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Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape or Robbery be Sufficient to Make a Murderer Eligible for a Death Sentence?--An Empirical and Normative Analysis

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Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?—An Empirical and Normative Analysis

By David McCord*

INTRODUCTION

Most death penalty jurisdictions make a murderer death-eligible if the murder was committed contemporaneously with one of five felonies: arson, burglary, kidnapping, rape, or robbery.¹ In recent years, however, this traditional approach has been challenged by two blue-ribbon panels—the Illinois Commission on Capital Punishment and the Massachusetts Governor’s Council on Capital Punishment—both of which advocated abolition of these five felonies as death-eligibility aggravators.² The stakes in this debate are high because these five felonies—hereinafter “the contemporaneous felonies”—are frequent companions of murder: over sixty percent of death-eligible defendants contemporaneously commit at least one of them,³ and

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¹ See infra notes 89-95 and accompanying text.

² See infra notes 103-116 and accompanying text.

³ See infra note 120 and accompanying text.
robbery alone qualifies more murderers for death-eligibility than any other aggravating circumstance. Yet neither of these blue-ribbon panels engaged in any significant empirical inquiry concerning the real-world impact such abolition would have on the universe of death-eligible defendants. This Article seeks to fill that void. Further, both blue-ribbon panels accepted the traditional model—which will herein be termed the “one-aggravator-is-sufficient-and-all-are-equal model”—of death-eligibility, of which the contemporaneous felonies are examples. By contrast, this Article will challenge traditional model and argue for a multi-factor death-eligibility model.

The Article proceeds in five Parts. Part I introduces the concept of “depravity factors,” that is, all the factors that make a murder worse than a “normal” murder so that it might be considered as a candidate for a death penalty prosecution, and explains how such factors relate to statutory aggravating circumstances, including the contemporaneous felonies. Part II explains the law relating to the contemporaneous felonies as aggravators by providing a short history of the use of contemporaneous felonies as bases for death eligibility, and canvassing the contemporaneous felony aggravating circumstances of every jurisdiction. Part III examines the rationales of both the traditional position that any of the contemporaneous felonies should suffice, and the Illinois and Massachusetts panels’ conclusions that none of the contemporaneous felonies should suffice.

Part IV constitutes the innovative heart of the Article. There I examine a database consisting of all the death-eligible defendants I could find nationwide whose sentences were decided during the two-year period 2004 to 2005—a total of 1128 of them, including all 286

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4 See infra notes 124-139 and accompanying text.
defendants who were sentenced to death. This database enables a description of how the elimination of contemporaneous felonies as death-eligibility aggravators would affect the universe of death-eligible defendants. I also undertake a normative analysis whether eliminating contemporaneous felonies as aggravators would be a good idea within the context of the current one-aggravator-is-sufficient-and-all-are-equal model.

Following up in Part V, I broaden the discussion to address the real problem: the flawed premise of the one-aggravator-is-sufficient-and-all-are-equal model that death-eligibility is best determined by using a list of equally-weighted aggravators—whether contemporaneous felonies or others—any one of which is sufficient to confer death-eligibility. Instead, I will propose a model that allows for consideration of all depravity factors in the eligibility determination, including contemporaneous felonies, but requires an accumulation of them for death-eligibility.

Before beginning the analysis, several introductory explanations are in order. First, it is important to understand that death sentencing involves two separate determinations: the “eligibility decision” and the “selection decision.” The eligibility decision determines whether a

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5 See Online Appendices, http://facstaff.law.drake.edu/david.mccord/mccordAppendix.html, Appendix A, Part 1, for a narrative summary for each of these defendants.

6 See Tuilaepa v. California, 512 U.S. 967, 971–72 (1994) (“Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase. . . . We have imposed a separate requirement for
defendant is within that pool of murderers for whom a death sentence is an option, which hinges on whether a statutorily-defined aggravating circumstance is proven. In every case two different actors make an eligibility decision. The prosecutor makes a predictive eligibility decision by seeking a death sentence, thereby manifesting a belief that the trier-of-fact—usually a jury—will find the defendant death-eligible. The jury then makes the actual eligibility decision by finding that an aggravating circumstance exists. The selection decision determines whether a defendant who has been found to be death-eligible should receive a death sentence. A selection decision is constitutionally necessary because the Supreme Court has held that mandatory death sentences are unconstitutional. Again, the prosecutor makes a predictive selection decision by choosing to pursue a death sentence through to the penalty phase verdict; the jury makes the actual selection decision at the end of the penalty phase. In most jurisdictions the eligibility and selection decisions are submitted to the jury simultaneously, to be determined in the same deliberative

the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. “What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.”’’ (citations omitted).

I will use the term “jury” throughout the article rather than the more cumbersome “trier-of-fact.”

The two decisions are, nonetheless, sequential: if the defendant is determined not to be death-eligible then there is no need for the selection decision. This Article pertains almost exclusively to the eligibility decision.

Second, I will work from the premise that the goal of any death penalty system is to limit death-eligibility to the “worst of the worst” murderers. This assumption has only partial constitutional support inasmuch as the United States Supreme Court has held that death sentences can only be imposed on murderers who are somehow worse than “normal” murderers, but has not required that they be among the “worst of the worst.” Nonetheless, there is a

9 This familiar “bifurcated trial” process was approved by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 195 (1976) (“[T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner . . . are best met by a system that provides for a bifurcated proceeding . . . .”). At least one court, however, has required a trifurcated procedure: a guilt-innocence phase, a death-eligibility phase, and then if death-eligibility is found, a death-selection phase. See United States v. Johnson, 362 F. Supp. 2d 1043, 1111 (N.D. Iowa, 2005); see also, Donald M. Houser, Note, Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation, 64 WASH. & LEE L. REV. 349 (2007). Also, California requires trifurcation if the defendant presents a claim to the jury to be exempt from death-eligibility due to mental retardation. See CAL. PENAL CODE § 1376 (West 2007) (if guilt is found, jury then considers sole issue whether defendant is mentally retarded; if jury finds no retardation, jury moves to the death-selection phase).

10 See, e.g., Roper v. Simmons, 543 U.S. 551, 568, 569 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’ . . . Three general differences
compelling penological justification for limiting death-eligibility to the “worst of the worst.” Public support for capital punishment is primarily based on retributive and denunciation principles, and particularly blameworthy murderers are the ones to whom those rationales most strongly apply. Further, there is a powerful practical justification for the “worst of the worst” standard—the justice system simply has limited capacity to handle enormously resource-intensive death penalty cases. I am not alone in working from the “worst of the worst”

between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” (quoting Atkins v. Virginia, 536 U.S. 304, 319(2002))). A recent dissent marks the first time that any Supreme Court Justices have embraced the “worst of the worst” principle. See Kansas v. Marsh, 548 U.S. 163, ___, 126 S. Ct. 2516, 2543 (2006) (Souter, J., dissenting) (“[W]ithin the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst.’”).

11 See David McCord, Imagining a Retributive Alternative to Capital Punishment, 50 FlA. L. REV. 1, 26–37 (1998) (arguing this proposition at length, and concluding that jurors choose death sentences “primarily to vindicate their need for retribution, both in the sense of causing offenders to suffer the most serious penalty for the most serious crimes, and to express the sentencers’ feeling that the offenders’ crimes are so far beyond the pale as to warrant a higher expression of outrage than even ‘standard’ murders”).

12 Examining the most recent three years for which data are available (2004-2006), an average of 137 death sentences were imposed (146 in 2004, 140 in 2005, and 124 in 2006). See American Judicature Society, Capital Case Data Project, http://www.ajs.org/jc/death//jc_death.asp (last visited Mar. 7, 2008) (providing links to databases compiling all death sentences for 2004 through 2006 and summarizing the facts of each). In most
premise. In recent years there is a developing consensus among both scholars and death penalty litigators that the phrase “worst of the worst” correctly describes the category of murderers who should be death-eligible. As a rough approximation, the “worst of the worst” designation

jurisdictions the death sentencing rate in cases that reach a decision on the sentencing phase is between twenty-five and fifty percent, although the rate in the very active death penalty jurisdiction of Texas is much higher. See Jonathan R. Sorenen & Rocky L. Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1253 (2000) (“States in which jurors are directed to weigh specified aggravating and mitigating factors have average jury death sentencing rates ranging from approximately one-fourth to one-half that of life sentences. In Texas, over three-fourths of all capital trials brought before juries during penalty trials between 1974 and 1988 resulted in death sentences.”). For our rough calculation I will assume a forty percent rate across the country of death sentences for cases that reach a penalty phase determination. Assuming that the system is operating at relatively full capacity as to cases that reach the penalty phase, that means the system in the past three years had the capacity to handle about 340 penalty phase cases a year. Our research has found that death-eligible cases that are plea-bargained likely outnumber those that reach the penalty phase by at least fifty percent, which means there are at least about another 500 death-eligible cases in the system each year, for a total of about 840 per year (340 going to penalty phase; 500 plea-bargained). I hypothesize that this constitutes about the upper limit of death penalty cases the justice system can adjudicate per year.

See, e.g., Corinna Barrett Lain, Deciding Death, 57 DUKE L.J. 1, 25–26 (2007) (“[O]ne could easily conclude that mentally retarded individuals, who by definition had ‘significantly subaverage’ intellectual function, were not among the ‘worst of the worst’ for whom death was
appropriate.” (citing Penry v. Lynaugh, 492 U.S. 302, 343–48 (1979) (Brennan, J., concurring in part and dissenting in part)); Steven F. Shatz, The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study, 59 FLA. L. REV. 719, 722–23 (2007) (“In combination, the principles require states to limit death-eligibility to defendants who commit a narrow category of the most serious crimes, the worst of the worst, because the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.” (internal quotations omitted)); Note, The Rhetoric of Difference and the Legitimacy of Capital Punishment, 114 HARV. L. REV. 1599, 1604 n.4 (2001) (“Like the phrase ‘death is different,’ ‘the worst of the worst’ peppers death penalty literature.” (citations omitted)); Kate Braser, Wilkes’ Jury Deadlocked, Punishment Decision Turned over to the Judge, Evansville Courier, Dec. 15, 2007, at A1 (discussing a death penalty case in which defense counsel argued the defendant was “‘not the worst of the worst’” while the prosecution argued the defendant was “‘worse than the worst of the worst’”); Tyeesha Dixon, Morris Apologizes to Slain Officer’s Family, Convicted Killer Awaits Word on Judge’s Sentence, BALT. SUN, Jan. 25, 2008, at 1B (noting that a capital defense attorney “‘argued that the death penalty should be reserved for the ‘worst of the worst and that sentencing all murderers to death is arcane legal philosophy’”’); Tiara M. Ellis, Sentence for Agent’s Killer Considered: McKinney Jury Convicts Man, Now Must Decide Between Life Term, Death, DALLAS MORNING NEWS, Oct. 11, 2007, at 8B (involving a case in which the prosecution contended: “‘If the death penalty is reserved for the worst of the worst, I believe [the defendant] has earned himself a front-row seat.’”).
should describe less than ten percent of murderers, and probably closer to five percent.\textsuperscript{14} Of course, aggravators tell only half the story whether a murderer is among the “worst of the worst”—mitigating evidence presents the other half of the story, and it may be sufficient to dispel the conclusion that the defendant is one of the “worst of the worst” despite substantial aggravation. Mitigating evidence is, however, pertinent to the selection decision, not to the eligibility decision, and thus will not concern us here.

