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Unusual: The Death Penalty for Inadvertent Killing

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Unusual: The Death Penalty for Inadvertent Killing

GUYORA BINDER, BRENNER FISSELL & ROBERT WEISBERG*

Can a burglar who frightens the occupant of a house, causing a fatal heart attack, be executed? More generally, does the Eighth Amendment permit capital punishment of one who causes death inadvertently? This scenario is possible in the significant minority of American jurisdictions that permit capital punishment for felony murder without requiring a mental state of intent to kill or reckless indifference to human life. Thus far, Eighth Amendment death penalty jurisprudence has required a culpable mental state of recklessness for execution of accomplices in a fatal felony, but has not yet addressed the culpability required for execution of the actual killer. In this Article, we urge the recognition of a new Eighth Amendment norm against executing even actual killers who lack a culpable mental state of at least recklessness, with respect to the victim's death. Using the methods employed by the Supreme Court for determining "evolving standards of decency," we survey the pertinent homicide and sentencing laws of the fifty-three criminal law jurisdictions in the United States. Second, we evaluate the facts of the cases that resulted in the nearly five hundred executions that have taken place since 1973, when the post-Furman statutes became operative, and 2016, in those jurisdictions permitting execution for inadvertent killing. We did the same for the facts of the 1755 cases of all death row inmates convicted in those jurisdictions and alive at the time of the study (2016). This analysis shows that capital punishment for inadvertent killing has become "truly unusual," and therefore, unconstitutional.

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INTRODUCTION

We usually think of murder as unlawful, intentional killing. Lawyers and law students know, however, that in most American jurisdictions, one can also commit murder by participating in certain felonies during which a victim is killed—whether or not one intends that the victim die, and whether or not one causes the death. This is

the so-called felony murder doctrine. A consequence of being a “murderer,” though, even of the “felony murder” variety, can be capital punishment.¹

Because the felony murder doctrine extends liability for murder beyond the person who directly causes death, the Supreme Court has placed limitations on execution for felony murder. In *Enmund v. Florida* and *Tison v. Arizona*, the Court determined that accomplices to felony murder cannot be executed without proof of a culpable mental state of intent to kill, or of reckless indifference to life.² The Court has not, however, stipulated that any baseline mental state is required for the *actual killer*. The Court has probably not needed to do so because the circumstances of most killings evidence intent to kill or reckless indifference to human life. According to the FBI, the vast majority of homicides are committed by shooting the victim with a firearm;³ in these cases, the use of a deadly weapon against the victim shows a willingness to kill and—together with other circumstances—may show a purpose of doing so.

But this is not always the case. One can kill a person inadvertently—without awareness that one is imposing a danger of death. If this happens during a felony, the inadvertent killer may be liable for felony murder. In one remarkable dissenting opinion, a justice on the California Supreme Court catalogued some of the arguably absurd applications of the felony murder doctrine:

- (a) A burglar startles a resident, who dies of a heart attack. (Cf. *People v. Stamp* (1969) 2 Cal.App.3d 203, 82 Cal.Rptr. 598.)
- (b) A robber inflicts only a minor injury, but the victim dies weeks later of unexpected medical complications.
- (c) While defendant is on the way to committing an armed robbery, his gun fires accidentally, killing his accomplice. (Cf. *People v. Johnson* (1972) 28 Cal.App.3d 653, 104 Cal.Rptr. 807.)
- (d) While defendant is driving the get-away car, he causes an accident, killing a bystander. (Cf. *People v. Fuller* (1978) 86 Cal.App.3d 618, 150 Cal.Rptr. 515.)⁴

How the Supreme Court’s death penalty jurisprudence from *Enmund* and *Tison* would apply to these defendants—inadvertent actual killers—is unsettled.

1. See GUYORA BINDER, FELONY MURDER 183–247 (2012). In many jurisdictions, one can also be liable for murder—but not capital murder—by causing death with gross recklessness. GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 230 (2016). See, e.g., Ariz. Rev. Stat. Ann. § 13-1104; Kan. Stat. Ann. § 21-5403. But see Ky. Rev. Stat. Ann. § 507.020 (gross recklessness homicide a capital offense).

2. *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

3. *Expanded Homicide Data Table 11: Murder Circumstances*, FEDERAL BUREAU OF INVESTIGATION (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_11_murder_circumstances_by_weapon_2015.xls [<https://perma.cc/ZG5A-LNCX>] (recording that 9616 of 13,455 homicides in 2015 involved a firearm).

