below details the outcomes in the 1081 cases, indicating whether special circumstances were present,

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70. *See* CAL. PENAL CODE § 190.2(a)(1) (West 2019). Financial gain murders, e.g., contract killings or killings for insurance proceeds, should not be confused with ordinary robbery-murders.

71. *See* CAL. PENAL CODE § 190.2(a)(15) (West 2019).

72. Murder by a hidden bomb or by a mailed or delivered bomb, murder to escape custody or avoid arrest, murder with a hate motive, murder during arson, train wrecking or mayhem, and murder by poison. *See* CAL. PENAL CODE § 190.2(a)(4), (5), (6), (16), (17)(H), (17)(I), (17)(J), (19) (West 2019). These circumstances are rarely occurring and are dissimilar to the circumstances in the other categories. *See infra* Table 2.

73. CAL. PENAL CODE § 190.3(a) (West 2019).

74. *Id.* § 190.3(c).

75. *Id.* § 190.3(b).

76. We made no attempt to code for non-crime mitigating evidence, e.g., a defendant's possible childhood deprivation or mental impairments. While such evidence at a penalty phase might affect the penalty outcome, the present study concerns charging decisions. We were unable to determine what, if any, mitigating evidence prosecutors knew of prior to making those decisions.

whether prosecutors charged special circumstances and whether the District Attorney sought the death penalty.

Table 1: Case Outcomes, Presence of Special Circumstances ("SC"), and Charging Among All Cases that Resulted in a Homicide Conviction

Conviction Level	Total Cases	SC Present	SC Charged (% of SC present)	Death Charged (% of SC present)
First-Degree Murder	269	218 (81.0%)	110 (50.5%)	65 (29.8%)
Death Penalty	23	23 (100%)	23 (100%)	23 (100%)
SC Found (LWOP)	53	53 (100%)	53 (100%)	30 (56.6%)
No SC Found	193	142 (73.6%)	34 (23.9%)	12 (8.5%)
Second-Degree Murder	300	138 (46.0%)	17 (12.3%)	3 (2.2%)
Voluntary Manslaughter	398	120 (30.2%)	8 (6.7%)	2 (1.7%)
Involuntary Manslaughter	114	17 (14.9%)	1 (5.9%)	0 (0.0%)
Total	**1081**	**493 (45.6%)**	**136 (27.6%)**	**70 (14.4%)**

In the 1081 cases where prosecutors filed potential first-degree murder charges and where the defendant was convicted of a homicide, the prosecution obtained a first-degree murder conviction just under 25% of the time (269/1081). Prosecutors charged special circumstances in only 27.6% of the cases (136/493) where the facts would have supported a special circumstances finding, and the District Attorney sought death in 51.5% (70/136) of the cases where special circumstances were charged.[77] The death-sentence rate for all death-

77. We note that 61.6% of the convictions (666/1081) were obtained by pleas. As is the case with charging, prosecutors have complete discretion whether to reduce charges in the course of plea bargaining and by how much, so the homicide level of the defendant's conviction may have nothing to do with the facts of the case.

eligible defendants was 4.7% (23/493). The death-eligibility rate for defendants convicted of first-degree murder was 81.0% (218/269) and the death sentence rate was 10.6% (23/218). These findings—a high death-eligibility rate and a low death-sentence rate—are consistent with the findings of prior studies concluding that the California death penalty scheme fails to "genuinely narrow" the death-eligible class.[78]

Table 2 breaks down the 493 special circumstances cases and sets out numbers for special circumstances charges, death charges and death sentences.