Third, while many jurisdictions have degrees of each contemporaneous felony, this Article means to refer to the highest degree of each felony, which invariably is the degree involved in death-eligible murders. Briefly put, for arson this means burning of an occupied

\textsuperscript{14} For the most recent three years for which data are available, an average of about 16,500 murders per year were committed in the United States. \textit{See} Fed. Bureau of Investigation, Uniform Crime Report: Crime in the United States tbl. 7 (2006), available at http://www.fbi.gov/ucr/cius2006/data/table_07.html. About 13\% of the U.S. population lives in non-death-penalty states, however. Assuming that the percentage of murders in non-death-penalty states equals their population share, I must subtract 13\% of 16,500 to arrive at an estimate of the number of homicides in death penalty states: 14,355. Assuming our calculation of a systemic maximum of about 840 death penalty cases per year that can be handled through penalty phase decisions and plea bargains (\textit{see supra}, note 12), the 840 represents 5.9\% of the estimated 14,355 homicides each year in death penalty states. Indeed, the force of our argument later is that the percentage of murderers who should be death-eligible should be even smaller because the current one-aggravator-is-sufficient-and-all-are-equal model over-includes defendants within the death-eligible category.
structure;\textsuperscript{15} for burglary, the forcible invasion of a residence;\textsuperscript{16} for kidnapping, forcibly taking or holding the victim against the victim’s will for an unlawful purpose;\textsuperscript{17} for rape, forcible sexual contact against the victim’s will;\textsuperscript{18} and for robbery, the armed variety.\textsuperscript{19}

\textsuperscript{15} \textit{See, e.g.}, Okla. Stat. Ann. Tit. 21, § 1401 (West 2007) (“Any person who willfully and maliciously sets fire to or burns . . . any building or structure or contents thereof, inhabited or occupied by one or more persons . . . shall be guilty of arson in the first degree . . . .”).

\textsuperscript{16} \textit{See, e.g.}, 18 Pa. Cons. Stat. § 3502(a) (2007) (“A person is guilty of burglary [a felony of the first degree] if he enters a building or occupied structure [adapted for overnight accommodation], or a separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.”).

\textsuperscript{17} \textit{See, e.g.}, Mo. Ann. Stat. § 565.110(5) (West 2007) (“A person commits the crime of kidnapping if he or she unlawfully removes another without his or her consent from the place where he or she is found . . . for the purpose of . . . [i]nflicting physical injury on or terrorizing the victim or another.”).

\textsuperscript{18} \textit{See, e.g.}, Cal. Penal Code § 261(a)(3) (West 2007) (“Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.”). For simplicity, “rape” will be used to cover oral and anal forced sex, as well vaginal.

\textsuperscript{19} \textit{See, e.g.}, Fla. Stat. Ann. § 812.13(1)–(2)(a) (West 2007) (“Robbery means taking the money or other property which may be the subject of a larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or property, when in the course of the taking there is the use of force, violence, assault, or putting in
Fourth, herein the use of the terms “aggravating circumstances” or “aggravators” refers to any statutory contributor to a murderer’s becoming death-eligible, whether that contributor appears in the definition of murder\(^{20}\) or in a separate list of aggravators, and whatever name the contributor is called by, like “special circumstances” in California\(^{21}\) or “aggravating factors” as in several states, like Colorado.\(^{22}\)

Fifth, the Article will encompass thirty-nine jurisdictions death penalty jurisdictions: the federal government, the United States military, and thirty-seven death penalty states\(^{23}\)—all fear . . . . If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony in the first degree . . . .”)

\(^{20}\) Four states have such statutes. *OR. REV. STAT. ANN.* § 163.095 (West 2007) (listing the kinds of murder that constitute “Aggravated murder” and are thus death-eligible); *TEX. PENAL CODE ANN.* § 19.03(a) (Vernon Supp. 2007) (listing the kinds of murder that constitute “Capital murder” and are thus death-eligible); *UTAH CODE ANN.* § 76-5-202 (West 2007) (listing the kinds of murder that constitute “Aggravated murder” and are thus death-eligible); *VA. CODE ANN.* § 18.2-31 (West 2007) (listing the kinds of murder that constitute “Capital murder” and are thus death-eligible).

\(^{21}\) *See* *CAL. PENAL CODE* § 190.2 (“The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without parole if one or more of the following special circumstances has been found . . . .”).

\(^{22}\) *See, e.g.*, *COLO. REV. STAT. ANN.* § 18-1.3-1201(5) (West 2007) (“For purposes of this section, aggravating factors shall be the following . . . .”).

\(^{23}\) For the statutes of each jurisdiction, *see* Online Appendix C, *supra* at note 5. The thirty-seven states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida,
except New York, where the death penalty statute has been declared unconstitutional, but including New Jersey, where the death penalty was abolished in 2008, but which had death-eligible cases in the 2004 to 2005 database.


24 People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004). In LaValle, the jury was instructed that it had the choice of imposing a sentence of death or life in prison without parole; however, its decision had to be unanimous. Id. at 356. The jury was further instructed that if a deadlock occurred, then the judge would impose a sentence of life with the possibility of parole. Id. The court found that “the deadlock instruction gives rise to an unconstitutionally palpable risk that one or more jurors who cannot bear the thought that a defendant may walk the streets again after serving 20 to 25 years will join jurors favoring death in order to avoid the deadlock sentence.” Id. at 358.

Finally, readers should be aware that I believe the death penalty should be abolished. Nonetheless, analyzing the existing system and proposing improvements to it are traditional and acceptable scholarly endeavors. I will perform these scholarly tasks in an even-handed manner, setting my abolitionist preference aside. In my view, however, any changes I propose are far inferior to eliminating the death penalty entirely.

I. AN INTRODUCTION TO “DEPRAVITY FACTORS” AND STATUTORY AGGRAVATORS

Every murder is a terrible crime, but some murders that are worse than others. What makes a murder worse than “normal?” Before we can delineate what constitutes a “normal,” unaggravated murder, we must first identify the factors that make a murder worse than normal—what I will call “depravity factors.” I have identified these depravity factors by reading thousands of news articles describing capital homicides, in which the factors that make a case more despicable in the eyes of the public—and therefore in the eyes of prosecutors and juries—become clear.\(^{26}\) I will distinguish depravity factors (which are numerous) from statutory aggravators (which are fewer, even in jurisdictions that have the most aggravators) because our analysis in Part IV will show that one set of depravity factors plays a large \textit{de facto} role in death-eligibility despite the fact that it plays no \textit{de jure} role.

It will be useful to consider depravity factors of two sorts: (1) \textit{motives} that are more reprehensible than normal; and (2) \textit{non-motive factors} that make a murder worse than normal. A penalty, putting New Jersey into the vanguard of the fight against capital punishment. . . New Jersey becomes the first state to remove the death penalty from the books since the U.S. Supreme Court reinstated it in 1976.”).

\(^{26}\) \textit{See} Online Appendix A, Part 1, \textit{supra} at note 5, where the news article sources for each defendant are cited.
murder can be worse than normal because it proceeds from a more reprehensible motive, or has other factors that make it worse than normal, or both. In the lists below, rape and robbery are listed under motives, while arson, burglary, and kidnapping are listed under non-motive factors. This is a naturally-occurring division because while there were many cases in which rape and robbery were motives, there were no cases in the two-year period in which kidnapping was the primary motive, as it would be in a case of holding the victim for ransom. The numerous defendants who kidnapped invariably did so not as an end in itself, but either to further some other crime—usually robbery or rape—or to terrorize a woman with whom the male defendant was obsessed. Nor was there a single case in which arson was the primary motive, as it would be to attain insurance proceeds; rather, the murderers who contemporaneously committed arson did so in aid of some other crime, often by attempting to conceal the evidence of the murder by burning the premises containing the victim’s body. And as to burglary, the legal definition precludes finding any murderers whose primary motive was burglary: the definition requires a motive beyond the illegal entry of the structure, that is, to commit a felony within—typically in our sample, murder, rape, or robbery.

Focusing on motives, I will characterize “normal,” unaggravated motives collectively as “commonplace grievances.” This designation refers to relatively normal stressors to which defendants over-respond with homicidal violence. These commonplace grievances include problems at work, disputes with a significant other, grudges against neighbors, and other such

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27 See infra notes 146 and 148 and accompanying text.

28 See supra note 16 and accompanying text.
issues to which all of us can relate (although not absolving the perpetrator for resorting to homicidal violence).

By contrast, there are fifteen extraordinary, more reprehensible motives that show significantly more perversity of character. Not surprisingly, many of these are defined as statutory aggravating circumstances in at least some death penalty jurisdictions. In parentheses in the list below, after each reprehensible motive is the figure for how many death penalty jurisdictions have chosen to make this motive a statutory aggravator. Six motives are “common” in that they exist in more than half of death penalty jurisdictions—these six are indicated in bold, and include two of the contemporaneous felonies—to commit robbery or rape, indicated in italics. Also in parentheses, in italics, is a point value of my own creation ranging from one to five, correlating to my opinion about the relative degree of depravity of the factor—from one as lowest to five as highest. This number can be ignored for now—at the end of the Article when I propose our alternative model I will refer back to it, but the numbers is affixed here so that this long list, and the one immediately following, do not have to be reprinted at the end. Here, then, are the fifteen more reprehensible motives:

1. **To commit a robbery (34)** (2 points);

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29 For details regarding “commonplace grievance” cases, see Online Appendix B, *supra* at note 5.

30 See Online Appendix C, *supra* at note 5, which contains three Parts. Part 1 details where the contemporaneous felonies are located in the jurisdictions’ murder and aggravating circumstances statutes. Part 2 details where the other depravity factors are found in those same sources. Part 3 is a compendium of all the jurisdictions’ murder and aggravating circumstances statutes.

31 See Online Appendix C, Part 1, *supra* at note 5.
2. For insurance, inheritance, etc. (“for pecuniary gain”) (24)\textsuperscript{32} (3 points);

3. As part of male obsession with a female (over and above normal attachment) (0) (1 point);

4. To eliminate one side of a “love triangle;” that is, to be rid of one significant other to be with another (0) (2 points);

5. To physically abuse a child (0) (2 points);

6. To commit rape (34)\textsuperscript{33} (3 points);

7. To escape arrest (21)\textsuperscript{34} (2 points);

8. To escape incarceration or avoid recapture after escape (30)\textsuperscript{35} (3 points);

9. To eliminate a witness to a crime (25)\textsuperscript{36} (2 points);

10. To retaliate against a witness or informant (12)\textsuperscript{37} (2 points);

11. To further a criminal gang’s interests (10)\textsuperscript{38} (1 point);

12. For a terroristic or otherwise anti-government reason (17)\textsuperscript{39} (4 points);

13. As a hate crime because of the victim’s race, ethnicity, religion, etc. (4)\textsuperscript{40} (2 points);

\textsuperscript{32} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{33} See Online Appendix C, Part 1, supra at note 5.

\textsuperscript{34} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{39} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{40} Id.
14. For a thrill, and (1)\textsuperscript{41} (3 points);

15. As part of a dispute over illegal drugs (0) (1 point).

I will not spend much time attempting to justify why these fifteen motives are deemed to be more reprehensible than commonplace grievances, other than to note that almost all of them involve some element of wrongdoing beyond the homicide itself, and almost all involve some degree of premeditation. To most people it is intuitively obvious that these fifteen motives are particularly reprehensible.

As to non-motive factors that make a murder worse than normal, they are various but limited in number and can be organized into six categories. As with particularly reprehensible motives, many of these other factors constitute statutory aggravators in at least some death penalty jurisdictions. The number of such jurisdictions for each factor is indicated in parentheses following the factor, with factors that constitute aggravators in more than half of death penalty jurisdictions indicated in bold—including the other three contemporaneous felonies, indicated in italics. (Again, my number correlating to the degree of depravity of the factor is in parentheses in italics for later reference):

1. Relatively contemporaneous homicidal behavior—

   a. \textbf{killing more than one victim (31)}\textsuperscript{42} (5 points for each victim after the first), or

   b. attempting to kill more than one victim at about the same time (5)\textsuperscript{43} (1 point if intended victim suffers no or minor injury; 3 points if intended victim is seriously injured);

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} See Online Appendix C, Part 2, \textit{supra} at note 5.