4. *People v. Anderson*, 742 P.2d 1306, 1334–35 n.3 (Cal. 1987) (Broussard, J., concurring and dissenting) (emphasis in original).

While the legal question is open, we believe the right answer is clear: the Eighth Amendment should not permit capital punishment for inadvertent killing. In a previous article, we argued that this conclusion followed from the deeper considerations that animate Eighth Amendment law—most importantly, that those declared death eligible should be rationally selected as the most culpable offenders from the larger set of murderers.⁵ In this Article, we make a further claim. Not only is our conclusion implied by earlier Supreme Court case law, it is also compelled by an abiding societal consensus.

As we will show in this Article, a new standard of decency has emerged in the United States against capital punishment for inadvertent killing. Today, thirty-five years after *Enmund*, enough time has passed to observe how frequently legislatures have permitted such sentences, how often courts have imposed them, and how often these sentences have been executed. Relying on such analysis, this Article argues that such a sentence would now violate prevailing moral standards.

The Eighth Amendment forbids the imposition of “cruel and unusual punishment[],”⁶ including punishment that, although not inherently cruel, is disproportionate to an offender’s guilt. Proportionality has two dimensions—normative and descriptive. Normative proportionality assesses the relationship between a given sentence and the justifying purposes of punishment. Descriptive proportionality assesses the relationship between a given sentence and punishments imposed in similar cases. We might say that a normatively disproportionate sentence inflicts pointless suffering and in that sense is “cruel,” while a descriptively disproportionate sentence departs from prevailing custom and in that sense is “unusual.” The fact that a type of sentence is available or is applied in very few jurisdictions is evidence that it violates “evolving standards of decency.”⁷

Having explained in our previous article why capital punishment for inadvertent killing is “cruel,” we now aim to demonstrate that it is also “unusual.” Using the Court-prescribed method for determining “objective indicia” of societal consensus, we first survey the fifty-three American criminal law jurisdictions⁸ to assess how legislation and case law apply to this issue. Our review determines that only a minority of these jurisdictions, eighteen, permit the imposition of a death sentence for inadvertent felony murder.

After surveying legislation on the issue, we then turn to the second indicator of societal consensus: state practices of punishment. Here, we follow recent trends in Supreme Court jurisprudence, and count first and place most weight on the number of *executions* for inadvertent killing in the jurisdictions where this is possible, and not the larger set of death sentences. We believe this approach—the Court’s own—

5. Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017); see also Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 756–61 (2007) (offering a similar interpretation of Eighth Amendment case law in support of the unconstitutionality of California’s capital sentencing law).

6. U.S. CONST. amend. VIII.

7. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

8. The fifty states, District of Columbia, United States, and U.S. Military.

reflects the realities of the American capital punishment system, where death sentences remain unexecuted for decades, where the vast majority are overturned upon review, and where jurors, aware of these facts, “overproduce” these sentences.⁹ Our review of state practice regarding executions for inadvertent killing demonstrates that the practice is extremely rare. In the eighteen jurisdictions where execution of an inadvertent killer is legally permissible, we find a total of only five executions out of the 487 that have occurred since 1973 where culpability was arguably below recklessness. Moreover, we find that only one jurisdiction, Oklahoma, has executed arguably inadvertent killers who were sentenced within the last twenty years.

After assessing the data on executions, we then turn to another dataset that the Court has treated as relevant, but less probative: death sentences of current death row inmates. This set corroborates the conclusion that follows from the statistics on executions. Of the 1755 inmates on death row at the end of 2016 in the eighteen states that permit execution of inadvertent felony murderers, we could identify only fifteen sentenced for arguably inadvertent killings.

In light of these statistics, it is clear that capital punishment for inadvertent killing is “truly unusual.”¹⁰ The prevalence of legislative prohibitions on these types of death sentences, the rarity of their imposition by sentencers, and above all, the rarity of their execution, comport with statistics the Court has used to justify new Eighth Amendment rules in past cases. Accordingly, should the Court be presented with an opportunity to address the question of inadvertent killing, it should recognize a new constitutional rule against capital punishment for this conduct.

Part I shows how the problem of the inadvertent actual killer arises from the intersection of the felony murder doctrine with the Supreme Court’s death penalty jurisprudence. Part II explains the prescribed method for determining a new standard of decency under the Eighth Amendment, including an assessment of both legislation and state practice. Part III employs this method, demonstrating the rarity of capital punishment for inadvertent killing, and showing how the rarity of this practice compares to other Eighth Amendment rules recognized by the Court.

