Death By Initiative: California's Experiment with Direct Democracy and Capital Punishment

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I. Introduction

On its face, the capital punishment scheme defined in the California Penal Code[1] appears to comply with the mandates of *Furman*,[2] *Gregg*,[3] and the Supreme Court's subsequent death penalty jurisprudence. Yet underlying its facial compliance with these mandates is a system that appears to be collapsing under its own weight, largely because it is vague and discretionary and produces arbitrary outcomes.[4] While the state supreme court has refused to look beyond the facade of the statute,[5] the system that has emerged, after years of extensive expansion by ballot initiatives,[6] is at least as troublesome as the discretionary statutes that the Supreme Court struck down in *Furman* in 1972.[7] Moreover,

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1. To sentence a defendant to death in California, a jury must (1) find that the defendant is guilty of first-degree murder under Penal Code § 189; (2) find that the murder exhibited one of thirty-three special circumstances enumerated in § 190.2; and (3) in a separate penalty proceeding, find that the aggravating factors under § 190.3 outweigh the factors mitigating the defendant's behavior.

2. Furman v. Georgia, 408 U.S. 238 (1972) (striking down death penalty statutes giving juries "unguided discretion" over when to impose the death penalty, and instituting a *de facto* moratorium on the death penalty in the United States).

3. Gregg v. Georgia, 428 U.S. 153 (1976) (upholding Georgia's revised death penalty statute, which provided for guided discretion, judicial review, and individualized sentencing).

4. *See infra* Part II.C.

5. *Id.*

6. *See infra* Part II.B.

7. *See infra* Part II.C. *See also* Steven Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1288 (concluding that "the statutorily defined death-eligible class is so large and the imposition of the death penalty on members of the class so infrequent as to violate *Furman*.")

the cost and inefficiency of California's capital punishment system is staggering, and it appears unlikely that the system can continue without significant reform or greatly increased funding.[8]

The expansion of the death penalty statute and the resulting arbitrary system were not motivated by rational policy intentions.[9] The most troublesome aspects of the current law were added by ballot initiatives designed primarily as publicity stunts for state politicians, who campaigned for their passage using emotional fear tactics.[10] Under the state constitution, the involvement of the voters in constructing the modern death penalty scheme will necessitate their involvement in its dismantling,[11] which will also require a deconstruction of the fear tactics used to campaign for it.[12]

This article examines the history and expansion of California's death penalty statute, especially in light of the recent findings and recommendations of the California Commission for the Fair Administration of Justice (CCFAJ). Part II first provides an abbreviated summary of the U.S. Supreme Court's requirements for modern death penalty statutes, focused particularly on the most salient aspects for California's statute,

8. *See infra* Part II.C.

9. *See infra* Part III.A.

10. *Id.*

11. *See infra* Part III.B.

12. *Id.*

the narrowing and individualized sentencing requirements. It then summarizes the history of California's capital punishment system, and explores the challenges and consequences of the modern statute. Part III explores the role of the ballot initiative in shaping California's death penalty statute, discusses recommendations for reform, and explains the role the voters must play in deconstructing the current system. Finally, Part IV concludes with a look to the future of the California death penalty.

II. Background

A. Brief Summary of *Furman*'s Requirements for Capital Punishment Statutes

The Supreme Court shocked the nation when it imposed a temporary, nationwide moratorium on most states' death penalty systems under its 1972 decision in *Furman v. Georgia*.[13] Less than a year before, the Court had upheld a discretionary capital sentencing scheme in *McGautha v. California*,[14] but it abruptly reversed course in *Furman*, invalidating

13. Furman, 408 U.S. at 238.

14. McGautha v. California, 402 U.S. 183 (1971) (upholding California's fully discretionary capital sentencing scheme, which gave prosecutors complete discretion over when to seek the death penalty, and jurors complete discretion over whether to impose it). Rejecting the argument that discretionary sentencing led to the arbitrary application of the death penalty, Justice Harlan concluded that "in light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.* at 207.

Georgia's death penalty statute for giving juries unguided discretion in applying the death penalty.[15] Each justice issued a separate opinion in *Furman*, yielding no majority opinion.[16] A plurality of justices found that the death penalty, as applied in the cases before the Court, violated the Eighth Amendment's prohibition on cruel and unusual punishments.[17] The plurality focused on the infrequent application of the death penalty and the lack of meaningful basis for distinguishing cases where it was imposed, voicing particular concern that these inconsistencies strongly suggested arbitrary and capricious sentencing.[18]

Four years later, the Court refined its holding in *Furman* when it upheld Georgia's revised capital punishment statute in *Gregg v. Georgia*.[19] In upholding the new Georgia statute, the court focused on two of the statute's features: the *guided discretion* of the jury

15. Furman, 408 U.S. at 313 (White, J., concurring).

16. Four years later, in *Gregg v. Georgia*, 428 U.S. 153, 189, the plurality explained *Furman's* holding as follows: "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."

17. In *Furman*, Justices Brennan and Marshall found the death penalty *per se* unconstitutional under the Eighth Amendment, while Justices Douglas, Stewart, and White found the death penalty unconstitutional as applied to the petitioners in the case.