Table 2: Charges by Categories of Special Circumstances, in Cases in Which Special Circumstances Were Present (n=493)

Specials	Total Cases	SC Charged	Death Charged	Death Sentence
3 or More Categories	45	31 (68.9%)	20 (44.4%)	12 (26.6%)
2 Categories	119	54 (45.8%)	36 (30.3%)	8 (6.7%)
1 Category	329	51 (15.5%)	14 (4.3%)	3 (0.9%)
Multiple Murder Only	25	6	3	0
Sex Assault Only	10	3	0	0
Torture/Kidnapping Only	13	2	0	0
Theft Felony Only	105	28	8	2
Special Victims Only	5	0	0	0
Financial Gain Only	5	4	2	0
Lying in Wait Only	163	8	1	1
Miscellaneous Only	3	0	0	0
Total	**493**	**136 (27.6%)**	**70 (14.2%)**	**23 (4.7%)**

Two aspects of the data in Table 2 are particularly striking. First, the District Attorney sought death in only 14.2% of the cases, even though, by statute, death was an authorized penalty in all of the

78. *See supra* Section I.B.

cases.[79] Thus, it was the District Attorney's discretionary decision not to pursue a death sentence against over 85% of the defendants made statutorily death-eligible—not the statutory scheme—that "narrowed" the death-eligible class.[80] Second, the data reveal that murder accompanied by a single special circumstance (or special circumstances in a single category) rarely results in a special circumstance charge, a death charge or, in the end, a death sentence. Earlier California studies found that murders aggravated by certain of the special circumstances—multiple-murder and sexual assault—were much more likely to lead to a death charge and a death sentence than murders with other special circumstances.[81] We made similar findings,[82] but, in addition, as Table 2 indicates, we found that the number of different special circumstances present has a significant effect on charging and sentencing. As compared with single-special circumstance cases, cases with multiple different special circumstances were more than three times as likely to have a special circumstance charge, almost eight times as likely to have a death charge, and more than thirteen times as likely to result in a death sentence.

Our data confirm previous findings that the most common special circumstances murders—theft-based felony-murders and lying in wait murders (making death-eligible most premeditated murders)—rarely become death penalty cases.[83] Of the 493 special circumstances cases in our study, there were 305 cases (61.9%), where the only special circumstances were theft felonies, lying in wait or both. Special circumstances were charged in 43 of those cases (14.1%), and death was sought in 11 of those cases (3.6%). Only 3 defendants of the 305 were sentenced to death (1%).[84] Our data also establish that there

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79. The District Attorney further exercised his discretion to drop his request for death in 23 of the 70 cases resolved by a plea bargain.

80. This "narrowing" through the prosecutor's decisions not to seek death is not the *legislative* narrowing mandated by the Court. Hidalgo v. Arizona, 138 S. Ct. 1054, 1057 (2018) (statement of Justice Breyer regarding denial of certiorari).

81. *See* Shatz, *supra* note 43, at 113–15.

82. *See infra* Tables 6 and 7.

83. *See* Shatz & Dalton, *supra* note 51, at 1264–65.

84. A death-sentence rate so low calls into question the constitutional validity of these circumstances. The risk of arbitrariness is patent. *See* Gregg v. Georgia, 428 U.S. 153, 205–06 (1976) (plurality) (citing with approval the Georgia Supreme Court's understanding that the Eighth Amendment disallows the imposition of the death penalty "when juries generally do not impose the death sentence in a certain kind of murder case"). A death-sentence rate so low for these commonplace murders also raises proportionality concerns. *See* Roper v. Simmons, 543 U.S. 551, 571 (2008) ("[T]he culpability of the average murderer is insufficient

are statistically significant racial/ethnic disparities as to defendants prosecuted for these less egregious murders. Of the death-eligible black and Latinx defendants, 68.2% (161/236) were charged with such a murder, whereas the comparable figure for white defendants was 53.9% (124/230). This finding is generally consistent with the findings of Professor Grosso et al. in their statewide study. They found that, among death-eligible defendants, black defendants were significantly overrepresented in robbery/burglary murders and Latinx defendants were significantly overrepresented in lying in wait murders.[85] Thus, both studies reveal that the inclusion of these less egregious murders in the California scheme has the effect of significantly increasing the percentage of black and Latinx defendants in the death-eligible pool.