\textsuperscript{43} \textit{Id.}
2. Other bad acts committed relatively contemporaneously (that is, other than an additional murder or attempted murder, and other than a bad act already encompassed within the list of motives)—
   a. *kidnapping* (33)\(^{44}\) (3 points),
   b. *arson* (26\(^{45}\) plus 6 others where it will often qualify under “great risk to others”\(^{46}\)) (2 points),
   c. *burglary* (27)\(^{47}\) (2 points),
   d. drug dealing (17)\(^{48}\) (1 point),
   e. other robberies (0) (1 point);
   f. violating a protective order (5)\(^{49}\) (2 points)

3. Non-contemporaneous bad acts (either before the death-eligible homicide, or after)—
   a. *prior or subsequent murder or manslaughter* (31)\(^{50}\) (5 points),
   b. *conviction(s) of other violent crime(s)* (24)\(^{51}\) (1 point for one, 2 for two, 3 for three or more), or

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\(^{44}\) See Online Appendix C, Part 1, *supra* at note 5.

\(^{45}\) *Id.*

\(^{46}\) Arson would create a great risk to others if the structure set afire has additional persons in it besides the murder victim.

\(^{47}\) See Online Appendix C, Part 1, *supra* at note 5.

\(^{48}\) See Online Appendix C, Part 2, *supra* at note 5.

\(^{49}\) *Id.*

\(^{50}\) See Online Appendix C, Part 2, *supra* at note 5.

\(^{51}\) *Id.*
c. a non-conviction pattern of violence \(1\)\(^{52}\) (1 point);

4. Bad behavior by a perpetrator while incarcerated—
   a. **killing while incarcerated** \(34\)\(^{53}\) (4 points),
   b. committing lesser acts or threats of violence \(0\) (1 point), or
   c. escaping or attempting to escape from incarceration \(0\) (2 points); 

5. Victim is particularly sympathetic due to—
   a. **tender age** (I will use twelve and under as a typical age category) \(23\)\(^{56}\) (2 points),
   b. elder status (I will use seventy and over as a typical age category) \(10\)\(^{57}\) (1 point),
   c. being frail or handicapped (other than age-related) \(9\)\(^{58}\) (1 point),
   d. **being an on-duty police officer** \(38\)\(^{59}\) (4 points) or,

\(^{52}\) Id.

\(^{53}\) See Online Appendix C, Part 2, *supra* at note 5.

\(^{54}\) Threats of violence while incarcerated as used here includes the most typical such threat—the possession by defendant of a prison-made knife (“shank”).

\(^{55}\) This factor refers to escaping or attempting to escape in an episode separate from the murder for which the defendant is on trial, and thus is distinguished from the “To escape incarceration or avoid recapture after arrest” motive, which entails that the murder was committed during the attempt to escape or avoid recapture.

\(^{56}\) See Online Appendix C, Part 2 *supra* at note 5.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.
e. other on-duty government servant\textsuperscript{(60)} (30) (4 points);

6. A particularly blameworthy method of homicide commission (which I will call “bad perpetration details”), which consists of four subcategories:

a. hiring a killer or acting as a hired killer\textsuperscript{(38)} (4 points);

b. An especially blameworthy physical method of killing—

i. torture involved ("heinous, atrocious, and cruel")\textsuperscript{(32)} (4 points),

ii. three or more handgun wounds (0) (1 point),

iii. using a rifle or shotgun (0) (1 point),

iv. “execution-style” shot(s) to the head at close range (0) (2 points),

v. many stab wounds (0) (2 points),

vi. slitting the throat (0) (1 point if part of many stab wounds, 2 if not),

vii. bludgeoning or beating or running over with a vehicle (0) (2 points),

viii. strangulation or suffocation (0) (2 points),

ix. drowning (0) (2 points),

x. poisoning (7)\textsuperscript{(63)} (2 points),

xi. burning (0) (2 points);

xii. starving (1)\textsuperscript{(64)} (2 points)

c. Other factors in homicide commission indicating mental depravity—

\textsuperscript{60} Id.

\textsuperscript{61} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id.
i. luring the victim to the homicide scene (0) (1 point),

ii. stalking the victim (1)\textsuperscript{65} (1 point)

iii. killing a bound victim (0) (2 points),

iv. killing a victim who has begged to be spared (0) (2 points),

v. killing in the presence of a child twelve years old or younger\textsuperscript{66} (0) (1 point),

vi. killing a child in the presence of a parent\textsuperscript{67} (0) (2 points),

vii. behavior or remarks showing “relishing” the killing (1) (2 points),

viii. sexual perversity beyond rape (0), (2 points),

ix. causing great risk to other potential victims (35)\textsuperscript{68} (1 point),

x. killing a pet animal during the crime (0) (1 point).

d. Post-homicidal blameworthy acts—

i. mutilating the corpse (4)\textsuperscript{69} (2 points),

ii. dumping or burying the corpse (0) (1 point), or

iii. behavior or remarks demonstrating callousness as to the killing\textsuperscript{70} (0) (2).

\textsuperscript{65} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{66} This factor assumes that the child survives so as to have to relive the trauma.

\textsuperscript{67} This factor assumes that the parent survives so as to have to relive the trauma.

\textsuperscript{68} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{69} See Online Appendix C, Part 2, supra at note 5.

\textsuperscript{70} This factor refers to actions or comments made by the murderer after the killing indicating that the murderer took the killing lightly, or was proud of it.
Again, I will not spend much time seeking to justify why these factors make a murder worse than normal—these factors are intuitively aggravating. Note that there are a total of nineteen aggravators from the two lists that exist in more than half of death penalty jurisdictions, including the five contemporaneous felonies. The fourteen aggravators that are not contemporaneous felonies will hereafter be referred to as “other common aggravators.” Here they are in summary form for easy reference: 1) insurance/inheritance motive (“pecuniary gain”), 2) to escape arrest, 3) to escape incarceration or avoid recapture, 4) to eliminate a witness, 5) multiple contemporaneous homicides, 6) a prior or subsequent murder/manslaughter, 7) other serious record of violence, 8) killing while incarcerated, 9) victim twelve years of age or younger, 10) victim an on-duty police officer, 11) victim another on-duty government servant, 12) hired killer/hiring a killer, 13) torture (‘especially heinous, atrocious, and cruel”), and 14) great risk created to others.

Now we are in a position to identify a “normal,” unaggravated murder: it is one in which the motive is a commonplace grievance, and in which the perpetrator kills only one victim and does not attempt to kill anyone else, does not commit any other serious contemporaneous felonies, has either no or a non-serious record of criminal violence, is not incarcerated at the time of the killing and has not earlier committed serious incarceration misbehavior, the victim does not occupy a particularly sympathetic status, the commission of the homicide is by one or two gunshots (but not execution-style) or a couple of knife wounds, and there are no other bad perpetration details.

It is important to note from the above lists that there is far less than complete coverage of all the depravity factors by statutory aggravators. In fact, many of the depravity factors constitute statutory aggravators in few or no jurisdictions. But even when depravity factors do
not constitute statutory aggravators, all the depravity factors are still important. As a matter of common sense, prosecutors view the entirety of the facts of a case and determine how “bad” it is based on how many of the depravity factors are present, and then if they decide it is a really bad case, look to see if there are any statutory aggravators pegs present on which to hang a death penalty prosecution. Further, the depravity factors continue to have an important impact on the case throughout the litigation. If the depravity factor constitutes a statutory aggravator, jurors will be instructed to consider it.  

But even if the depravity factor does not constitute a statutory aggravator, jurors will almost inevitably learn about all of the depravity factors in the case, either because those factors will be part-and-parcel of the prosecution’s guilt phase proof (categories 1–2 and 4–6) or the prosecution’s penalty phase proof (category 3). Most jurisdictions permit jurors to consider depravity factors that do not constitute statutory aggravators (so-called “nonstatutory aggravators”) in making the selection decision. And even in jurisdictions that 

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71 See, e.g., Ark. Code Ann. § 5-4-603 (West 2007) (directing jurors to determine whether statutory aggravating circumstances exist beyond a reasonable doubt, whether aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, and whether the aggravating circumstances justify a death sentence beyond a reasonable doubt); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (West 2007) (directing the jury that “the verdict must be death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances”).

72 The Supreme Court has found no constitutional bar to the prosecution’s use of nonstatutory aggravators at the penalty phase. See Zant v. Stephens, 462 U.S. 862, 878–79 (1983) (holding use of nonstatutory aggravators is proper as long as the jury finds at least one statutory
instruct jurors to consider only statutory aggravators in making the selection decision.\textsuperscript{73} surely the jurors’ decision will still take all the depravity factors into account.

There is one particular lacuna in coverage of statutory aggravators that will become important later in the Article.\textsuperscript{74} Of the many subparts of category six—bad perpetration details—only three are covered by statutory aggravators in a significant number of jurisdictions: hired killer/hiring a killer, torture, and great risk to others. I will refer to bad perpetration details other than those three as “non-statutory bad perpetration details.” The omission of so many non-statutory bad perpetration details from coverage has a simple doctrinal explanation: such details were intended to be captured by the Model Penal Code’s widely-adopted “especially heinous, aggravator); \textit{see also} United States v. Higgs, 353 F.3d 281, 320 (4th Cir. 2003) (“Once a defendant has been rendered eligible for the death penalty by the jury’s finding of a statutory aggravating factor, the use of nonstatutory aggravating factors serves only to individualize the sentencing determination.”); State v. Middleton, 103 S.W.3d 726, 739 (Mo. 2003) (holding jury in capital sentencing is entitled to hear any evidence that assists its decision); State v. Carroll, 573 S.E.2d 899, 913 (N.C. 2002) (holding that state in death sentencing proceeding is entitled to “admit any evidence that substantially supports death”).

\textit{See, e.g.,} ARK. CODE ANN. § 5-4-602(4) (“In determining sentence, evidence may be presented to the jury as to any matters relating to [the ten categories of] aggravating circumstances enumerated in § 5-4-604.”); 42 PA. CONSOL. STAT. § 9711(a)(2) (“Evidence of aggravating circumstances shall be limited to those [eighteen categories of aggravating] circumstances specified in subsection (c).”).\textsuperscript{74} \textit{See infra} notes 185-88 and accompanying text.
atrocious, and cruel” aggravator, but after the Supreme Court held that aggravator to be too
vague, jurisdictions refined it as synonymous with torture before death, and were presumably

75 See MODEL PENAL CODE § 210.6(3)(h) (1980) (“The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.”). The Commentary does not add much clarity: “Of course, virtually every murder is heinous, but Paragraph (h) addresses the special case of a style of killing so indicative of utter depravity that imposition of the ultimate sanction should be considered.” Id. § 210.6 cmt. 6(b). Even today thirty-one jurisdictions have a statutory aggravator derived from this Code provision. See Online Appendix C, Part 5, supra at note 5.

76 The Supreme Court began its jurisprudence relating aggravators derived from this Code provision in Proffitt v. Florida, 428 U.S. 242, 255 (1976) (holding that an “especially heinous, atrocious, or cruel” aggravator was sufficiently narrowed by construction of “the conscienceless or pitiless crime which is unnecessarily tortuous to the victim”). The Court proceeded to Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (holding that the aggravator, “outrageously or wantonly vile, horrible, or inhuman in that it involved . . . depravity of mind” was unconstitutionally vague without a narrowing interpretation: “There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder a ‘outrageously or wantonly vile, horrible, and inhuman.’”). The sequence progressed to Walton v. Arizona, 497 U.S. 639, 654–55 (holding that an “especially heinous, atrocious, or cruel” aggravator was sufficiently narrowed by a construction of a murderer who “relishes the murder, evidencing debasement or perversion” or “shows an indifference to the suffering of the victim and evidences a sense of pleasure in the killing”). The Court’s last decision on this topic was in Arave v. Creech, 507 U.S. 463, 471–72 (1993) (holding the
deterred from enacting any additional aggravators based on perpetration details for fear that such aggravator “utter disregard for human life” sufficiently narrowed by a construction of a “killer who kills without feeling or sympathy”). The Court has not rendered another decision on the topic, probably because all jurisdictions have revised such aggravators to require torture before death. Sometimes this is done by statute. See Online Appendix C, Part 5, supra at note 5. In other jurisdictions an otherwise vague aggravator like this is saved by a narrowing judicial construction. See, Scott W. Howe, Furman’s Mythical Mandate, 40 U. MICH. J. LAW REFORM 435, 453-454 (2007) (“However, the Court has frequently upheld vague aggravating circumstances on grounds that the narrowing constructions given them by state courts have cured the ambiguity.”)