18. *See, e.g.*, Furman, 238 U.S. at 305 (Brennan, J., concurring).

19. Gregg, 428 U.S. at 153.

and the availability of judicial review.[20] On the issue of guided discretion, the Court explicitly noted that "before *Furman* less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment,"[21] and described the importance of distinguishing "the few cases in which [the death penalty is imposed] from the many cases in which it is not."[22]

The Court in *Gregg* also reiterated that "'justice generally requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'"[23] Thus, the guided discretion requirement has come to mean that valid death penalty statutes must: (1) provide a *narrowing* mechanism (meaningfully limiting the class of death-eligible offenders to a class small enough that a substantial portion receive the sentence); and (2) consider the *proportionality* of the offense (distinguishing those criminals most deserving of capital punishment from those less deserving the sentence).[24]

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20. *Id.* at 198. The court in *Gregg* also applauded the Georgia statute's proportionality review, *id.*, but later held that while judicial review is an essential part of a statutory death penalty scheme, proportionality review is not required for a statute to pass Constitutional muster. Pulley v. Harris, 465 U.S. 37 (1984).
21. Gregg, 428 U.S. at 182, n. 26.
22. *Id.* at 188.
23. Gregg, 428 U.S. at 189, quoting Penn. ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937).
24. Shatz & Rivkind, *supra* note 7 at 1295.

On the same day that it decided *Gregg*, the Supreme Court also issued its opinion in *Woodson v. North Carolina*, striking down mandatory death penalty schemes for failing to consider "the character and record of the individual offender and the circumstances of the particular offense ... a constitutionally indispensable part of the process of inflicting the penalty of death."[25] This individualized sentencing requirement was further affirmed in *Lockett v. Ohio*, in which the Court struck down Ohio's death penalty statute for limiting the mitigating factors a sentencing jury could consider.[26]

While the guided discretion principle elucidated in *Gregg* retains strong support on the Court, subsequent rulings have weakened the individualized sentencing prong of *Woodson* and *Lockett* over the years. In 1980, it appeared that the Court would "require that the sentencer's discretion be channeled at the penalty phase by 'clear and objective standards,'"[27] but the Court walked back this position three years later in *Zant v. Stephens*.[28] In *Zant*, the Court upheld Georgia's penalty-phase scheme that provided no specific standards to guide the jury's discretion in weighing aggravating and mitigating circumstances, finding that such guidance was unnecessary so long as the class of death-eligible defendants was adequately narrowed at the guilt phase.[29]

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25. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
26. Lockett v. Ohio, 438 U.S. 586, 608-09 (1978).
27. Shatz & Rivkind, *supra* note 7 at 1293.
28. Zant v. Stephens, 462 U.S. 862 (1983).

Some commentators have noted the apparent incompatibility between the narrowing and individualized sentencing requirements,[30] with Justice Scalia announcing in *Walton v. Arizona* that he will no longer follow *Woodson* and *Lockett* because of it.[31] Scalia noted that the individualized sentencing requirement "obviously destroys whatever rationality and predictability [the guided discretion requirement] was designed to achieve."[32] Justice Thomas has expressed similar concerns.[33] Jeffrey Kirchmeier concludes that "in its attempts to follow both principles while reacting to perhaps unanticipated legislative responses, the Court has retreated from both principles … creat[ing] a system that has the paradoxical problems of a constitutional sentencing scheme that is somehow both mandatory and arbitrary."[34]

Despite this concern, however, the Court has recently expanded protection for

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29. *Id.* at 877-88. *See also* Shatz and Rivkind, *supra* note 7 at 1291 ("by the time of *Zant*, the requirement that states reduce the risk of arbitrary imposition of the death penalty had evolved into a requirement that there be a statutory narrowing of the category of death-eligible murderers.")

30. *See* Jeffrey Kirchmeier, *Aggravating and Mitigating Factors*, 6 Wm. Mary Bill Rts. J. 345, 360 (1998); Markus Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 Buff. L. Rev. 85, 98 (1993).

31. Walton v. Arizona, 496 U.S. 639, 673 (1990) (Scalia, J., concurring).

32. *Id.* at 664-65.

33. *See* Graham v. Collins, 506 U.S. 461, 493-500 (Thomas, J., concurring).

34. Kirchmeier, *supra* note 30 at 360.

specific classes of defendants under the principle of individualized sentencing.[35] Whether this limited return to individualized sentencing portends a return to the broader standards envisioned before *Zant* remains to be seen. Regardless of what the future may hold, nearly any *pro forma* nod to individualized sentencing appears Constitutionally acceptable today,[36] outside of a few specific exceptions, and the primary legacy of *Furman* is its two-pronged guided discretion requirement.[37]

B. History of California's Modern Capital Punishment System

Interwoven with the High Court's jurisprudence is the prolonged, dramatic evolution of the California death penalty. Prior to the Supreme Court's 1972 decision in

35. *See*, *e.g.*, Kennedy v. Louisiana, 544 U.S. ___ (2008) (declaring it unconstitutional to sentence a defendant to death for a crime that did not result in the death of the victim); Atkins v. Virginia, 536 U.S. 304 (2002) (declaring the death penalty unconstitutional as applied to the mentally retarded); Enmund v. Florida, 458 U.S. 782 (1982) (declaring the death penalty unconstitutional for felony murder).