III. RACE/ETHNICITY AND CHARGING IN SAN DIEGO COUNTY

In examining the data for possible race/ethnicity effects, we focused on potential differences between white defendants and victims on the one hand and black or Latinx defendants and victims on the other.[86] As a result, for purposes of the race effects analysis, we did not include the 46 cases in which the defendant was not white, black or Latinx and/or there was no white, black or Latinx victim.[87] That left 447 cases to be analyzed for race/ethnicity effects.

We built statistical models to study three "dependent variables" or three outcomes: (a) whether prosecutors charged special circumstances; (b) whether or not the District Attorney sought the death penalty; and (c) whether or not a death sentence was obtained. Prosecutors charged special circumstances in 27.1% (121/447) of the cases. Table 3 below shows whether special circumstances were

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to justify the most extreme sanction available to the State . . . ."). As Justice Scalia put it, "[t]he Court has prohibited the death penalty for all crimes except murder, and indeed even for what might be called run-of-the-mill murders, as opposed to those that are somehow characterized by a high degree of brutality or depravity." Antonin Scalia, *God's Justice and Ours*, 123 FIRST THINGS 17, 17 (2002).

85. Catherine M. Grosso, Jeffrey A. Fagan, Michael Laurence, David C. Baldus, George W. Woodworth & Richard Newell, *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, UCLA L. REV. 42–43 (forthcoming 2019).

86. The other two categories coded in the study, "Asian" and "Other," were too small to allow for meaningful statistical analysis.

87. There were 13 cases with no white, black or Latinx defendant and no white, black or Latinx victim; 14 additional cases with no white, black or Latinx defendant; and 19 additional cases with no white, black or Latinx victim.

charged in the cases, broken down by the race of the victim and race of the defendant.[88]

Table 3: Special Circumstances Charged (SCC) by Race/Ethnicity of Victim and Race/Ethnicity of Defendant

Special. Circ.		WV-WD	WV-LD	WV-BD	B/LV-WD	B/LV-LD	B/LV-BD	Total
No SCC	N	131	21	20	29	65	60	326
	%	69.7%	72.4%	42.6%	80.6%	92.9%	77.9%	72.9%
SCCs	N	57	8	27	7	5	17	121
	%	30.3%	27.6%	57.4%	19.4%	7.1%	22.1%	27.1%
Total	N	188	29	47	36	70	77	447
	%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-Square = 39.090, 5 degrees of freedom, $p = .000$[89]

The table reveals that the rate at which prosecutors charged special circumstances differed substantially by race/ethnicity. Specifically, prosecutors charged special circumstances in 57.4% of the cases with white victims and black defendants (n=27), almost twice as often as they charged special circumstances in other white victim cases (n=63) and almost four times as often as they charged special circumstances in black and Latinx victim cases (n=29). Combining the above figures, we find that prosecutors charged special circumstances in 34.8% of the cases ((57+8+27)/(188+29+47)) with white victims (n=92) and in 15.8% of the cases ((7+5+17)/(36+70+77)) with black or Latinx victims (n=29). The Chi-Square calculation demonstrates that

88. In this and subsequent tables, we use the following abbreviations: D=Defendant; V=Victim; W=White; L=Latinx; B=Black.

89. The chi-square test is one of the most common measures used by quantitative researchers to show the relationship between two variables. It is affected by both the strength of the relationship and sample size. For example, if we flipped a coin ten times and got ten heads, the chi-square measure would be statistically significant, indicating that it would be extremely unlikely to get ten heads in a row with an unbiased coin. Or, if we obtained heads in 70 or 80 percent of the flips, the chi-square might say this is unlikely if we flip the coin 100 times but could happen by chance with ten flips. The convention is to use the .05 level of significance, which means we would conclude that the observed patterns would be expected when flipping an unbiased coin less than five percent of the time. *See* ALAN AGRESTI, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 218–23 (5th ed. 2018).

these racial and ethnic effects are statistically significant, with the probability of obtaining the observed patterns by chance close to .000.