This may be done in the statute itself. See, e.g., TENN. CODE ANN. § 39-13-204(i)(5) (West 2007) (requiring the murder to be “especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death”); UTAH CODE ANN. § 76-5-202(1)(r) (requiring the murder to be committed “in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death”). The narrowing may also be accomplished via a narrowing judicial construction of the otherwise vague statutory language. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 428–33 (1980) (noting that Georgia Supreme Court had properly limited the statutory phrase “outrageously or wantonly vile, horrible, and inhuman” in earlier cases to torture, but had failed to do so in Godfrey’s case, which rendered the phrase unconstitutionally vague); Bradley v. Nagle, 212 F.3d 559, 570 (11th Cir. 2000) (defining Alabama’s “heinous, atrocious, or cruel” through a limiting instruction to torture renders the aggravator sufficiently clear).
aggravators would also run afoul of the Supreme Court. Nonetheless, the empirical analysis will reveal that non-statutory bad perpetration details loom large in the thought processes of both prosecutors and juries.\(^7\)

II. THE LAW OF CONTEMPORANEOUS FELONIES AS DEATH ELIGIBILITY AGGRAVATORS

A. A Short History of Contemporaneous Felonies and Death Eligibility

The legal concept that proof of an “aggravating circumstance” is the sine qua non to render a murderer death-eligible emerged from the debris of the United States Supreme Court’s bombshell 1972 decision in *Furman v. Georgia*.\(^7\) There a fractured five-Justice plurality found that the virtually unlimited discretion given to juries to impose death sentences resulted in such arbitrariness as to constitute cruel and unusual punishment under the Eighth Amendment.\(^8\) Jurisdictions wishing to try to correct this arbitrariness had to read the tea leaves of five separate opinions from the majority Justices. Some jurisdictions divined that they should enact mandatory death sentence statutes.\(^9\) This reading turned out to be wrong, as the Court struck

\(^7\) See *infra* notes 185-88 and accompanying text.

\(^8\) *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

\(^9\) Four Justices relied at least in part on the arbitrariness rationale. See *id.* at 255–57 (Douglas, J., concurring); *id.* at 293 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring). The fifth vote was provided by Justice Marshall, who argued that the death penalty was unconstitutional under any circumstances as incompatible with evolved standards of decency. See *id.* at 369 (Marshall, J., concurring).

such statutes down in 1976 and thereafter. The remaining jurisdictions turned for inspiration to the primary then-existing suggestion of an alternative manner of death sentencing—the Model Penal Code. The Code was influential: not only was it promulgated by the prestigious

82 Id. at 292–93 (“The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society jury determinations and legislative enactments both point conclusively to the repudiation of automatic death sentences.”); see also Sumner v. Shuman, 483 U.S. 66, 78 (1987) (striking down mandatory death sentence for a prisoner who committed murder while under a life-without-parole sentence); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down mandatory death penalty in Louisiana statute).

83 The Code was published in its final form in 1962. It had already begun to have some influence prior to Furman in that six states had changed to a bifurcated trial model, although without any statutory restriction on the types of first-degree murder that were death eligible or any jury instructions about how to decide on the sentence. See McGautha v. California, 402 U.S. 183, 208 & n.19 (1971) (noting that California, Connecticut, Georgia, New York, Pennsylvania, and Texas had such bifurcated procedures). The Code’s Commentary was published in 1980, almost two decades after the Code itself. By that time, the foundations of the Supreme Court’s capital jurisprudence were in place. This permitted the Commentary to state, “Cumulatively, [our] observations confirm what the 1976 plurality [in Furman] several times implied—that Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislatures.” Model Penal Code § 210.6 cmt. 12(d) (1980).
American Law Institute, but it was also relatively current, having been promulgated a mere decade earlier. Jurisdictions taking this path guessed correctly—in 1976 the Court upheld the Code-inspired statutes in Florida, Georgia, and Texas. The jurisdictions whose mandatory

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85 See Gregg v. Georgia, 428 U.S. 153, 195 (1976) (approving Georgia statute that provided for bifurcation and aggravating and mitigating circumstances even though the jury was given no guidance concerning how to deal with the aggravating and mitigating evidence after finding at least one aggravator).

86 See Jurek v. Texas, 428 U.S. 262, 276 (1976). The Texas statute was less like the Model Penal Code’s model than the Georgia and Florida statutes. The Texas statute required at least one aggravating circumstance through a finding of guilt of capital murder, but then channeled the penalty decision—and thus the mitigating evidence—through a set of three questions. One of those questions was applicable to every case: it asked the jury to answer “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” See TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon Supp. 1975). Whether mitigating evidence could properly be given weight through this question has generated decades of litigation, some of it successful for defendants. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 327–28 (1989) (holding that the “continuing threat” issue did not provide for sufficient consideration of the defendant’s evidence of mental retardation). The statute was amended in 1991 to provide for unconstrained consideration of mitigating evidence. TEX. CODE CRIM. PROC. ANN. § 37.071(2)(e) (Vernon 2007) (adding the following question if the jury answers “yes” to the other applicable questions: “Whether, taking into consideration all of the evidence, including
statutes had been struck down soon conformed in their essentials to the Model Penal Code, as has every jurisdiction since. Thus, the Model Penal Code proposal became the “safe harbor” for death sentencing schemes.

One of the key characteristics of the Code’s winning template was its idea that only murderers who were more aggravated than normal murderers should be death-eligible. The circumstances of the offense, defendant’s character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence be imposed.”).

Nonetheless, there has continued to be successful litigation by defendants who were sentenced prior to the effective date of the statute, or who received improper jury instructions under the amended statute. See Penry v. Johnson, 532 U.S. 782, 797–800 (2001) (holding that at the same defendant’s re-sentencing the jury instruction still did not provide for sufficient consideration of mental retardation mitigation); see also Abdul-Kabir v. Quarterman, __ U.S. __, 127 S. Ct. 1654, 1675 (2007) (holding that jury instructions on the “continuing threat” aggravator did not provide for sufficient consideration of defendant’s bad childhood and the consequences of it).

The Code’s successful template had two other key features. First, the Code proposed that rather than throwing the issues of guilt/non-guilt and sentencing to the jury as part of one deliberation, the issues should be divided: guilt should be decided in a first phase (now known as the “guilt/innocence phase”), and if guilt was found, the sentence should be determined in a second phase (now known as the “penalty phase”). See MODEL PENAL CODE § 210.6(2) (“[The court] shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree [non-death sentence] or sentenced to death.”). Second, the Code proposed that sentencers be permitted to consider mitigating circumstances that might
Code identified these “aggravating circumstances” in eight subparts. The one pertinent to our inquiry is subpart (e): “The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.”\textsuperscript{88} The list includes six felonies, but “deviate sexual intercourse by force or threat of force” falls under this Article’s broad definition of rape; thus, this aggravator is limited to the five contemporaneous felonies with which we are concerned. It is to the current status of the contemporaneous felonies as aggravators that we now turn our attention.

\textbf{B. Which Felonies Will Suffice for Death-Eligibility}

Of the thirty-nine jurisdictions, the following include the listed contemporaneous felony as an aggravator:\textsuperscript{89}

\begin{itemize}
  \item There are four statutory mechanisms by which a contemporaneous felony can result in death eligibility. For details of these, see Online Appendix C, \textit{supra} at note 5—here I will merely summarize the mechanisms. By far the most common mechanism is inclusion of a contemporaneous felony within the definition of the degree of murder that is death-eligible (usually “first-degree”), and also inclusion of the same contemporaneous felony as an aggravating circumstance that will make a murderer death-eligible. In these jurisdictions, the aggravating effect of the contemporaneous felony on death eligibility is primarily through guilty
\end{itemize}
verdict—the finding of the contemporaneous felony as an aggravating factor at the sentencing phase is a foregone conclusion because it has already been found at the guilt phase.

The second mechanism, found in four jurisdictions—Oregon, Texas, Utah, and Virginia—is inclusion of the contemporaneous felony within the definition of death-eligible “capital” or “aggravated” murder, without requiring a further finding of an aggravating circumstance. In these jurisdictions, the aggravating effect of the contemporaneous felony on death eligibility inheres exclusively in the guilty verdict. However, because in the first mechanism the finding of the aggravating circumstance after the finding of guilt is a foregone conclusion, the effect of the contemporaneous felony in making the murderer death-eligible is the same with both mechanisms.

The third mechanism, found in four jurisdictions—Kentucky, Missouri, New Jersey, and Pennsylvania—is a definition of murder in terms of an intentional killing, without including contemporaneous felonies, but contemporaneous felonies are included as aggravating circumstances. In these states the aggravating effect of the contemporaneous felonies on death eligibility inheres exclusively in the finding of the aggravating circumstance at the penalty phase, rather than through the guilty verdict. Again, though, the result is the same as in the first two patterns—the finding of the contemporaneous felony renders the defendant death-eligible.

The fourth pattern, found in three jurisdictions, is inclusion of a contemporaneous felony within the definition of death-eligible capital murder, but requiring an additional aggravating circumstance—and the same contemporaneous felony will not necessarily suffice. This pattern is unlike the first three because the finding of the contemporaneous felony does not necessarily equate to death-eligibility. In Arkansas, the definition of capital murder includes all five contemporaneous felonies, but only arson (sometimes, such as when it creates a great risk to
• Rape: 34\textsuperscript{90} (all but Colorado, Kansas, Nebraska, and South Dakota);

• Robbery: 34\textsuperscript{91} (all but Connecticut, Montana, New Hampshire, and New Mexico);

• Kidnapping: 33\textsuperscript{92} (all but Colorado, Kansas, Montana, Nebraska, and South Dakota, although Virginia limits to kidnapping for extortion or to defile the victim);

• Arson: 26,\textsuperscript{93} plus 6 others where it will often qualify under a separate “great risk of death to others” aggravator.\textsuperscript{94} Thus, there are six jurisdictions that exclude it completely (Connecticut, Montana, Nebraska, New Hampshire, New Mexico, and Virginia);

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other persons) and robbery constitute aggravating circumstances. Connecticut is more restrictive: while murder during the commission of kidnapping or rape is within the definition of capital murder, none of the contemporaneous felonies will suffice as an aggravating circumstance unless the defendant had been convicted of that same felony on a previous occasion. In New Hampshire, murder during the commission of kidnapping or rape is within the definition of capital murder, but an additional aggravating circumstance is required for death eligibility, which can be arson if it creates a great risk of death to others, or robbery.

\textsuperscript{90} See Online Appendix C, Part 1, \emph{supra} at note 5.

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} See Online Appendix C, Part 5, \emph{supra} at note 5.
• Burglary: 27\textsuperscript{95} (all but Colorado, Connecticut, Georgia, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, South Dakota, and Virginia).