36. *See* Shatz & Rivkind, *supra* note 7, at 1293 for a thorough overview of the broad standards that may guide juries in the penalty phase.

37. Under *Zant*, the statutory narrowing requirement has both a quantitative component, requiring the state to "genuinely narrow the class of persons eligible for the death penalty" and a qualitative component, requiring the law to "reasonably justify the imposition of a more severe sentence" on the worst offenders. Zant, 462 U.S. at 877. *See also* Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (requiring that the death-eligible class be "demonstrably smaller and more blameworthy" than the class of all murders).

Furman,[38] California's death penalty was fully discretionary.[39] Every first-degree murder was eligible for the death penalty (though first-degree murder was more narrowly defined than to today's death eligible class).[40] The Supreme Court upheld California's discretionary death penalty statute in May of 1971,[41] just a year before its decision in *Furman* would strike it down. Only months later, the state supreme court overturned the law under the California Constitution's ban on cruel and unusual punishments.[42] California voters acted swiftly to overrule the state supreme court by initiative.[43] Before Proposition 17 even made it to the ballot, however, the Supreme Court decided *Furman v.*

38. Furman, 408 U.S. 238 (1972) (striking down discretionary sentencing schemes in Georgia and Texas and imposing a temporary, *de facto* moratorium on death sentencing in the United States).

39. *See* McGautha, 402 U.S. 183 (upholding California's discretionary capital sentencing scheme, allowing prosecutors complete discretion over when to seek death, and jurors complete discretion over whether to impose it).

40. See Cal. Penal Code § 189 (West 1970). First degree murder was defined as killing (1) during the commission or attempted commission one of six felonies (arson, rape, robbery, burglary, mayhem, or lewd act with a minor); (2) with malice and by means of a bomb, poison, torture, or lying in wait; or (3) with malice and premeditation and deliberation. By comparison, today there are 21 categories of first-degree murder (Cal. Penal Code § 189) and 33 special circumstances that qualify a first-degree murderer for the death penalty (Cal. Penal Code § 190.2).

41. McGautha, 402 U.S. 183 at 207. Rejecting the argument that discretionary sentencing led to arbitrary application of the death penalty, Justice Harlan concluded that "in light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.*

42. People v. Anderson, 493 P.2d 880, 883 (Cal. 1972) (citing Cal. Const. art. I, § 6, amended by Cal. Const. art. I § 17). Anderson was decided on February 18, 1972.

Georgia, imposing a temporary, nationwide moratorium on the death penalty.[44] Despite the *Furman* decision, however, Proposition 17 passed in November of 1972 with 67.5% of the vote.[45]

The existing death penalty statute, endorsed by voters in Proposition 17, was facially invalid under *Furman*.[46] Faced with the popular mandate of Proposition 17 and the judicial mandate of *Furman*, the state legislature attempted to chart a course that would satisfy both their constituents (and the newly amended California Constitution) and the courts. Their initial solution was to adopt a mandatory death penalty for every first-degree murder exhibiting one of ten special circumstances.[47] The Supreme Court of the United States thwarted this effort only a few years later, in 1976, when it found mandatory death sentences unconstitutional in *Woodson v. North Carolina*,[48] and the state supreme

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43. Proposition 17, 1972, proposed amending the California Constitution to state that "the death penalty under [existing] statutes shall not be deemed to be, or to constitute, the infliction of cruel and unusual punishments within the meaning of Article I, Section 6 . . ."

44. Furman, 408 U.S. 238. Furman was decided on June 29, 1972.

45. U.C. Hastings Ballot Initiatives Database, Proposition 17, 1972, http://library.uchastings.edu/cgi-bin/starfinder/7735/calprop.txt.

46. Furman, 408 U.S. at 238. One of the only points the fractured justices in *Furman* could agree on was that giving juries unguided discretion over death sentencing was unconstitutional. Since California's system was fully discretionary, it clearly violated *Furman*.

47. 1973 Cal. Stat. 719 §§ 1-5.

48. Woodson v. North Carolina, 428 U.S. 280 (1976).

court quickly followed suit.[49]

California again reinstated the death penalty in 1977, with a revised statute that became the basis for its modern capital punishment scheme.[50] The 1977 statute brought the advent of California's bifurcated trial procedure, intended to comply with the requirements of *Furman*, *Gregg*, and *Woodson*. At the guilt phase of the trial, a jury could render a defendant death-eligible by finding one of eleven special circumstances beyond a reasonable doubt.[51] If the jury found such a special circumstance to apply, the court would then hold a separate penalty hearing, where the same jury would weigh aggravating and mitigating factors in the defendant's case, and return at its discretion a sentence of death or life without possibility of parole.[52]

This statute came before the Supreme Court in the 1984 case of *Pulley v. Harris*, on the question of whether the statute violated *Gregg* by failing to provide discretionary proportionality review.[53] The court, in dicta, also addressed the narrowing requirement:

> By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of

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49. Rockwell v. Superior Court, 18 Cal. 3d 420 (Cal. 1976).