Table 4 examines whether the District Attorney sought death in the 447 cases, broken down by the race/ethnicity of the victim and race/ethnicity of the defendant.

Table 4: Death Penalty Sought (DPS) by Race/Ethnicity of Victim and Race/Ethnicity of Defendant

		WV-WD	WV-LD	WV-BD	B/LV-WD	B/LV-LD	B/LV-BD	Total
No DPS	N	157	23	31	35	66	72	384
	%	83.5%	79.3%	66.0%	97.2%	94.3%	93.5%	85.9%
DPS	N	31	6	16	1	4	5	63
	%	16.5%	20.7%	34.0%	2.8%	5.7%	6.5%	14.1%
Total	N	188	29	47	36	70	77	447
	%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-Square = 32.490, 5 degrees of freedom, p = .000

The table reveals that the rate at which the District Attorney sought death differed substantially by race/ethnicity, and there was an even greater disparity here than in special circumstance charging. The District Attorney sought death in 20.0% of the cases with a white victim (53/264), but only 5.5% of the cases with black or Latinx victims (10/183). As was the case with specials circumstances charging, the black defendant/white victim cases showed the greatest disparity: The District Attorney sought death in 34.0% of black defendant/white victim cases (16/47), but only 11.8% of the time (47/400) for all other cases. Again, the Chi-Square calculation demonstrates that these racial and ethnic differences are statistically significant, with the probability of obtaining the observed patterns by chance close to .000.

A death sentence was ultimately imposed in 20 of the 447 cases (4.5%). Table 5 sets out the racial/ethnic breakdown of the death sentences:

Table 5: Death Sentence Imposed (DSI) by Race/Ethnicity of Victim and Race/Ethnicity of Defendant

		WV-WD	WV-LD	WV-BD	B/LV-WD	B/LV-LD	B/LV-BD	Total
No DSI	N	182	26	40	36	68	75	427
	%	96.8%	89.7%	85.1%	100.0%	97.1%	97.4%	95.5%
DSI	N	6	3	7	0	2	2	20
	%	3.2%	10.3%	14.9%	0.0%	2.9%	2.6%	4.5%
Total	N	188	29	47	36	70	77	447
	%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-Square = 17.749, 5 degrees of freedom, p = .003.

A death sentence was imposed in 13.2% of the cases with a white victim and a black or Latinx defendant (10/76), but only 2.7% of the time in all other cases (10/371). None of the 36 cases with black or Latinx victims and white defendants resulted in a death sentence. As the Chi-Square calculation demonstrates, the probability of obtaining the observed patterns by chance is less than .003, or less than 3 chances out of 1000.

Using a multivariate logistic regression analysis, we statistically controlled for a number of variables to allow us to determine if the race/ethnicity correlations identified in Tables 3 and 4 continue to be present even after other variables are held constant.[90] Logistic regression is the appropriate tool to employ in predicting a dichotomous (two-value) dependent variable with a series of independent variables. Tables 6 and 7 below model two dependent variables. Table 6 examines the 447 cases to predict whether prosecutors charged one or more special circumstances. Table 7 examines the 447 cases to predict whether the District Attorney sought the death penalty. We predict these variables with four measures of race/ethnicity. Three are included in the logistic regressions: cases with white victims and white defendants, white victims and Latinx defendants, and white victims and black defendants (WV/WD, WV/LD, WV/BD, respectively). We omitted the fourth race/ethnicity variable, cases with black or Latinx victims regardless of the race of the

90. There were too few death sentences to permit a similar regression analysis with regard to Table 5.

defendant, from the logistic regression analyses, so this variable could be used as the comparison or reference group. In addition, we used nineteen dichotomous variables to predict each dependent variable.