I. THE PROBLEM: CAPITAL PUNISHMENT FOR UNINTENTIONAL FELONY MURDER

The current system of capital sentencing dates from 1973, because essentially all previous capital sentencing laws were struck down as excessively discretionary by the 1972 Supreme Court decision in *Furman v. Georgia*.¹¹ The Court’s 1976 decision in *Gregg v. Georgia* upheld guided discretion capital sentencing laws, some passed

9. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000).

10. *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

11. 408 U.S. 238 (1972). State courts in Delaware and North Carolina held that *Furman* invalidated only discretionary jury sentencing provisions, effectively converting their capital sentencing laws to mandatory death sentencing provisions. *State v. Dickerson*, 298 A.2d 761, 769 (Del. 1973); *State v. Waddell*, 282 S.E.2d 431 (N.C. 1973). Such mandatory capital sentencing laws were then struck down in 1976, see *infra* n.13, so no executions were carried out under mandatory death penalty laws and no current death row inmates were sentenced under those laws.

as early as 1973, which require a sentencing jury to weigh statutorily enumerated aggravating circumstances against mitigating evidence, as sufficiently justified by the penal purposes of retribution and deterrence.¹² The Court simultaneously struck down mandatory capital sentencing laws, which impose execution on all defendants committing aggravated murder.¹³ Thus, modern capital sentencing requires an individualized assessment that the offender was especially deserving of punishment and the offense especially merited deterrence. This function of capital sentencing makes the offender's culpability highly relevant.¹⁴

The mental state required for capital punishment of someone who kills another person is currently unsettled. The Supreme Court has stated that "in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons . . . on the other."¹⁵ Yet many of those convicted of first degree murder are convicted not of intentional homicide, but instead of "felony murder." Felony murder liability derives from intentional participation in a felony other than homicide where a victim of that felony is killed—whether or not the defendant was the killer.¹⁶

Because nonkillers participating in felonies can be convicted of murder, the Supreme Court has sought to limit the punishment of these co-felons (it has called this "vicarious felony murder").¹⁷ To this end, the Court held in the 1982 case of *Enmund v. Florida* that felony "murderers" may be executed only when they themselves "killed or attempted to kill," or "intended or contemplated that life would be taken."¹⁸ In 1987, the Court lowered the bar in *Tison v. Arizona*, requiring only "reckless indifference to human life" for substantial participants in the felony.¹⁹ Both *Enmund* and *Tison*, though, were cases involving nonkiller co-felons: Earl Enmund was just a getaway driver, and the Tison brothers stood idly by while watching their fellow gang members kill the victims.²⁰ Perhaps because of this, the cases left ambiguous their application to an *actual killer*—what mental state would he or she need?

Lower courts have grappled with this question of mental state. Of those addressing the question, the majority have held that the actual killer need not act with any

12. 428 U.S. 153 (1976). The statute upheld in *Gregg* was passed in 1973. GA. CODE ANN. § 27.2534.1 (1972), as amended, Ga. Laws No. 74 (1973).

13. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

14. Binder et al., *supra* note 5, at 1151–56.

15. *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008).

16. "A felony murder rule punishes as murder at least some instances of unintended homicide in the course of attempting or perpetrating at least some felonies." Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 413 (2011). In most felony murder jurisdictions, participants in a fatal felony are liable as accomplices in the killing if the death was foreseeable as a result of and sufficiently connected to the felony. In some jurisdictions, all participants in a foreseeably fatal felony are equally liable as principals. BINDER, *supra* note 1, at 213–25.

17. *Kennedy*, 554 U.S. at 438.

18. 458 U.S. 782, 801 (1982).

19. 481 U.S. 137, 158 (1987).