50. Cal. S.B. 155, 1977.

51. *Id.*

52. *Id.*

53. Pulley v. Harris, 465 U.S. 37 (1984) (holding that the Constitution does not require states to conduct discretionary proportionality review of capital sentences).

> capital-eligible cases. The statutory list of relevant factors, applied to defendants within this subclass, "[provides] jury guidance and [lessens] the chance of arbitrary application of the death penalty, [guaranteeing] that the jury's discretion will be guided and its consideration deliberate." The jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system ... cannot be successfully challenged under *Furman* and our subsequent cases.[54]

While *Pulley* was based on the language of the 1977 statute, the law on the books had already broadened by the time it was decided in 1984. In 1978, California voters had again exercised their referendum power over the death penalty by enacting the Briggs Initiative.[55] Originally called the Murder Penalty Initiative, the Briggs Initiative broadened the list of special circumstances qualifying first degree murders for the death penalty, expanding the number from eleven to twenty-eight.[56] It also altered the level of juror discretion at the penalty phase, explicitly allowing the jury to consider prior felony convictions,[57] and *requiring* juries to return a verdict of death where the aggravating factors at sentencing outweigh their mitigating factors.[58]

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54. *Id.* at 74 (internal cross-references omitted).

55. U.C. Hastings Ballot Initiatives Database, Proposition 7, 1978, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

56. *See* Shatz & Rivkind, *supra* note 7 at 1312-13.

57. *Id.*

58. *Id.*

Since Briggs, the breadth of California's death penalty has only continued to expand. In 1982 (still two years before *Pulley* was decided), the legislature expanded the definition of first-degree murder to include murder by "armor-piercing bullets."[59] Then in 1990, the people passed two more initiatives expanding eligibility for capital sentencing. Proposition 114 expanded the definition of a peace officer.[60] Proposition 115 expanded the scope of felony murder, adding five new underlying felonies[61] and two new death-qualifying special circumstances,[62] and removing "intent to kill" as a prerequisite for sentencing a felony murder convict to death.[63] Another initiative in 1993 added carjacking and "discharge of a firearm from a motor vehicle" to the definition of first-degree murder;[64] and three more special circumstances were added by initiatives in 1996.[65]

In 2000, the legislature expanded the definition of first-degree murder to include

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59. 1982 Cal. Stat. 950, 1 (codified as amended at Cal. Penal Code § 189 (West 2007)).

60. U.C. Hastings Ballot Initiatives Database, Proposition 114, 1990, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

61. U.C. Hastings Ballot Initiatives Database, Proposition 115, 1990, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt (adding murder during kidnapping, train wrecking, sodomy, oral copulation, or rape by instrument to the list of death-eligible felony murders).

62. *Id.*

63. *Id.*

64. U.C. Hastings Ballot Initiatives Database, Proposition 172, 1993, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

"felony torture murder."[66] In the same year, the voters further expanded the special circumstances qualifying for capital punishment, by changing the definition of "lying in wait;"[67] amending the arson and kidnapping felony murder circumstances;[68] and adding gang-related homicide as a special circumstance.[69] Most recently, in 2002, the legislature added "murder by means of a weapon of mass destruction" to the definition of first-degree murder.[70]

To sentence a defendant to death in California today, a jury must: (1) find the defendant guilty of one of t*wenty-one* categories of first-degree murder enumerated in Penal Code § 189; (2) find that one of *thirty-three* special circumstances in § 190.2 applies; and (3), in a separate trial, find that the aggravating factors of the murder outweigh the mitigating factors enumerated in section § 190.3 and introduced by the defense.

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65. U.C. Hastings Ballot Initiatives Database, Proposition 196, 1996, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt (adding murder by drive-by shooting as a special circumstance); U.C. Hastings Ballot Initiatives Database, Proposition 195, 1996, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt (adding felony-murder carjacking and murder of a juror to the list of special circumstances).

66. Stats. 1999, c. 694, § 1 (effective January 1, 2000).

67. U.C. Hastings Ballot Initiatives Database, Proposition 18, 2000, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

68. *Id.*

69. U.C. Hastings Ballot Initiatives Database, Proposition 21, 2000, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

70. Stats. 2002, c. 606, § 1 (effective September 17, 2002).

C. Problems with California's Capital Punishment System

Against this backdrop, the problems that might arise under California's statutory scheme need little introduction. Underlying California's quagmire are the Supreme Court's own conflicting goals of guided discretion and individualized sentencing.[71] These conflicting jurisprudential goals are magnified in California, as Kirchmeier suggests,[72] by a statutory scheme that has broadened out of control, giving jurors the very type of "unguided discretion" that the Supreme Court definitively struck down in *Furman*.[73]

Much of this broadening has occurred through the addition of "special circumstances" to Penal Code § 190.2, qualifying first-degree murderers for death at the guilt phase. Yet § 190.2 cannot be read without § 190.3, which provides the factors jurors use at the penalty phase in deciding whether to impose death or life without possibility of parole. Less attention has been paid to § 190.3, especially since the Supreme Court seems to have backed away from its individualized sentencing requirement.[74] Yet the § 190.3 factors present serious difficulties of their own,[75] and work in tandem with § 190.2 to yield a system that is more arbitrary in its outcomes than the Georgia statute in *Furman*, and

71. *See supra* Sec. II.A.