Table 6: **Logistic Regression Analysis of Victim/Defendant Race/Ethnicity and Other Factors**[91] **on Whether Special Circumstances Were Charged (n=447)**[92]

Independent Variables	β	S.E.	Sig.	Exp(β)
WV/WD	.617	.361	.088	1.852
WV/LD	.534	.571	.350	1.706
WV/BD	1.318	.460	.004	3.734
Prior Felony Conviction	.225	.353	.524	1.252
Other Crimes of Violence	.108	.331	.744	1.114
Use of a Firearm	.869	.315	.006	2.386
On Probation or Parole at Time of Murder	.321	.328	.328	1.379

91. The analysis and that in the following table (Table 7) also includes the gender of the victim(s) and the defendant.

92. This table and Table 7 present four statistical measures. The β coefficient in a logistic regression model measures the relationship between the particular independent variable *x* and the dependent variable *y* (special circumstances charging in this table, death charging in Table 7). The relationship can be positive (as *x* increases, the probability of *y* increases); negative (as *x* increases, the probability of *y* decreases); or 0 (the variables are not related). The "S.E.," or standard error, is the standard deviation of its sampling distribution (the expected or typical deviation from the true value of the effect if one could observe multiple samples of the same size). "Sig." measures statistical significance (or *p*-value)—the probability that a relationship between two or more variables is caused by something other than chance. It measures how likely a given relationship can be expected to be found in a sample if there is not a relationship in the larger population. By convention, a relationship is deemed to be significant if that probability is less than .05. The Exp(β) coefficient is the β coefficient converted (by using the mathematical exponential transformation) to an odds ratio, which is the ratio of the odds of obtaining the outcome of interest for a particular group divided by the odds of receiving that outcome for a second group; in this case the odds of a special circumstances charge (or, in Table 7, a death charge) in cases where the independent variable is present (as opposed to not present, or in the case of the race variables as opposed to the omitted category—minority victim cases). *See* AGRESTI, *supra* note 89, at 460–68.

In Gang at Time of Murder	.684	.481	.155	1.982
Principal Role in Crime	-.237	.363	.515	.789
Victim(s) a Stranger to Defendant	.840	.332	.012	2.316
Child or Elderly Victim	-.061	.500	.903	.941
Injuries to Non-Homicide Victims	-.398	.296	.431	.672
Female Victim	1.549	.362	.000	4.705
Female Defendant	-.090	.581	.877	.914
Multiple Murder Special	2.298	.401	.000	9.957
Sex Crime Special	1.696	.618	.006	5.453
Torture/Kidnapping Special	1.123	.400	.005	3.075
Theft Felony Special	1.573	.355	.000	4.823
Victim Special	.831	1.020	.415	2.296
Financial Gain Special	3.563	.613	.000	35.258
Lying in Wait Special	.261	.314	.407	1.298
Other Special	1.125	.631	.074	3.082
Constant	-4.819	.654	.000	.008

Using the conventional level of significance for statistical studies (<.05), there are nine predictor variables that had a statistically significant effect on special circumstance charging. Seven of those variables concerned the nature of the crime: use of a firearm, stranger victim and five special circumstances—multiple murder, sex crime, theft felony, torture/kidnapping and financial gain. These variables are arguably legitimate considerations in the charging decision. However, the other two variables with a statistically significant effect—race/ethnicity (WV/BD) and gender of the

victim—are not.[93] With regard to the WV/BD variable, column Exp(β) in Table 6 shows the strength of the predictive power of this variable to be 3.734. Thus, in cases involving a white victim and a black defendant, the odds of prosecutors alleging special circumstances were 3.734 times higher for WV/BD cases than in the category omitted from the model, the BV or LV (or minority victim) cases.