20. *Id.* at 141; *Enmund*, 458 U.S. at 784–85.

culpable mental state at all with respect to the victim's death.²¹ Most have seen the question as easily answered by the language of *Enmund*—if one “killed,” then that is enough even absent intent (perhaps some thought intent was implicit in the term “killing”). Take, for example, the conclusion of the Tenth Circuit in *Workman v. Mullin*, where the evidence showed that the defendant caused three blunt head injuries to a two-year-old child, equivalent in force to the fall from a two- or three-story building.²² The court answered the *Enmund-Tison* challenge as follows:

Workman's crime falls into the category of cases under *Enmund* in which a felony murderer has “actually killed” his victim. . . . The significance of falling into *Enmund*'s category of when a felony murderer has “actually killed” his victim is that the Eighth Amendment's culpability determination for imposition of the death penalty has then been satisfied.²³

Our research has found that twelve jurisdictions agree, and six disagree.²⁴

We have addressed the merits of this interpretation of *Enmund* and *Tison* fully in our previous article, *Capital Punishment of Unintentional Felony Murder*.²⁵ There, we argued that the required mental state for the actual killer under the controlling cases is not easily decided by the words in those opinions, and instead remains an open question.²⁶ Moreover, we explained how failing to consider the culpable mental state of the perpetrator allows for a cruelly disproportionate result: the execution of an inadvertent actual killer.²⁷ This result is absurd, and should be held unconstitutional, because the central background principle of Eighth Amendment death penalty law is the rational selection of the most culpable murderers for death.²⁸ Obviously, this rational selection is impossible if culpability is ignored, and by any standard in our jurisprudence, an inadvertent killer cannot be among the most culpable of those sentenced for murder. To solve this problem, we urged the Court to promulgate a new interpretation of *Enmund* and *Tison* that extends the requirement of recklessness even to actual killers.²⁹

In reading through the lower court cases that interpreted *Enmund* and *Tison*, we noticed something striking: their facts. Although many of these courts made legal rulings that no intent was required for an actual killer, almost none of them presented even a plausible case of killing without intent to kill or reckless indifference to human life. This pattern has led us to believe that the case for prohibiting capital punishment for inadvertent killings goes well beyond the logical extension of Eighth Amendment

21. See Binder et al., *supra* note 5, at 1181–1201 (surveying jurisdictions).

22. *Workman v. Mullin*, 342 F.3d 1100, 1104 (10th Cir. 2003).

23. *Id.* at 1111 (citing *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), *abrogated by* Pope v. Illinois, 481 U.S. 497 (1987)).

24. See Binder et al., *supra* note 5, at 1201.

25. Binder et al., *supra* note 5.

26. *Id.* at 1180–81.

27. *Id.* at 1207–09.

28. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“For these reasons we have explained that 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.””).

29. See Binder et al., *supra* note 5.

principles. Since the resumption of capital punishment permitted by the 1976 decision in *Gregg v. Georgia*, a societal consensus has emerged against the capital punishment of inadvertent killing. Thus, even if the 1982 decision in *Enmund* were correctly interpreted to permit execution for inadvertently causing death in the course of certain felonies, a standard of decency “evolving”³⁰ since that time could now make capital punishment for this conduct unconstitutional. Indeed, we will argue that such a standard *has* evolved.

II. DETERMINING A NEW STANDARD OF DECENCY

The Eighth Amendment forbids “cruel and unusual punishments.”³¹ As delineated in the language of the Supreme Court’s elaboration, this prohibition has been interpreted to ban punishments that are “disproportionate” to the offense, with proportionality defined according to the punishment’s comportment with “the evolving standards of decency that mark the progress of a maturing society.”³² Therefore, the effect of this Clause will change over time: “The standard itself remains the same, but its applicability must change as the basic mores of society change.”³³ The reason is that proportionality “is not merely descriptive, but necessarily embodies a moral judgment.”³⁴ How, though, do courts discern whether a new standard of decency has emerged? While much could be said about whether such an assessment is possible or desirable,³⁵ Eighth Amendment doctrine provides a well-established method for performing such an assessment.

A. Comparative vs. Categorical Review of Sentences

The determination of proportionality has differed depending on the type of sentence. Challenges to term-of-years sentences have most often been assessed by weighing the totality of the circumstances and comparing the sentences with others for similar offenses in the same and other jurisdictions. By contrast, challenges to death sentences have been evaluated categorically.

In the context of sentences of imprisonment, when a “particular defendant’s sentence” is challenged as “grossly” disproportionate, it is weighed using what we might call a totality of the circumstances test: the Court has said it will look at “all of the circumstances of the case.”³⁶ The assessment begins by “comparing the gravity of the offense and the severity of the sentence.”³⁷ If this threshold of

30. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

31. U.S. CONST. amend. VIII.

32. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. at 101). “[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U.S. 349, 367 (1910).

33. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

34. *Id.*

35. *See Glossip v. Gross*, 135 S. Ct. 2726, 2747–50 (2015) (Scalia, J., concurring).

36. *Graham v. Florida*, 560 U.S. 48, 59–61 (2010).

37. *Id.* at 60.

disproportionality is met, the Court then engages in a comparative analysis: “compar[ing] the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.”³⁸ If the intra- and interjurisdictional comparison “validates” the threshold conclusion of gross disproportionality, then the sentence is unconstitutional.³⁹ Applying this method, the Court held in *Solem v. Helm* that the sentence of a repeat offender to life-without-parole for writing a bad check was disproportionate.⁴⁰ Yet since *Solem* (1983), every similar challenge to a particular sentence of incarceration has failed.⁴¹ When the Court most recently invalidated a term-of-years sentence in *Graham v. Florida*, it did so using a different method: a “categorical approach.”⁴² The Court justified the different approach by concluding that it was evaluating not a particular sentence, but a “sentencing practice,” in this case imposing life without parole on juvenile offenders for nonhomicide offenses. The Court defined a sentencing practice as a “particular type of sentence as it applies to an entire class of offenders.”⁴³ As the Court acknowledged, it borrowed this “categorical” approach from death penalty cases.⁴⁴

A “categorical” evaluation of a sentencing practice involves two steps: (1) ascertaining the empirical moral consensus of the national population, and (2) determining conceptually whether a sentencing practice in violation of such a consensus nevertheless advances accepted purposes of punishment. This is the Court’s most recent formulation, from *Graham v. Florida*:

The Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.⁴⁵

Both the objective indicia of societal consensus and the independent judgment of the Court must point to the same answer for a claim of disproportionality to prevail.

38. *Id.*

39. *Id.*

40. 463 U.S. 277, 303 (1983).

41. *Graham*, 560 U.S. at 60 (discussing *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263 (1980)).

42. *Graham*, 560 U.S. at 62.

43. *Id.* at 61.

44. *Id.* at 60 (“The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty.”).

45. *Id.* at 61 (citations omitted).

1. Objective Indicia

The first step in the categorical approach is the empirical survey of moral viewpoints in American society as evidenced by “legislative enactments” and “state practice.”⁴⁶ These are called “objective indicia of society’s standards.”⁴⁷

A legislative consensus against a sentencing practice is not a *sine qua non* for finding a societal consensus rejecting such a practice. For example, in *Graham*, the court found a societal consensus against life without parole for juveniles committing nonhomicidal offenses even though a majority of jurisdictions permitted the practice.⁴⁸ Yet, legislative enactments are “the clearest and most reliable” evidence of societal views.⁴⁹ Legislative evidence includes state and federal statutes regarding who and what can be capitally punished. The number of jurisdictions that permit or forbid a certain result is the most relevant question. In *Kennedy v. Louisiana*, the Court summarized what the threshold number for a national consensus would look like:

Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.⁵⁰

Thus, evidence that a substantial majority of jurisdictions has enacted legislation against an application of the death penalty (including those banning the death penalty entirely) may be sufficient to show legislative support for a societal consensus. The Court did not find a legislative consensus in *Graham*, for example, when it noted that thirty-seven states plus the United States and the District of Columbia permitted life without parole for juvenile nonhomicide offenders.⁵¹ Beyond the tally, the trend of jurisdictions towards or away from abolition is also relevant,⁵² and so too is the strength of the majorities that passed the given enactment in the jurisdiction’s legislature.⁵³

The second, and more complicated category is that of “state practice”—how the legislation on the books is actually implemented. In *Graham*, for example, the Court noted that while thirty-nine of fifty-two jurisdictions permitted life without parole

46. *Id.*

47. *Id.*

48. *Id.* at 62.

49. *Id.*

50. *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (emphasis in original).

51. *Graham*, 560 U.S. at 62 (finding consensus on grounds of state practice).

52. *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (The Court noted that while only nineteen states banned execution of the mentally disabled, seventeen of these bans occurred soon after the earlier decision in *Penry* which had said that two states was insufficient. This was called the “consistency of the direction of the change.”).