72. Kirchmeier, *supra* note 30.

73. *See infra* Section 2.

74. *See supra*, Section II.A.

costs both state and federal taxpayers millions of dollars per year to administer.

1. Challenges to the Modern Statutory Scheme

The Supreme Court's overarching concern in its death penalty jurisprudence has been to prevent the arbitrary application of the penalty. To this end, the Court has indicated that statutes must provide for both guided discretion – in the form of statutory narrowing and proportionality review[76] – and at least some nod to "an individualized [sentencing] determination on the basis of the character of the individual and the circumstances of the crime."[77]

Thus the most obvious concern with California's statutory scheme is that the growing number of special circumstances and classes of first degree murder are at odds with the Supreme Court's narrowing requirement. When the Court upheld Californa's death penalty statute in 1984, it approved of the 1977 language, which contained only twelve enumerated special circumstances and half the categories of first-degree murder in today's statute.

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75. Most notably, California, unlike many other states, has chosen to provide no statutory guidance on which factors weigh in mitigation versus which weigh in aggravation. Instead, the statute merely contains a list of factors for the jury to consider. Moreover, the statute *requires* imposition of a death sentence if the aggravating factors of the crime outweigh the factors in mitigation.

76. Zant, 462 U.S. at 879.

77. *Id.*

The state supreme court has upheld the narrowing function of the modern statute as recently as 1993, explaining that "under our death penalty law ... the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes."[78] The court noted that the statute was nearly identical to that upheld by the Supreme Court in *Pulley v. Harris*, and silently declined to analyze the expansion of § 190.2 special circumstances and any impact they might have on the constitutional narrowing analysis.[79]

Challenges to the penalty-phase factors enumerated in § 190.3 have been similarly unsuccessful. In *Tuilaepa v. California*, the Supreme Court rejected challenges to several of the § 190.3 sentencing guidelines, noting that § 190.2 performs the requisite narrowing, and no more is required.[80] Citing *Tuilaepa* and *Zant*, the state courts have concluded that the breadth and vague guidance of the sentencing guidelines in § 190.3 do not violate the Constitution, because the § 190.2 factors perform the necessary narrowing, and § 190.3

78. People v. Bacigalupo, 862 P.2d 808, 813 (Cal. 1993) (further expressing the view that "as long as a state's capital sentencing scheme 'narrows the class of death-eligible murderers' and then during the sentence selection permits the exercise of discretion and does not limit the consideration of evidence in mitigation, the United States Supreme Court has stated that the Eighth Amendment 'requires no more.'").

79. *Id.*

80. Tuilaepa v. California, 512 U.S. 967, 978-79 (1994).

provides the jury with the discretion to make an individualized sentencing determination.[81] The state supreme court now regularly rejects challenges to the death penalty statute without comment, citing to *Bacigalupa*, *Tuilaepa*, and prior decisions.[82]

Notably, the Supreme Court of the United States has not ruled on the Constitutionality of California's modern death penalty scheme as a whole. When the Court upheld the Constitutionality of three penalty-phase sentencing guidelines in California's statute, in Tuileapa v. California, Justice Blackmun, the lone dissenter, warned:

> Of particular significance, the Court's consideration of a small slice of one component of the California scheme says nothing about the interaction of the various components – the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review – and whether their end result satisfies the Eighth Amendment's commands. The Court's treatment today of the relevant factors as "selection factors" alone rests on the assumption, not tested, that the special circumstances perform all of the constitutionally required narrowing for eligibility. Should that assumption prove false, it would further undermine the Court's approval today of these relevant factors.[83]

Justice Blackmun foreshadowed a key problem with the California death penalty

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81. *See*, *e.g.*, Bacigalupo, 862 P.2d at 813.

82. *See* Shatz & Rivkind, *supra* note 7 at 1317.

83. Tuilaepa, 512 U.S. at 994-95 (Blackmun, J., dissenting).

statute. As discussed below, the special circumstances have indeed become so broad that they do not perform the requisite narrowing; and in the absence of legitimate narrowing, the sentencing factors give juries full "unguided discretion" in the application of the death penalty, leading to the high likelihood of arbitrary outcomes the Court feared in *Furman*.

2. Effects of the Statutory Scheme

While the state supreme court apparently remains in denial over the narrowing function of § 190.2, empirical evidence has emerged to contradict its assumptions about the law and vindicate Justice Blackmun's skepticism over the statute's Constitutionality. In 1997, Steven Shatz and Nina Rivkind conducted an empirical review of California death penalty cases, and concluded that "the statutorily defined death-eligible class is so large and the imposition of the death penalty on members of the class so infrequent as to violate *Furman*."[84] The Shatz and Rivkind study showed that 84% of convicted first-degree murderers in the state were factually death-eligible, while only 9.6% of first-degree murderers are sentenced to death.[85] This yields a death sentence ratio of approximately 11%, which is considerably lower than Georgia's and California's pre-*Furman* death

84. Shatz & Rivkind *supra* note 7 at 1288.

85. *Id.* at 1332.

sentence ratios.[86] Such statistics empirically substantiate Justice Blackmun's fear that the special circumstances indeed are not "perform[ing] all of the constitutionally required narrowing for eligibility."