Table 7: Logistic Regression Analysis of Victim/Defendant Race/Ethnicity and Other Factors on Whether Death Penalty Sought (n=447)

Independent Variables	β	S.E.	Sig.	Exp(β)
WV/WD	.804	.496	.105	2.234
WV/LD	1.993	.713	.005	7.337
WV/BD	1.874	.592	.002	6.516
Prior Felony Conviction	-.022	.460	.961	.978
Other Crimes of Violence	.348	.430	.419	1.416
Use of a Firearm	.548	.398	.169	1.729
On Probation or Parole at Time of Murder	1.144	.436	.009	3.139
In Gang at Time of Murder	-.513	.788	.515	.599
Principal Role in Crime	-1.020	.467	.029	.361
Victim(s) a Stranger to Defendant	.393	.433	.363	1.482
Child or Elderly Victim	.250	.587	.670	1.284
Injuries to Non-Homicide Victims	-.210	.366	.566	.811
Female Victim	1.427	.427	.001	4.166
Female Defendant	.381	.657	.562	1.464
Multiple Murder Special	2.555	.480	.000	12.877
Sex Crime Special	.831	.667	.213	2.297
Torture/Kidnapping Special	1.706	.464	.000	5.505

93. *See* Glossip v. Gross, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (labeling race and gender as "circumstances that ought *not* to affect application of the death penalty").

Theft Felony Special	.734	.419	.080	2.084
Victim Special	.124	1.276	.923	1.132
Financial Gain Special	3.291	.641	.000	26.857
Lying in Wait Special	.356	.389	.360	1.427
Other Special	.784	.666	.239	2.191
Constant	-5.401	.827	.000	.005

In Table 7, eight variables had a statistically significant effect on death charging. Five of the variables reflected legitimate charging considerations: that the defendant was on probation or parole, that the defendant was the principle in the killing and three special circumstances—multiple murder, torture/kidnapping, and financial gain. As was the case with special circumstances charging, a female victim has a significant effect on death charging.[94] The two race variables (WV/LD, and WV/BD) show even larger effects (compared to the omitted category of BV and LV) on the decision to seek the death penalty. The column labeled "Exp(β)" shows that the odds of the District Attorney seeking the death penalty were more than twice as high in WV/WD cases as in cases with black and Latinx victims. In cases with white victims and minority defendants, the odds the District Attorney would seek death were over seven times as high in WV/LD cases and six and a half times as high in WV/BD cases as in cases with black or Latinx victims. Those racial/ethnic combinations were stronger predictors that the District Attorney would seek death than any other variables except multiple murders and financial gain murders.

A. Summary

In his opinion in *Furman*, Justice Stewart referred to the death penalty being imposed on a "random handful" of defendants and equated it to being "struck by lightning."[95] Justice Brennan likened death sentencing to a "lottery system."[96] However, this study confirms what other studies have found: capital case charging, death charging and death sentencing are not imposed on the selected "handful" in an entirely random fashion. If the process is a lottery, the tickets are not

94. The odds of a defendant being charged with special circumstances and the odds of the District Attorney seeking death are both more than four times as high if a victim was a woman than if the defendant killed a man or men.

95. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

96. *Id.* at 293 (Brennan, J., concurring).

of equal value because two factors, one legitimate—the "egregiousness" of the crime—and one illegitimate—the race/ethnicity of the defendant and victim—significantly impact the selection. We measured egregiousness in two ways, by looking at the particular special circumstance(s) in the case and by looking at the number of different special circumstances in the case. We found, for example, that multiple-murder cases and financial-gain cases made a special circumstances charge and a death charge substantially more likely.[97] We found that cases where two or more different special circumstances were present were also substantially more likely to produce a special circumstances charge or a death charge.[98] However, the fact that, as a general matter, the prosecutors' special circumstances charging and District Attorney's death charging correlated with the egregiousness of the crime, does not minimize the risk of arbitrariness in light of the relative infrequency of those charges. Only a little over a quarter of the death-eligible defendants (27.6%) were charged with special circumstances.[99] And, the District Attorney did not seek death against most defendants committing the most egregious crimes: almost two-thirds of the defendants with multiple special circumstances were *not* death-charged; and almost two-thirds of the defendants who murdered two or more victims were *not* death-charged.[100]

Beyond the risk of arbitrariness, the study documents discrimination. We found that, in murder prosecutions during the relevant time period—particularly in cases with white victims and black defendants—a substantial factor in prosecutors' decision whether to charge special circumstances and in the District Attorney's decision whether to seek the death penalty was the race/ethnicity of the victims and defendants.