Put differently, in twenty-four jurisdictions all five contemporaneous felonies act as aggravators: Arizona, Arkansas, California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, Wyoming, the federal government, and the military. Here are the other fourteen jurisdictions and the contemporaneous felonies they do not use as aggravators:

• Alabama: arson, unless via great risk to others;
• Colorado: arson, unless via great risk to others; burglary, kidnapping, and rape;
• Connecticut: arson, burglary, and robbery;
• Georgia: arson, unless via great risk to others; and burglary;
• Kansas: arson, unless via great risk to others; burglary, kidnapping, and rape;
• Maryland: burglary;
• Montana: arson, burglary, kidnapping, and robbery;
• Nebraska: arson, burglary, kidnapping, and rape;
• New Hampshire: arson, burglary, and robbery in the definition of capital murder; arson unless great risk to others; burglary, kidnapping, and rape not included as aggravators;
• New Mexico: arson, burglary, and robbery;
• South Carolina: arson unless via great risk to others;

\textsuperscript{95} See Online Appendix C, Part 1, supra at note 5.
• South Dakota: arson unless via great risk to others; burglary, kidnapping, and rape;
• Virginia: arson, burglary, and some kidnapping;
• Federal law: arson unless through explosion that destroys government property, burglary.

Significantly, nine of these fourteen jurisdictions are inactive or barely active death penalty jurisdictions. Those nine, followed by the most recent figure for each for its number of death row inmates, are as follows: Colorado (2), Connecticut (8), Kansas (9), Maryland (8), Montana (2), Nebraska (9), New Hampshire (0), New Mexico (2), and South Dakota (4). The list includes only five active death penalty jurisdictions: Alabama (195), Georgia (107), South Carolina (67), Virginia (20), and the federal government (44). Further, the jurisdictions that include the fewest number of contemporaneous felony aggravators are the inactive or barely active ones (except for barely active Maryland that excludes only burglary). Accordingly, the fact that these nine jurisdictions do not use many contemporaneous felony aggravators has limited impact on the nationwide applicability of the death penalty for contemporaneous felonies. Thus, in every active death penalty jurisdiction a contemporaneous kidnapping, rape, and


97 One could argue that the very reason those jurisdictions have limited death penalty activity is that they severely limit the use of contemporaneous felony aggravators. Close examination would reveal, however, that these jurisdictions do not vigorously pursue death sentences in general, and thus their exclusion of contemporaneous felonies as aggravators is more an effect of
or robbery is sufficient for death-eligibility; in all but two (Georgia and Virginia) burglary will suffice; and in all but Virginia at least some arson (when it poses a great risk to others) will suffice.

III. THE OPPOSING POSITIONS REGARDING WHETHER CONTEMPORANEOUS FELONIES SHOULD SUFFICE AS AGGRAVATORS FOR DEATH-ELIGIBILITY

A. The Traditional Position: Any One of the Contemporaneous Felonies Should Suffice for Death-Eligibility

The traditional position, represented by the Model Penal Code and still prevailing in most death penalty jurisdictions, is that any one of the contemporaneous felonies is enough for death eligibility. There are two simple explanations for this rule.

The first is history. For several centuries English and American law made all the contemporaneous felonies themselves punishable by death, even without an accompanying murder.\(^98\) While death-eligibility for burglary and arson was largely a thing of the past by the their lukewarm attitude toward capital punishment than it is a cause. See William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1520 (2002) (characterizing Colorado, Connecticut, Kansas, Montana, New Hampshire, New Mexico, and South Dakota as “inactive” death penalty jurisdictions, and Maryland and Nebraska as “active” but not “aggressive”).

\(^98\) See MODEL PENAL CODE § 210.6 cmt. 3 (“As of 1959, some 35 jurisdictions punished kidnapping as a capital offense, and treason and rape were capital crimes in 25 and 21 jurisdictions, respectively. Less commonly, the death penalty was authorized for some forms of
time the Model Penal Code was drafted, death-eligibility for kidnapping, rape, and robbery was still on the books in many jurisdictions, and death sentences for rape were not uncommon.99 Further, most jurisdictions at the time the Code was drafted made these contemporaneous felonies predicates for first-degree felony-murder, which was a death-eligible offense.100 Accordingly, from both the standpoints of history and then-current practice, inclusion of these five contemporaneous felonies as death-eligibility aggravators must have seemed natural to the drafters of the Code, and has continued to appeal to virtually every death penalty jurisdiction in the post-\textit{Furman} era.

\footnotesize
\begin{itemize}
  \item See id. at 119 (“In the years 1930–1970, the states executed 409 persons for rape.”); see also Coker v. Georgia, 433 U.S. 584, 597 (1977) (“Georgia juries have thus sentenced rapists to death six times since 1973 [until the present, 1977].”).
  \item See Model Penal Code § 210.2 cmt. 6, at 32 n.76 (“[At the time the Code was drafted] [t]hirty-one [jurisdictions] included as first-degree murders only those felony murders committed in the perpetration or attempted perpetration of arson, rape, robbery, and burglary, occasionally adding . . . kidnapping. . . .”). First-degree felony-murder was a death-eligible crime in most jurisdictions. See id. § 210.6 cmt. 4(b), at 123 (“The [Pennsylvania] Act of 1794 [which] provided that ‘all murder . . . committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder murder in the first degree’ [and thus death-eligible] . . . proved to be extremely influential. . . . At the time the Model Code provision on capital murder was drafted, 34 American jurisdictions had laws based closely on the original Pennsylvania formulation.” (quoting 1794 Pa. Laws, ch. 257, §§ 1–2)).
\end{itemize}
The second explanation for the traditional position that contemporaneous felonies should be aggravators is that all five of them are very serious crimes in-and-of-themselves. Kidnapping, rape, and robbery are among the most serious violent crimes against persons.\(^{101}\) The personal injury inherent is rape is probably second only to murder;\(^{102}\) and the mental trauma from all three of these crimes can hardly be overstated, particularly with respect to kidnapping and rape in

\(^{101}\) Sentences for rape and robbery are, on average, among the longest for any crime other than murder. The U.S. Department of Justice has reported the following data on sentences in state courts for the most prevalent major offenses (expressed in the average prison sentence/time served, in months): murder (241/147), rape (154/109), robbery (100/64), burglary (56/29), aggravated assault (61/42), larceny (35/20), drug trafficking (60/28), drug possession (37/16), and weapons offenses (47/30). Bureau of Justice Statistics, State Court Sentencing of Convicted Felons 2004, http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04105tab.htm (last visited Mar. 7, 2008). Note that no data were provided for kidnapping convictions.

Figures from Alabama show what is certainly true in other states—that kidnapping draws severe sentences compared with most other felonies, as demonstrated by the following data:
murder I (401/248); rape (369/120); kidnapping I (321/127); manufacturing a controlled substance (186/42); robbery I (243/89); burglary I (216/82); arson I (202/84). See RESEARCH & PLANNING DIV., ALA. DEPT. OF CORR., INAMTE STATISTICAL REPORT 10–11 (2006), available at http://www.doc.alabama.gov/docs/AnnualRpts/2006StatisticalReport.pdf.

\(^{102}\) See Coker v. Georgia, 433 U.S. 584, 597–98 (1977) (“Short of homicide, [rape] is the ‘ultimate violation of self.’ It is also a violent crime because it normally involves force . . . . Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage.”(citations omitted)).
which the victim is typically under the unwanted control of the criminal for a substantial period of time. As to arson and burglary, while they can sometimes be committed without danger to persons, they are among the most serious property crimes, and typically do have great potential for danger to persons.

B. The Revisionist Position: None of the Contemporaneous Felonies Should Suffice for Death-Eligibility

First the Illinois Commission on Capital Punishment (“Illinois Commission”) in 2002, and then the Massachusetts Governor’s Council on Capital Punishment (“Massachusetts Council”) in 2004, recommended that contemporaneous felonies be completely eliminated as bases for death eligibility. We will examine the rationales of each in turn.

The Illinois Commission recommended that eligibility factors be limited to: (1) police officer or firefighter victim, (2) murder at a correctional facility, (3) multiple murders, (4) torture, and (5) murder to obstruct or retaliate for a criminal prosecution. The Commission wrote a special section of its Report on the “Exclusion of ‘course of a felony’ eligibility factor.” That section noted that “the long list of [fifteen] felonies included . . . could make


106 Id. at 72.
almost any first degree murder death eligible.” The Commission pointed out that “a statutory scheme which makes every murderer death eligible would . . . run afoul of constitutional concerns.” The Commission then reached the core of its argument:

Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility decision is the one most likely subject to interpretation and discretionary decision-making . . . .

A second reason for excluding the “course of a felony” eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous murderers, this eligibility factor does not advance that goal. . . . This means that a defendant who robs a store, and who commits a single murder during the course of that robbery, can be sentenced to death even if this is a first offense and there is no substantial criminal record. While such a defendant should be subject to a serious punishment for taking a life, this type of offense differs substantially from a situation where the defendant has killed multiple times . . . . It is true that the “course of a felony” eligibility factor reaches some murders which are also heinous and brutal. However, it was the view of the Commission members in the majority on this proposal that it invites the possibility of excessiveness in the death sentencing process and should

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107 Id.

108 Id. at 72–73.
therefore be eliminated as a factor making the defendant eligible for the death penalty.\textsuperscript{109}

The Illinois Commission incorporated some items of empirical data in Summary Table 3 of its report: 157 of 263 (59.6\%) Illinois Supreme Court death penalty cases involved death-eligibility based at least in part on a contemporaneous felony; 122 of 263 (46\%) involved multiple murder; and no other factor identified by the Commission in a relatively short list was involved in more than 10.6\% of cases (“Child under 12, brutal & heinous”).\textsuperscript{110} While the Committee referred to the “long list” of eligible felonies, in fact the five contemporaneous felonies on which we have been focusing accounted for almost all 157 cases—only nine cases of “armed violence” fell outside of arson, burglary, kidnapping, rape, and robbery.\textsuperscript{111}

Likewise, the Massachusetts Council proposed a limited number of aggravating circumstances: (1) political terrorism involved, (2) murder to obstruct or retaliation for a criminal prosecution, (3) torture, (4) multiple murders, (5) previous murder conviction, and (6) murder while the defendant was subject to a life-without-parole sentence for a prior murder.\textsuperscript{112}

The Council did not speak directly to its exclusion of contemporaneous felonies, instead speaking in more general terms regarding why it drew the boundaries of death eligibility

\begin{footnotes}
\item[109] Id.
\item[110] \textsc{Governor’s Comm’n on Capital Punishment, State of Ill., Techinal Appendix to Report tbl. 7 (2002), available at}
\begin{verbatim}
http://www.idoc.state.il.us/ccp/ccp/reports/technical_appendix/entire_technical_appendix.pdf
\end{verbatim}
\textsuperscript{[hereinafter Illinois Report Appendix]}.
\item[111] Id.
\item[112] See \textsc{Massachusetts Report, supra} at note 104, at 6–7.
\end{footnotes}
narrowly. It began with the proposition that the death penalty should be reserved for the “worst of the worst” murderers.\textsuperscript{113} It then echoed the Illinois Commission’s point about over-inclusion and overly-broad discretion:

If the statutory list is overly broad, then the discretionary decisions of prosecutors, judges, and juries must carry the entire burden of ensuring that the death penalty is applied narrowly and with reasonable consistency. . . . The Council concluded that the burden of narrowing a large pool of death-eligible murders down to the ‘worst of the worst’ is simply too much to expect discretionary decision-makers to handle effectively.\textsuperscript{114}

The Council then made a second point: “The same expansion of death-eligibility also contributes directly to the serious and well-documented problem of racial disparity in the application of the death penalty [due to] too much discretion [so that] overt and hidden prejudices can influence the decision.”\textsuperscript{115} Thus, the Council recommended the following criterion for aggravating circumstances:

\begin{quote}
No [aggravating circumstance] should be placed on the list, and included within the scope of death-eligibility, unless the overwhelming majority of such murders are among the most heinous of all crimes. In other words, the statutory list of ‘aggravating circumstances’ should include only those categories of first-degree murders in which almost every individual case might be expected to be found by a jury to be among the most heinous of all crimes . . . . If this means that some of
\end{quote}

\textsuperscript{113} Id. at 10.
\textsuperscript{114} Id. at 10–11.
\textsuperscript{115} Id. at 11.
the most heinous individual crimes will manage to avoid the death penalty, then so be it—because it is far more important to ensure that the death penalty will not be applied too broadly than it is to ensure that every one of the most heinous crimes will be eligible for the death penalty.  