Shatz and Rivkind's conclusion that the breadth of California's statute leads to arbitrary application of the death penalty is bolstered by more recent statistics as well. The California Commission for the Fair Administration of Justice recently released a report on the death penalty, which reported that federal courts granted some form of relief in 70% of the habeas petitions received from California death row inmates, indicating a high judicial error rate.[87] The report also revealed that significantly fewer defendants would be sentenced to death under a narrower set of special circumstances similar to those found in other states and in California's original 1977 legislation.[88] Failure to investigate mitigating factors is also a leading factor in reversals, largely due to open-ended and cross-purpose mitigation factors and underfunded defense counsel.[89]

The CCFAJ also documented the overall inefficiency and staggering financial cost

86. *Id.*

87. California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, at 20, n. 22 (2008), available at http://www.ccfaj.org.

88. *Id.* at 69-71.

89. *Id.*

of California's capital punishment system. These findings were nearly as startling as those on the arbitrary application of the death penalty. Due to persistent underfunding, the average length of time a California inmate spends on death row, from date of sentence to execution, is 20-25 years – the longest of any of the death penalty states.[90] This ignoble statistic gives California the largest death row in the nation, with 670 inmates awaiting execution.[91] At a marginal cost of $90,000 per year, per inmate (compared to serving a sentence of life without parole), the state thus spends $63.3 million per year just to maintain its current death row.[92]

These are but a small sampling of the disturbing statistics revealed by the CCFAJ Report, which should be considered required reading for anyone studying capital punishment in California. As described below, moreover, this highly problematic capital punishment scheme is a wicked step-child of the California initiative process, bearing little relationship to legitimate policy goals. While the extant system may be too expensive to maintain, its legacy in the initiative process may simultaneously make it too difficult to reform.

90. *Id.*

91. *Id.*

92. *Id.*

III. Discussion

A. Role of the Ballot Initiative in California's Death Penalty

While the people and the legislature must ultimately share responsibility for the current statutory scheme, it is safe to conclude that California's death penalty would be vastly different absent the role of the ballot initiative. In fact, the death penalty would not likely exist in California but for the ballot initiative.[93] Aside from 1972's Proposition 17, however, the single greatest influence on California's modern death penalty was the 1978 Briggs Initiative (Proposition 7). The Briggs Initiative represents the single greatest expansion of California's death penalty statute to date, and it began a trend of expansion by initiative that would continue for decades.

The motivation behind the Briggs Initiative was entirely political. It was conceived, from the very beginning, to bolster the publicity of State Senator John V. Briggs, a Republican representing Orange County, in his 1978 gubernatorial bid.[94] Prop. 7 was paired with another initiative that Briggs championed, in an attempt to replicate the

93. Recall that the state supreme court outlawed capital punishment in 1972, only to be reversed by the voters the following fall via Proposition 17.

94. *See Briggs Unveils Death Penalty Initiative Plan*, Los Angeles Times, Nov. 9, 1977 at A3 ("Briggs said he intended to tie passage of the initiative to his campaign and, if the measure is approved, will seek signatures on petitions at campaign stops.")

See also Bud Lembke, *Briggs: Out of the Race But Still Running*, Los Angeles Times, May 21, 1978 at OC1:

political notoriety that Howard Jarvis had garnered by successfully promoting Proposition 13[95] on the spring primary ballot.[96] The other initiative Briggs promoted in the general election would have banned homosexuals from teaching in the state's public schools.[97] A gay reporter following this proposition felt that Briggs "simply didn't take his campaign as seriously as the public Senator Briggs professed" and "found that the private John Briggs seemed as much bemused by his followers as in league with them."[98] Taken together, the stories from the popular media of the time strongly suggest that Briggs

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> "Those two initiatives will be the Proposition 13 of the general election," [Briggs] predicted, implying they will get a lot of attention, as will the fellow who put them before the electorate.
>
> "By the time of the general election, people will know me from the initiatives," Briggs said. "I will be very visible on those."
>
> And what is he going to do with this enhanced name identification?
>
> Briggs isn't saying, but he is also not discouraging speculation that he may run for U.S. senator in 1980.

95. Proposition 13, 1978, limited the amount of property tax the State of California can levy against property owners. It is widely considered to have ignited the modern wave of ballot initiatives in California and throughout the country, and to have started the taxpayers' revolt that launched Ronald Reagan to the White House.

96. *See* Ron Javers, *John Briggs Models a Role*, S.F. Chronicle, Oct. 16, 1978 at 8:

> At every turn in the busy two days of campaigning last week, the conservative Republican from Orange County sought to identify with Jarvis and the success of Proposition 13.
>
> "We want to send the politicians another message," he told a Castro Valley Rotary-Lions Club meeting earlier the same afternoon. "Just like we sent them with Proposition 13."
>
> ...

conceived of both initiatives primarily as publicity stunts, with little or no basis in sound policy goals.