CONCLUSION

In *McCleskey*, the Court emphasized that "prosecutorial discretion cannot be exercised on the basis of race."[101] However, as noted above, McCleskey's Equal Protection claim failed because he

97. *See supra* Tables 6, 7.

98. *See supra* Table 2.

99. *See supra* Table 2.

100. And while the substantial majority of the defendants who committed the most egregious murders were not death-charged, 11 defendants who committed lying-in-wait and/or theft felony-murders were death-charged.

101. McCleskey v. Kemp, 481 U.S. 279, 310 n.30 (1987) (citing Wayte v. United States, 470 U.S. 598, 608 (1985); United States v. Batchelder, 442 U.S. 114 (1979); Oyler v. Boles, 368 U.S. 448 (1962)).

could not identify a single person or entity whose purposeful discrimination caused the racial disparities identified in the Baldus study and his single-county evidence apparently was based on too small a sample.[102] The present study meets both of the objections to McCleskey's study: special circumstances charging was done by a single entity (the San Diego District Attorney's Office) and death charging by a single person (District Attorney Edwin Miller); and the present study is far larger than McCleskey's Fulton County study (covering roughly three times as many death-eligible cases). In sum, it would seem our central finding—that from 1978 to 1993 race/ethnicity was a substantial factor in the decision of prosecutors to charge special circumstances and in the District Attorney's decision to seek the death penalty—is sufficient to make out the purposeful discrimination necessary to make an Equal Protection claim.

There may be a temptation to minimize the significance of our findings by hypothesizing that San Diego County simply had a rogue District Attorney at the time and/or that the data are more than twenty-five years old and no longer reflect current realities. However, any suggestion that the San Diego findings are an aberration is belied by the several California studies finding racial discrimination elsewhere. More importantly, this suggestion ignores the central problem that the majority Justices in *Furman* were attempting to address: the "untrammeled discretion" to impose the death penalty.[103] It is California's exceedingly broad (arguably unconstitutionally overbroad) death penalty statute and the unconstrained discretion it affords to prosecutors to charge (or not charge) special circumstances and to seek (or not seek) death that invites discrimination, and the proof of discrimination in this and prior studies is, in turn, evidence that the statute is overbroad. That statute has not been narrowed and prosecutors' discretion has not been limited in any way in the last twenty-five years—in fact, the statute has been broadened[104]—so there is no reason whatsoever to presume that discrimination is less of a problem today than it was at the time of the study.

The issue of capital case biases by California prosecutors can be addressed county by county with research such as that in the present study, or it can be addressed through the systemic reform of a genuine narrowing of the death-eligible class. This was a remedy

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102. *McCleskey*, 481 U.S. at 295 n.15.

103. Furman v. Georgia, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

104. The death penalty has been broadened two more times since the study period. *See* 1995 Cal. Stat. 478, enacted by Cal. Proposition 196 § 2 (approved Mar. 26, 1996); Cal. Proposition 18 (approved Mar. 7, 2000).

proposed by Professor Baldus and his colleagues twenty-five years ago in their response to *McCleskey*.[105] However, this remedy was never implemented in California or anywhere else until 2019, when Oregon revised its death penalty scheme by significantly limiting death eligibility.[106] Whether such a remedy would be sufficient is unclear, but what is clear is that California's present scheme is, in Justice Douglas's words, "pregnant with discrimination."[107]

105. *See* David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 419 (1994).

106. *See* S.B. 1013, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

107. Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).