By implication, the Council found that murders involving contemporaneous felonies did not meet that criterion. The Council cited no empirical data in support of its recommendations.

IV. EMPIRICAL EVIDENCE REGARDING THE REAL-WORLD EFFECTS OF CONTEMPORANEOUS FELONIES AS AGGRAVATORS, AND NORMATIVE ANALYSIS

The recommendations of the Illinois Commission and the Massachusetts Council represent invitations to a bold departure from the well-entrenched traditional position. But neither the Illinois Commission nor the Massachusetts Council did any significant empirical work to predict the real-world impact their recommendations would have on death-eligibility. I will attempt to rectify this gap in knowledge.

The database presented for analysis consists of information about a large sample of death-eligible murderers whose sentences were decided in 2004 to 2005—a total of 1128 of them, including all of the 286 defendants sentenced to death, plus 218 spared by juries and 624 spared by plea-bargains.  

116 Id.

117 I found defendants who had been sentenced to death by comparing name-by-name the about 3200 death-sentenced prisoners in succeeding quarterly Reports of Death Row USA (DRUSA). If a new name appeared, it meant that defendant had joined the ranks of the death-sentenced. Also, DRUSA brackets the names of inmates whose sentences have been reversed; thus, if an inmate’s name became unbracketed in a succeeding Report, it meant the inmate had either been
much information as I could about each, and worked and re-worked a list of depravity factors until I had a set that permitted us to code every depravity factor found in any case. I then used that set of factors to code each of the 1128 defendants for the depravity factors and input each defendant into a spreadsheet that permitted me to pull out the needed data and statistics.\textsuperscript{118} Here are the pertinent results.\textsuperscript{119} Since the accompanying data for the footnotes in this Part are best presented as lists of numbers extracted from a spreadsheet, the footnotes will reference an online Appendix in which these lists can be viewed.

The starting point for the analysis is the prevalence of defendants who committed contemporaneous felonies—of the 1128 defendants, 708 (63\%) committed at least one of the contemporaneous felonies; 420 (37\%) did not.\textsuperscript{120}

\textsuperscript{118} See Online Appendix A, Part 2, \textit{supra} at note 5, which is comprised of a “depravity factor sheet” for each defendant.

\textsuperscript{119} The data are imperfect because there was no comprehensive way to find all the cases where sentencers and prosecutors spared defendants, and because there is no guarantee that all the depravity factors were mentioned in the news articles. Still, the data are as good as can be obtained, and of sufficient quantity and quality as to justify the use I make of them.

\textsuperscript{120} See Online Appendix D, \textit{supra} at note 5.
Among the 286 death-sentenced defendants, 209 (73%) committed at least one contemporaneous felony;\textsuperscript{121} among the 218 defendants spared by sentencers, 131 did so (60%);\textsuperscript{122} and among the 624 defendants who were spared by prosecutors’ plea-bargains, 366 did so (59%).\textsuperscript{123} Thus, the prevalence of defendants who committed contemporaneous felonies is well above half, both in the overall total and within each of the three sub-groups.

The prevalence of each of the contemporaneous felonies individually is shown below, first in graph form and then in list form. The figures dramatically show the prevalence of robbery, burglary, kidnapping, and rape—but not arson. Note that the total of these figures far exceeds the 708 defendants who committed contemporaneous felonies because so many

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{contemporaneous_felonies.png}
\caption{Proportion of death-eligible defendants who committed at least one contemporaneous felony.}
\end{figure}

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
defendants—as I will explore shortly—committed multiple contemporaneous felonies. The prevalence of the other typical aggravators identified above are included for comparison:

![Prevalence of Typical Aggravators](image)

Figure 2: Prevalence of typical statutory aggravators for death-eligible murders. The most common aggravators are listed toward the top. Contemporaneous felonies are indicated with an asterisk.

Here are the same figures in list form. The figures for the five contemporaneous felonies are italicized for easy reference:

<table>
<thead>
<tr>
<th>Number</th>
<th>Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Robbery</td>
<td>445</td>
</tr>
<tr>
<td>2.</td>
<td>Multiple murders</td>
<td>369</td>
</tr>
</tbody>
</table>

\[Id.\]

\[Id.\]
3. Burglary 264
4. Violent non-homicidal record 190
5. Victim 12 years or less 163
6. Kidnapping: 154
7. Rape 125
8. To conceal a crime 66
9. Murder for hire 48
10. Prior murder conviction 47
11. For pecuniary gain (not robbery) 44
12. Police officer victim 43
13. Great risk to others 38
14. To escape arrest 35

126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
14 (tie). Arson 35

16. Heinous through torture 28

17. By a prisoner 9

18. To escape incarceration 7

19. Gov’t. victim (not police officer) 6

Thus, robbery (445), burglary (264), kidnapping (154), and rape (125) are first, third, sixth, and seventh in frequency of occurrence of the most-codified aggravators, with only multiple murders (369), violent non-homicide record (191), and victim 12 years or younger (163) also breaking into triple figures.

Another perspective emphatically shows the prevalence of robbery and rape—but not arson, burglary, and kidnapping—as motives for death-eligible offenses. Below are figures for the prevalence of the fifteen particularly blameworthy motives, and the “commonplace grievances” motive. Note that these figures do not add up to the 1128 total defendants for the several reasons. First, there were 103 murderers whose motives were unknown because of insufficient information, twenty-three I classified as without discernible motive because they

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137 Id.
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
were deranged by mental illness,\textsuperscript{144} and five I classified as without discernible motive because they were deranged by intoxication,\textsuperscript{145} for a total of 131 “motiveless” defendants. Second, even after subtracting those 130 defendants, the number of motives (1171) is more than the number of defendants (1128) because some defendants had more than one motive. Again, the data are presented in both graph and list form:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{prevalence_of_typical_motives.png}
\caption{Prevalence of typical motives for death-eligible murders. The most common motives are listed toward the top. Contemporaneous felonies are indicated with an asterisk.}
\end{figure}

\begin{enumerate}
\item \textit{Robbery} \hspace{1cm} 445 \textsuperscript{146}
\item Commonplace grievances \hspace{1cm} 153 \textsuperscript{147}
\end{enumerate}

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
<table>
<thead>
<tr>
<th></th>
<th>Crime Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Rape</td>
<td>125</td>
</tr>
<tr>
<td>4</td>
<td>Male obsession with female</td>
<td>95</td>
</tr>
<tr>
<td>5</td>
<td>To conceal a crime</td>
<td>66</td>
</tr>
<tr>
<td>6</td>
<td>Child abuse</td>
<td>63</td>
</tr>
<tr>
<td>7</td>
<td>Insurance, inheritance, etc.</td>
<td>44</td>
</tr>
<tr>
<td>8</td>
<td>Gang furtherance or retaliation</td>
<td>41</td>
</tr>
<tr>
<td>9</td>
<td>Drug dispute</td>
<td>38</td>
</tr>
<tr>
<td>10</td>
<td>Escape arrest</td>
<td>35</td>
</tr>
<tr>
<td>11</td>
<td>Retaliate against witness</td>
<td>25</td>
</tr>
<tr>
<td>12</td>
<td>Hate crime</td>
<td>11</td>
</tr>
<tr>
<td>13</td>
<td>Love triangle</td>
<td>9</td>
</tr>
</tbody>
</table>

147 *Id.*  
148 *Id.*  
149 *Id.*  
150 *Id.*  
151 *Id.*  
152 *Id.*  
153 *Id.*  
154 *Id.*  
155 *Id.*  
156 *Id.*  
157 *Id.*  
158 *Id.*
These figures demonstrate that robbery is by far the most common motive involved in murders that become death-eligible, appearing almost three times as often as the next-most common motive; and rape is third in prevalence.

The data enable us to address the question crucial to this Article: What percentages and what kinds of defendants would escape death-eligibility if the contemporaneous felony-elimination position espoused by the Illinois Commission and the Massachusetts Council were adopted nationwide? The database contains a large number of murderers who represent an excellent cross-section of death-eligible defendants. There is no reason to believe that the database is atypical of the kinds of defendants who will recur in any succeeding time period. Thus, an analysis of which defendants would have been excluded from death-eligibility in the 2004–2005 database should quite accurately predict the real-world effects that would flow from eliminating contemporaneous felonies as death-eligibility aggravators.

The analysis is complicated by the fact that each death penalty jurisdiction has its own set of aggravators, although many of the aggravators are common to many jurisdictions. Because I am assaying a nationwide analysis of general application, I will employ a simplifying rubric: a hypothetical set of aggravators consisting of the other fourteen common aggravators earlier

159 Id.
160 Id.
161 Id.
This set, while hypothetical, closely resembles the actual aggravating circumstances that exist in many jurisdictions, minus the contemporaneous felonies.

Recall that 708 of the 1128 defendants committed at least one contemporaneous felony. Of those 708 defendants, 393 (56%) would still have been death-eligible because their cases presented one of the other typical aggravators. That leaves 315 defendants (44%) who would have been excluded from death-eligibility because their eligibility rested on a contemporaneous felony without any of the other typical aggravators.

Figure 4: Proportion of defendants eliminated from death eligibility by eliminating contemporaneous felonies.

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162 See infra notes 31-68 and accompanying text.

163 See infra note 120 and accompanying text.

164 See Online Appendix D, supra at note 5.

165 Id.
The exclusion breakdown by crime is set out below. Note that the number of excluded for the five crimes adds up to more than 315 because many of the eliminated defendants committed more than one contemporaneous felony and are thus included in the count for more than one of the felonies. It would, however, be double-counting to exclude them more than once. The raw numbers of defendants who would have been excluded from death-eligibility before deleting the duplications are as follows: 13 of 35 arsonists (37%); 166 92 of 264 burglars (35%); 167 54 of 154 kidnappers (35%); 168 40 of 125 rapists (32%); 169 and 239 of 445 robbers (53%). 170 After eliminating duplications, the 315 exclusions from death eligibility under this system represents twenty-eight percent of the 1128 defendants listed in the database. Certainly the change recommended by the Illinois and Massachusetts panels, which would eliminate more than one-quarter of death-eligible defendants, would be a very significant one.

As to the three sub-groups in our database, the 315 defendants excluded from death-eligibility under this system break down as follows: 49 death-sentenced, 171 61 sentencer-spared, 172 and 205 prosecutor-spared through plea-bargains. 173

166 Id.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
173 Id.
Figure 5: Eliminated defendants by category.

The 49 defendants excluded from among the 286 death-sentenced constitute seventeen percent of the defendants sentenced to death during that two-year span—certainly a significant percentage, although perhaps not as great as proponents of eliminating contemporaneous felonies as aggravators might have guessed. The exclusion of 61 sentencer-spared from among 218 sentencer-spared defendants constitutes thirty percent exclusion, and the exclusion of 205 defendants spared by prosecutors through plea bargains from among 624 constitutes thirty-three percent exclusion, also significant exclusion percentages.

Our next task is to identify any relevant patterns among the 315 murderers excluded from death-eligibility. Three patterns jump out from the data. The first is the prevalence of murderers who committed multiple contemporaneous felonies. The second pattern is the prevalence of non-statutory bad perpetration details. And the third pattern is that the least depraved cases are almost exclusively ones where robbery is the only contemporaneous felony. We will explore each of these three patterns in detail, below; normative analysis will be included when appropriate. For the moment, I will accept the traditional one-aggravator-is-sufficient-and-all-
are-equal model, although it makes answering the normative questions quite problematic. Later I will propose a model that makes answering normative questions significantly clearer and more just.