While Briggs was ultimately unsuccessful in eliciting the public fear of homosexuals needed to banish them from the schools,[99] he succeeded in eliciting the fear of criminals needed to expand the death penalty.[100] The Briggs campaign employed unabashed fear tactics in promoting its death penalty initiative. In one such tactic, the campaign sent letters to residents reading "Dear Jane, You can protect yourself from the ruthless killers who are walking the streets of San Francisco if you sign this petition and return it to Citizens for an Effective Death Penalty today."[101] The letter was personalized with the addressee's first name and city of residence.[102] Accompanying the letter was also a brochure declaring "your life is in danger, killers still walk the streets! ... If Charles

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> Now Briggs sounds more than a touch bitter that it was Jarvis – and not the state senator from Orange county – who rode the property tax issue to statewide victory and national acclaim.
>
> "Do I wish I thought of it first?" he answers a reporter's question wistfully. "Well, what do you think?" In fact, Briggs maintains, "Jarvis was going nowhere until I walked into his life."

97. U.C. Hastings Ballot Initiatives Database, Proposition 6, 1978.
98. Randy Shilts, *A Gay Journalist's Friendship With Briggs*, S.F. Chronicle, Oct. 31, 1978 at 4.
99. Proposition 6 failed with 58% of the vote.
100. Proposition 7 passed with 71% of the vote.
101. W.E. Barnes, *Sen. Briggs: "Your Life is in Danger"*, S.F. Chronicle, Apr. 2, 1978 at 10.
102. *Id.*

Manson sent his family of drug-crazed killers to slaughter your family, Manson would not face the death penalty under California law."[103]

Given this fear-based campaigning, it can be little surprise that Proposition 7 – designed to "give Californians the toughest death-penalty law in the country"[104] that would "apply to every murderer"[105] – passed by an overwhelming margin. The irrational power of fear-based appeals has been widely documented, especially in the context of public opinion about the death penalty.[106] "Locating the causes of capital crime exclusively within the offender – whose evil must be distorted, exaggerated, and mythologized – not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself," according to noted mitigation expert and psychologist Craig Haney.[107]

Moreover, the invocation of Charles Manson – in addition to R.F.K. murderer Sirhan Sirhan in the Voter Information Pamphlet[108] – appears to be a classic appeal to

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103. *Id.*

104. *See* Shatz & Rivkind supra note 7 at 1310.

105. *Id.*

106. *See generally* Craig Haney, Death By Design 27-44 (Oxford 2005).

107. *Id.* at 44.

108. U.C. Hastings Ballot Initiatives Database, Proposition 7, 1978, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

what Haney terms "case-specific bias,"[109] where the worst and most gruesome aspects of a case are called to the focus of public attention, tending to dehumanize criminals, and feeding into our abdication of social responsibility for crime. Thus, while John Briggs faded into relative obscurity after resigning from the California Senate in 1981, his Proposition 7 legacy lives on with us today.

Other initiatives that have expanded the death penalty in the intervening years have followed similar patterns of appeals to irrational fear or political posturing. For example, Senator Pete Wilson seems to have taken a page directly out of Briggs' playbook in the 1990 Crime Victims Justice Reform Act (Proposition 115). A 1989 editorial in the Los Angeles Times reported:

> Other versions of [the] measure, which is a compendium of ill-advised proposals prudently rejected by the Legislature over the past decade, have been circulated twice since 1984, and then withdrawn for lack of popular support. This year, Wilson – mindful of the public's anxiety over crime – has given the proposal's backers several hundred thousand dollars they could not raise from the people on their own. That money currently is being used to fund a campaign to gather enough signatures to finally put the measures on the ballot.[110]

Not surprisingly, the campaign for Proposition 115 again relied on fear of mythologized, dehumanized criminals – the "Night Stalker" and "Singleton Torturer" – as a key

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109. *See generally* Haney, *supra* note 106 at 45-65.

110. Editorial, *Invading the Initiative Process*, L.A. Times, Aug. 20, 1989 at V4.

component of its campaign strategy.[111] And once again, it worked.[112]

Thus, while rational policy arguments can be conceived for some of the expansions in California's death penalty over the years since *Furman*, most of the changes – especially those brought about by popular initiative – have been motivated more by political posturing and fear than by rational policy motivations.

B. Reforming the System

The CCFAJ report offers three recommendations for reforming the current death penalty system in California, without giving preference to one over another.[113] The first option identified by the commission is to maintain the current system, but provide it with additional resources so that it can clear the backlog of cases awaiting adjudication and inmates awaiting execution. The second option identified by the report is to narrow the class of death-eligible crimes, perhaps in accordance with the Mandatory Justice Factors.[114] The final option the commission identified is complete abolition of the death penalty.

Of these options, only the first is viable without voter participation under the

111. U.C. Hastings Ballot Initiatives Database, Proposition 115, 1990, http://library.uchastings.edu/cgi-bin/starfinder/8632/calprop.txt.

112. *Id.* Prop. 115 passed with 57% of the vote.