The first relevant pattern evident within the 315 excluded murderers is the prevalence of defendants who committed more than one different \(^{174}\) contemporaneous felony—105 of the excluded defendants (33%) fall into this category: \(^{175}\) one committed four; \(^{176}\) seventeen committed three; \(^{177}\) and eighty-seven committed two. \(^{178}\) This squarely raises an important normative question: Should murderers who committed multiple contemporaneous felonies be eliminated from death-eligibility? Of the 105 multiple-contemporaneous-felony murderers, death sentences were imposed with some regularity (twenty-four, which means twenty-three percent). \(^{179}\) Still, in eighty-one such cases (seventy-seven percent) either juries (in fourteen

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\(^{174}\) If a defendant committed multiple instances of the same contemporaneous felony, as by kidnapping two victims contemporaneously, the coding sheet only permitted coding for the presence of “kidnapping,” since that was all that was needed for the main purpose of this Article to ascertain whether the felony was present in the case. Thus, there are more defendants in the database who committed multiple contemporaneous felonies than the number who committed different contemporaneous felonies.

\(^{175}\) See Online Appendix D, supra at note 5.

\(^{176}\) Id.

\(^{177}\) Id.

\(^{178}\) Id.

\(^{179}\) Id.
or prosecutors (in sixty-seven cases) spared the defendants. The twenty-three percent rate at which these 105 murderers received death sentences is substantial enough to support, but not compel, the conclusion that such murderers are worthy of death often enough that they should be included within the universe of the death-eligible. Ultimately, though, the normative question cannot be answered by data analysis alone.

While normative questions typically admit of no definitive answers, I believe the better answer under the one-aggravator-is-sufficient-and-all-are-equal model is that it would be unjust to exclude multiple-contemporaneous-felony murderers from death-eligibility. Such murderers surely rank toward the top of the depravity heap in the eyes of the public. Certainly this is true for defendants who committed three or four contemporaneous felonies, but even for those who commit two, it seems that any of the ten possible permutations of two felonies is sufficiently blameworthy to put the murderer toward the upper end of the scale.

Multiple-contemporaneous-felony murderers are likely encompassed within the category the Illinois Commission had in mind when it noted, with apparent regret, “It is true that the ‘course of a felony’ eligibility factor reaches some murders which are also heinous and brutal,” and to which the Massachusetts Council referred in stating, “If [eliminating several traditional aggravators, including contemporaneous felonies] means that some of the most heinous individual crimes will manage to avoid the death penalty, then so be it . . . .” But those panels were too simplistic in their analysis when it comes to multiple-contemporaneous-felony murderers.

\[180\] Id.

\[181\] Id.

\[182\] ILLINOIS REPORT, supra note 103, at 73.

\[183\] MASSACHUSETTS REPORT, supra note 104, at 11.
felony murderers. It is a simple drafting task to preserve death-eligibility for murderers who commit multiple contemporaneous felonies, while excluding those who commit only one. A legislature could eliminate the individual contemporaneous felonies as aggravators, and replace them with this aggravator:

As part of the same criminal episode as the murder for which the defendant is charged, the defendant committed any two or more of the following crimes: arson, burglary, kidnapping, rape, or robbery; or committed multiple instances of the same one of these crimes; provided, however, that robbing more than one victim simultaneously does not qualify.\textsuperscript{184}

Including multiple-contemporaneous-felony murderers as death-eligible under an aggravator like this is preferable to eliminating those murderers from death-eligibility. The multiple-contemporaneous-felony aggravator just proposed is, in fact, a simplistic foretaste of the more nuanced multi-factor model that will be proposed later.

\textsuperscript{184} See, e.g., People v. Williams, No. 271870, 2008 WL 183088, at *5 (Mich. Ct. App. Jan. 22, 2008) (holding that the “unit of prosecution” for robbery is by the person robbed, and thus multiple counts of robbery are permissible when multiple victims are robbed in the same incident); Williams v. State, 240 S.W.2d 293, 300 (Tex. Ct. App. 2007) (“In Texas, the allowable unit of prosecution for an assaultive offense such as robbery is per victim.”(citation omitted)); State v. Phelps, No. 25879-3-III, 2008 WL 152600, at *4 (Wash. Ct. App. Jan. 17, 2008) (stating that in Washington, “a conviction on one count of robbery may result from each separate taking of property from each person”).
The second relevant pattern evidenced by the 315 excluded murderers is the prevalence of non-statutory bad perpetration details: 249 of the 315 excluded murderers (seventy-nine percent) presented bad perpetration details; 66 did not (twenty-one percent).\textsuperscript{185}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{presence_of_non_statutory_bad_perpetration_details.png}
\caption{Presence of non-statutory bad perpetration details.}
\end{figure}

This brings home the point from earlier in the Article that non-statutory bad perpetration details weigh heavily in prosecutor’s decisions to pursue death sentences.\textsuperscript{186} Of these 249, ninety-four committed more than one contemporaneous felony.\textsuperscript{187} I will not examine these ninety-four further because I have already expressed the belief that multiple-contemporaneous-felony murderers should be death-eligible, with or without bad perpetration details. The focus here will be on the 155 single-contemporaneous felony murderers with non-statutory bad perpetration details. Whether such murderers should be excluded from death-eligibility is perplexing.

\textsuperscript{185} See Online Appendix F, supra at note 5.

\textsuperscript{186} See supra notes 71–73 and accompanying text.

\textsuperscript{187} Id.
Twenty such defendants received death sentences, certainly a significant number.\footnote{188} This, however, constitutes only thirteen percent of the total of 155, which is probably toward the margin of the range at which murderers are worthy of death often enough that they should be included within the universe of the death-eligible. But again, empirical evidence alone does not definitely answer the normative question.

From a policy standpoint, non-statutory bad perpetration details, particularly if they are multiple, often cause the conscience of the community to rank such murderers high on the depravity scale. But if one believes—as I do\footnote{189}—the Illinois and Massachusetts panels’ position that excess prosecutorial discretion is a vice in death sentencing, then permitting prosecutors to use non-statutory bad perpetration details as a mechanism of virtually statutory significance for selecting single-contemporaneous felony murderers against whom to seek death sentences is particularly suspect. In doing so, prosecutors rely on an unregulated, “stealth” non-statutory aggravator. I frankly do not see how to rationally resolve this issue within the current one-aggravator-is-sufficient-and-all-are-equal model. Accordingly, I will punt this normative question to the model proposed at the end of the Article, which gives explicit weight to bad perpetration details while properly checking unbridled prosecutorial discretion.

The third pattern from the data is that the least depraved cases among contemporaneous felony murderers are almost exclusively ones where robbery is the only contemporaneous felony. As to the other four contemporaneous felonies, every single arsonist, kidnapper, rapist, and all

\footnote{188} Id.

\footnote{189} Indeed, I will argue that those panels’ proposals do not go nearly far enough in seeking to constrain it. See infra notes 202-217 and accompanying text.
but one burglar presented at least one other depravity factor. By contrast, twenty-nine robbers presented no other depravity factor other than the robbery itself, and two of these received death sentences. Normatively, these twenty-nine robber-murderers were simply not depraved enough to have been included within the pool of death-eligibility, and the two death sentences within that category were wrongly imposed. An otherwise undepraved murder during a robbery is not among the “worst of the worst” murders for which death should be an option. Yet under the current one-aggravator-is-sufficient-and-all-are-equal model, there is no way to constrain prosecutorial discretion in order to limit the pursuit of death sentences to those robber-murderers who present other depravity factors.

There are clearly significant detriments in permitting prosecutors to pursue death sentences in undepraved cases even if (as is usually true) death sentences do not result. These detriments include expending excess resources attributable to capital cases on defendants who should not be considered for the penalty, unnecessarily fraying the nerves of all concerned, and giving prosecutors improper leverage in plea-bargaining by being able to allege death-eligibility in an insufficiently depraved case. The alternative model I am about to propose provides the needed constraint on prosecutors while still permitting appropriate consideration of all depravity factors. But first we need to assess two proposals from other scholars that would eliminate only some of the contemporaneous felonies as death-eligibility aggravators.

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190 See Online Appendix G, supra at note 5.

191 Id.

192 See infra notes 193 and 199 and accompanying text.
Professor Steven Shatz has argued for eliminating burglary as an aggravator, although he makes the odd move of combining the robbery and burglary into a “robbery/burglary” category that he argues should be eliminated. He believes robbery so predominates as the goal of burglars that the two can be combined. I disagree with combining the two crimes for data analysis purposes. In our sample, robbery was certainly the predominant motive of burglars, but there were plenty of burglars whose goal was some other felony—typically murder, kidnapping, or rape—while, conversely, many robbers did not commit burglary. As a practical matter, though, eliminating burglary would have minimal real-world impact because most burglars would still be death-eligible either because they committed other contemporaneous felonies or

193 See Steven F. Shatz, The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study, 59 FLA. L. REV. 719, 770 (2007) (“A substantial first step in addressing this overbreadth [of coverage of statutory aggravators] would be the recognition of the constitutional infirmity of making death-eligible ordinary robbery-burglary murderers: They are, in every respect, the ‘average’ murderers . . . .”).

194 Id. at 723 (“Because the two underlying felonies, robbery and burglary, are generally committed with similar motives and intentions—a substantial proportion of robberies are committed indoors and therefore involve a burglary, and a majority of burglaries are committed for the purpose of theft and become robberies or attempted robberies when force (in this context, lethal force) is used—they will be treated together throughout this Article.”).

195 See supra note 193 and accompanying text. By examining Online Appendix D, supra at note 5, we can ascertain that 143 of 448 robbers also committed burglary; and 143 of 264 burglars also committed robbery.
because other typical aggravators were present. Ultimately, I do not strongly advocate a position on the elimination of burglary because of this minor effect. And although nobody has proposed it, I would likewise take no position on the elimination of arson as an aggravator—its elimination would have even a smaller real-world effect than eliminating burglary. The three felonies that really matter for death-eligibility purposes are kidnapping, rape, and robbery.

Professor Shatz has proposed eliminating robbery as an aggravator via his suggestion to eliminate “robbery/burglary.” Further, one of the few academic supporters of the death penalty, Professor Robert Blecker, has endorsed the idea of eliminating death-eligibility for some robbers who are otherwise undepraved. Unlike eliminating arson or burglary, eliminating robbery would exclude a large number of murderers from death-eligibility. Several arguments

196 See Online Appendix F, supra at note 5.
197 Id.
198 See Shatz, supra at note 193, at 770.
199 See Symposium, Rethinking the Death Penalty: Can We Define Who Deserves Death? 24 PACE L. REV. 107, 176 (2003) (“But, the majority of people on death row are robber-murderers, who did not commit the kind of killings that qualify them as ‘the worst of the worst.’”). According to our database, we doubt Professor Blecker’s assertion that “a majority” of murderers on death row committed robbery, although certainly a substantial percentage of them did. Nor can we tell exactly how Professor Blecker would limit the death penalty for robber-murderers. Given that he is a death penalty supporter, we doubt that he would support the contemporaneous-felony-elimination position of the Illinois Commission and the Massachusetts Council. Our best guess is that Professor Blecker believes that robber-murderers who present little or no depravity factors besides the robbery should not be death-eligible.
for eliminating robbery are enticing. First, there is a strong moral argument that kidnapping and rape are more depraved crimes than robbery. Kidnapping and rape almost always cause more harm because they make significantly greater intrusions on the victim’s bodily autonomy than almost any robbery. Second, eliminating robbery would eliminate some murderers who should definitely be excluded from death-eligibility—that is, the least depraved murderers in our sample consisted almost exclusively of single-contemporaneous-felony robbers who presented no other depravity factors. Third, even if robbery were eliminated, many of the worst robbers would still be death-eligible because of other typical aggravators. But the downside of eliminating robbery is that it would also eliminate a significant number of murderers who arguably should be death-eligible—primarily single-contemporaneous felony robbers with multiple bad perpetration details. Of the options so far mentioned, the proposed multiple-contemporaneous-felony aggravator is preferable to eliminating robbery entirely. Without that option, if forced to choose between retaining robbery and eliminating it, I would side with Professor Shatz for eliminating it because the benefits of doing so probably outweigh the costs. We need not be forced to such a choice, however, because a better option can be created.

V. A PROPOSED MULTI-FACTOR-WEIGHTED-THRESHOLD MODEL

My suggested alternative to the current one-aggravator-is-sufficient-and-all-are-equal model is a multi-factor, weighted system with a threshold for death-eligibility. Specifically, a legislature should take every depravity factor set forth at the beginning of this Article, including contemporaneous felonies and all the bad perpetration details, and assign each a point

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200 See supra notes 101–02 and accompanying text.

201 See supra notes 190–92 and accompanying text.

202 See supra notes 31–70 and accompanying text.
value. The legislature should then set a threshold for points a murderer would have to accrue in order to be death-eligible.\textsuperscript{203} Under this model, a prosecutor could make a predictive eligibility decision based on what point values for depravity factors the prosecutor thinks could be proven, which the prosecutor usually knows quite early in the case. The jury would make the actual eligibility decision in the penalty phase by determining which depravity factors had been proven in answers to a series of special interrogatories on the verdict form. If the jury found sufficient points to confer eligibility, then the jury would proceed to the selection decision.\textsuperscript{204} If the jury found insufficient points, the defendant would receive an alternative non-death sentence—in most jurisdictions, life-without-parole.\textsuperscript{205} Because it contains an exhaustive list of depravity

\textsuperscript{203} I believe a system seeking the worst of the worst would set a threshold that would require multiple “hits” on depravity factors to reach the necessary threshold, although it would be supportable to assign a point value to a certain depravity factors such that they are sufficient for death-eligibility in-and-of-themselves—the two most likely candidates in our view would be a prior murder conviction and multiple homicides.

\textsuperscript{204} I see significant advantages, however, to giving the selection decision to a judge rather than a jury.

\textsuperscript{205} Typically, this would be a life-without-parole (“LWOP”) sentence. See Catherine Appleton & Brent Grover, \textit{The Pros and Cons of Life Without Parole}, \textit{47 Brit. J. Criminology} 597,598 (2007) (“The vast majority of US states that retain the death penalty mandate that anyone not sentenced to death for capital or first-degree murder--the crimes that normally carry the death penalty in the United States--shall serve a sentence of LWOP.”); Jeffrey Fagan, \textit{Death and Deterrence Redux: Science, Law, and Causal Reasoning on Capital Punishment}, \textit{4 Ohio St. J.}
factors with point values calibrated to the degree of depravity of the factor, this model would provide a much more complete and accurate assessment of the aggravation level of the case than the current one-aggravator-is-sufficient-and-all-are-equal model, which is one-dimensional by comparison. Additionally, the threshold point total would ensure that only the “worst of the worst” would reach death-eligibility. The model would not require any change to the familiar and constitutionally-accepted bifurcated trial.\textsuperscript{206} Nor would the model run afoul of the rather loose constitutional mandate that only murderers who are worse than “normal” can be death-eligible;\textsuperscript{207} instead, it would fulfill that mandate much better than the traditional system.

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\item[206] It would probably be wise, however, to institute a trifurcated proceeding that requires the jury to return the completed depravity factor special interrogatories in open court and take a break for the judge to determine whether they should retire again to address the death-selection question. This trifurcation would be minor because no additional evidence or argument by counsel would need to be presented. Alternatively, if the jurisdiction preferred a judge to make the selection decision, the jury could be dismissed after answering the eligibility question. As I have argued previously, there is much to recommend giving the selection decision to a judge. \textit{See} David McCord, \textit{An Open Letter to Governor George Ryan Concerning How to Fix the Death Penalty System}, 32 \textit{LOYOLA U. CHI. L. J.} 451, 463 (2001) (“[S]ince jurors are not well trained, they should be eliminated from the sentencing process. Many of the errors in capital cases arise from ill-fated efforts to educate jurors concerning their sentencing duties.”).
\item[207] \textit{See supra} note 10 and accompanying text.
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I will apply my model to ten murderers from the database to illustrate how it would operate. Assume the legislature has assigned the point values from one to five for each depravity factor as suggested earlier, and has set a threshold point value of seven that a defendant must accrue in order to be death-eligible. We will begin with two easy cases that far surpass the threshold point value:

- Defendant and a cohort robbed a convenience store, and then kidnapped two store clerks and a customer. Defendant and the cohort raped one of the clerks, and then shot all three victims execution-style. One of the victims died; the other two survived. This defendant would accrue points as follows: for two attempted murders with serious injury—two times 3 for a total of 6; for rape—3; for robbery—2; for three kidnappings—three times 3 for a total of 9, and for an execution-style shot to the head—2. This totals 22, and would make the defendant death-eligible by a wide margin.

- During a home-invasion burglary and robbery, defendant beat to death the homeowners, ages eighty-four and eighty-two. This defendant would accrue points as follows: for an additional murder—5; for robbery—2; for burglary—2; for two bludgeoning—two times two for a total of 4; for two victims seventy or older—two times one for a total of 2. This totals 15, and would make the defendant death-eligible by a wide margin.

These two murderers are clearly among the “worst of the worst,” and the model easily identifies them as such.

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208 See supra notes 31–70 and accompanying text.

209 See Online Appendix A, Parts 1 and 2: DS-04-TX-02, supra at note 5.

210 See Online Appendix A, Parts 1 and 2: DS-04-AL-08, supra at note 5.
Now here are six hard cases that present only one contemporaneous felony and other depravity factors, but without any of the other common aggravators. Predictably, these cases are close to the threshold point value for death-eligibility:

- An arson case: The defendant bound and gagged his ex-wife and a seventy-seven-year-old man in the man’s mobile home and threatened them with a knife before throwing kerosene on the victims and the home and setting fire to the trailer. The man died from intense heat and from breathing the fire. The ex-wife was critically wounded, and had her legs amputated.\(^{211}\) This defendant would accrue points as follows: for attempted murder with serious injury—3; for arson—2; for victim seventy or older—1; for burning to death—2; and for victim bound—2. This totals 10, which would make the defendant death-eligible.

- A burglary case: Defendant was under a restraining order as to his ex-wife. He broke into her home in the middle of the night and took her from her bed, while she slept with the couple’s daughter. Defendant led her to the garage where he shot her thirteen times. The couple’s eight-year-old son was awake the entire time and he called 911 to report the shooting.\(^ {212}\) This defendant would accrue points as follows: for burglary—2; for violating a protective order—2; for three or more handgun wounds—1; for killing in presence of a child twelve or younger—1. This totals 6, which would make the defendant not death-eligible.

- A kidnapping case: The defendant kidnapped, beat, bound, stripped, and shot the victim in connection with a drug dispute, and then dumped the body. This defendant would

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\(^{211}\) See Online Appendix A, Parts 1 and 2: DS-05-TN-02, supra at note 5.

\(^{212}\) See Online Appendix A, Parts 1 and 2: PS-04-OR-08, supra at note 5.
accrue points as follows: for drug dispute motive—1; for kidnapping—3; for beating—2; for victim bound—2; for dumping the corpse—1. This totals 9, which would make the defendant death-eligible.

- A rape case: Defendant beat and raped the victim, then strangled her. He then put her seminude body in the trunk of a car, hauled it to a vacant lot and poured gasoline on it and set it on fire.\(^{213}\) This defendant would accrue points as follows: for rape—3; for beating—2; for strangulation—2; for mutilating the corpse—2. This totals 9, which would make the defendant death-eligible.

- A robbery case: The defendant needed money and a car to go see his pregnant ex-girlfriend. He lured the victim to a field on the pretext of test-firing a shotgun defendant claimed he might buy. Defendant then shot the victim in the abdomen with the shotgun, then in the side as the victim was trying to flee, and then in the face as the victim was lying on his back. Defendant then stole the victim’s car.\(^ {214}\) This defendant would accrue points as follows: for robbery—2; for using a rifle or shotgun—1; for execution-style shot to the head—2; for luring the victim to the homicide scene—1. This totals 6, which would make the defendant not death-eligible.

- Another robbery case: Defendant robbed a pharmacy. He shot the manager in the leg to “soften him up,” then dragged him to the store safe. The manager opened the safe while pleading for his life. Defendant then shot him once in the head, killing him.\(^ {215}\) This defendant would accrue points as follows: for robbery—2; for execution-style shot to the head—2; for using a rifle or shotgun—1; for luring the victim to the homicide scene—1. This totals 6, which would make the defendant not death-eligible.

\(^ {213}\) See Online Appendix A, Parts 1 and 2: SS-04-AR-02, supra at note 5.

\(^ {214}\) See Online Appendix A, Parts 1 and 2: DS-04-NC-04, supra at note 5.

\(^ {215}\) See Online Appendix A, Parts 1 and 2: DS-04-PA-04, supra at note 5.
head—2; for killing a victim who begged to be spared—2. This totals 6, which would make the defendant not death-eligible.

Finally, here are two easy cases that fall well short of the threshold for death-eligibility:

- A third robbery case: Defendant robbed a pawnshop. He took the clerk to a back room and shot him in the back, then stood over him and fired another shot execution-style.216 This defendant would accrue points as follows: for robbery—2; for execution-style shot to the head—2. This totals 4, which make the defendant not death-eligible.

- A fourth robbery case: Defendant and a cohort were attempting to rob a bank, and provoked a shootout during which a bank security guard was shot and killed.217 This defendant would accrue points as follows: for robbery—2. This totals 2, which makes the defendant not death-eligible.

I do not claim to have any special dispensation of knowledge about what point value should be assigned to each factor, nor about what the threshold point value should be. If the model does not come to the right outcome for particular fact patterns, then the point values should be adjusted. The argument is not based on particular point values, but on the contention that this model provides a better mechanism for attempting to identify the “worst of the worst” murderers than either of the competing models. Under the traditional one-aggravator-is-sufficient-and-all-are-equal model, all ten of these murderers would be death-eligible based on a contemporaneous felony alone, and prosecutors would have unbridled discretion to choose which ones to pursue as death penalty cases. Under the contemporaneous-felony-elimination model proposed by the Illinois Commission and the Massachusetts Council, none of these defendants

216 See Online Appendix A, Parts 1 and 2: SS-04-FD-10, supra at note 5.

217 See Online Appendix A, Parts 1 and 2: DS-05-OK-08, supra at note 5.
would be death-eligible despite their contemporaneous felonies and other depravity factors. The blue-ribbon panels certainly make a powerful point that excess prosecutorial discretion in capital cases leads to an unacceptable potential for arbitrariness. But those panels’ proposed solution—to reduce the number of aggravators—is flawed because it accepts the traditional system’s flawed premise that death-eligibility for the “worst of the worst” can be correctly conferred through finding just a single aggravator from an equally-weighted list. I advocate moving in an entirely different direction: expanding the number of depravity factors dramatically, but requiring an accumulation of them from a weighted list to establish death-eligibility.

CONCLUSION

If I were forced to choose between those blue-ribbon panels’ proposed model that entirely eliminates contemporaneous felonies as death-eligibility aggravators, and the traditional model, I would opt for the traditional model. The wholesale exclusion of contemporaneous-felony murderers would eliminate too many truly depraved murderers, particularly those who commit multiple contemporaneous felonies, and those who commit murders with multiple bad perpetration details. While the traditional system confers death-eligibility for contemporaneous felonies far too broadly, usually the good sense of prosecutors and juries avoids imposing death sentences on truly non-depraved defendants, albeit with a great deal of inefficiency due to the over-inclusion of those who are death-eligible. There is no need, however, for a forced choice between the flawed traditional model and the even more flawed model proposed by the Illinois Commission and Massachusetts Council. The proposed multi-factor-weighted-threshold model correlates much more strongly with justice, and could be simply implemented. Perhaps the next blue-ribbon panel will consider it.