113. CCFAJ Report, *supra* note 87.

California Constitution, which requires that repeals of legislative initiatives and amendments must be approved by the voters.[115] As the current list of death eligibility circumstances was largely created by initiative statute, the legislature cannot act alone to narrow the class of death-eligible crimes, but must also seek the approval of voters. Complete abolition of the death penalty would be even more difficult politically, as Proposition 17 (1972) amended the state constitution to remove capital punishment from its prohibition against cruel and unusual punishments.[116]

The first option, while the most politically feasible avenue for reform, is probably

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114. According to the CCFAJ Report, *supra* note 87 at 61, "An initiative of the Constitution Project, based in Washington, D.C., established a blue-ribbon bipartisan commission of judges, prosecutors, defense lawyers, elected officials, professors and civic and religious leaders to examine the administration of the death penalty." The commission recommended limiting death eligibility to five key factors: (1) the murder of a peace officer killed in the performance of his or her duties when done to prevent or retaliate for that performance; (2) the murder of any person occurring at a correctional facility; (3) The murder of two or more persons regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts, as long as either (a) the deaths were the result of an intent to kill more than one person, or (b) the defendant knew the act or acts would cause death or create a strong probability of death or great bodilyharm to the murdered individuals or others; (4) The intentional murder of a person involving the infliction of torture; and (5) the murder by a person who is under investigation for, or who has been charged with or has been convicted of, a crime that would be a felony, or the murder of anyone involved in the investigation, prosecution, or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators.

115. Cal Const. Art. II § 10 provides that the legislature may repeal an initiative statute only with the approval of the voters. In order for the legislature to amend the constitution, as would be required to abolish the death penalty, a two-thirds majority of each house must first approve the amendment, and then the voters must approve it as well. The people could endeavor to change the law through the standard initiative processes outlined in Cal. Const. Art. II.

not financially practical. The estimated cost to properly fund the existing death penalty system is an additional $95 million per year (a total cost of $216.8 million per year),[117] and in the state of fiscal crisis California finds itself in, it is difficult to imagine where the funds to properly administer the existing death penalty might materialize.

This leaves the second and third options as the only financially viable avenues of reform. Either narrowing of the death-eligible class or outright abolition would require voter participation. Recent polling on the death penalty in California shows a decline in overall support for the punishment, but a majority still favor death sentencing for serious crimes.[118] A growing segment of the population – though still a minority – also appears to be questioning the fairness of the death penalty.[119]

Combined with the economic crisis and the high cost of California's current capital

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116. Since Proposition 17 amended the Constitution, it would require a 2/3 vote of the legislature – instead of the simple majority needed for an initiative statute – to place an abolition measure in front of the voters. Alternatively, the voters could gather the requisite signatures to place such a measure on the ballot, but that seems even less likely in the current political climate. *See* Cal. Const. Art. II.

117. CCFAJ Report, *supra* note 87 at 83.

118. Death Penalty Information Center, State Polls and Studies, http://www.deathpenaltyinfo.org/state-polls-and-studies (revealing that 63% of respondents favor keeping the death penalty for serious crimes, down from 72% in 2002 and 83% in 1985 and 1986).

119. *Id.* ("The poll asked Californians if they believed the death penalty has been "generally fair and free from error." Among respondents, 48% said yes, 39% said no, and 13% had no opinion. When the same question was posed during a poll two years ago, 58% said the system was fair, and 31% disagreed.")

punishment system, this suggests that an initiative to narrow the class of death-eligible crimes might soon become attractive to California voters, especially if the financial burden of the current system is emphasized in a prospective campaign. Given the solid majority of Californians who still support the death penalty for serious crimes, however, the option of outright abolition remains a goal on the distant horizon of the initiative landscape.

IV. Conclusion

The State of California's death penalty – over-burdened, inefficient and arbitrary, and constricted by the initiative process – begs the question: what is the intrepid death penalty opponent to do? Advocating for a new ballot initiative to narrow the class of death-eligible crimes seems attractive, because it has a moderate chance of success, will reduce the cost of administering the current system, and increase its overall efficiency. Yet if the goal of reform is to see fewer defendants executed, improving the efficiency of the system may be the worst possible outcome. Perhaps for death penalty opponents, a better strategy is to allow the current dysfunctional system to fester and collapse under its own weight. This option, however, also allows public opinion about the death penalty to fester, and may not go far enough in countering the fear-induced attitudes among the populace that resulted in the current, problematic scheme. Moreover, it will cost the

taxpayers dearly as the state tries to defend its dysfunctional statute from increasing budgetary and political attacks, in a time when funding is desperately needed for other social service programs.

Given the morally conflicting outcomes of a narrowing initiative – with death penalty opponents perhaps unlikely to sign on to a more efficient killing apparatus – and the political infeasibility of an abolition initiative, it seems almost certain that California's dysfunctional death penalty system will continue as it stands for some time to come, until its expense bankrupts us or the level of its injustice rises to critical mass. Perhaps the best option for death penalty opponents, in the meantime, is to continue educating the public about the injustice and dysfunctionality of capital punishment, in an effort to make abolition a political reality when the people are eventually forced to confront the true cost of California's modern death penalty.