53. *Id.* at 316 (“The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.”).

for juvenile nonhomicide offenders, only eleven jurisdictions imposed such sentences, and the majority of such sentences came from just one state.⁵⁴

In evaluating societal standards for capital punishment, the most essential aspect of state practice is the number of death sentences and executions a given state metes out for a given class of conduct or offender: “the sentencing decisions that juries have made.”⁵⁵ While death sentences continue to be relevant in determining state practice, the trend in more recent case law is to focus on the executions that are ultimately carried out. In 2002, the Court in *Atkins v. Virginia* found that execution of the mentally disabled was “truly unusual” when only five states completed such executions in the prior thirteen years.⁵⁶ Similarly, in *Roper v. Simmons* (2005), the Court noted that only three states had executed defendants who had committed their crimes as juveniles in the previous ten years.⁵⁷ Finally, in the 2008 case *Kennedy v. Louisiana*, the Court took note that only two death sentences for child rape had been given since 1964, but seemed especially convinced by the fact that zero executions had occurred in the same time:

Statistics about the number of executions . . . confirm our determination . . . that there is a social consensus against the death penalty for the crime of child rape. . . . [N]o individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963.⁵⁸

The final objective indicium, and that which carries the least weight, is the category of nonofficial and international evidence of opinion. This includes public opinion data,⁵⁹ the views of respected organizations in civil society,⁶⁰ and the positions

54. *Graham*, 560 U.S. at 64.

55. *Enmund v. Florida*, 458 U.S. 782, 794 (1982) (“Society’s rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, “[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.” (citing *Coker v. Georgia*, 433 U.S. 584, 596 (1977))). See *infra* note 175 regarding sentences imposed by judges.

56. *Atkins*, 536 U.S. at 316 (The Court did not count death sentences of the mentally disabled.).

57. *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005).

58. 554 U.S. 407, 433 (2008).

59. See *Atkins*, 536 U.S. at 316 n.21 (“[P]olling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.”).

60. *Id.* at 316 n.21 (“For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae*; Brief for AAMR et al. as *Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’ Brief for United States Catholic Conference et al. as *Amici Curiae* 2.”).

of foreign jurisdictions.⁶¹ This evidence has been called “not irrelevant,”⁶² but “by no means dispositive.”⁶³ These considerations appear to function primarily as makeweights to buttress a conclusion already apparent from domestic, official sources.

2. Independent Judgment—Purposes of Punishment and Culpability

After the objective indicia are assessed, the Court makes its own “independent judgment” as to whether the sentence is disproportionate, evaluating whether the death penalty “serve[s] legitimate penological goals” as applied.⁶⁴ The legitimate social purposes of capital punishment are retribution and deterrence.⁶⁵ Retribution is the “expression of society’s moral outrage at particularly offensive conduct.”⁶⁶ Deterrence is the aim of reducing crime by creating the “threat of death” for its commission.⁶⁷ The death penalty as applied must advance these two goals, and it must do so in more than a tenuous or “limited” way.⁶⁸

The touchstone of whether the death penalty advances retribution and deterrence is culpability.⁶⁹ As the Court wrote in *Atkins*:

With respect to retribution—the interest in seeing that the offender gets his “just deserts”—the severity of the appropriate punishment necessarily depends on the culpability of the offender. . . . With respect to deterrence—the interest in preventing capital crimes by prospective

61. *Id.* 316–17 n.21 (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4.”); *Enmund v. Florida*, 458 U.S. 782, 796–97 n.22 (“It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”).

62. *Enmund*, 458 U.S. at 796 n.22 (quoting *Coker v. Georgia*, 433 U.S. 584, 596, n.10 (1977)).

63. *Atkins*, 536 U.S. at 317 n.21.

64. *Graham v. Florida*, 560 U.S. 48, 67 (2010).

65. *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) (“two distinct social purposes served by the death penalty”).

66. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

67. *Id.* at 185.

68. *Graham*, 560 U.S. at 72 (“Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders’ diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.”).

69. Some treat the test as bifurcated. See Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT’G REP. 58, 58 (2010); *Kennedy*, 554 U.S. at 420 (quoting *Roper v. Simmons*, 543 U.S. 551, 558 (2005)) (“For these reasons we have explained that 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.””).

offenders—“it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.’”⁷⁰

We do not deserve punishment if we did not choose to cause or risk harm, and similarly, the threat of punishment cannot deter us from unwitting conduct.

Rationally advancing the purposes of punishment requires assessing culpability, which in turn involves evaluating the offense and the actor’s moral responsibility for committing it. The Court has summarized its cases as breaking down into “two subsets”: “the nature of the offense” and “the characteristics of the offender.”⁷¹

With respect to offender characteristics, the Court has held that the mentally disabled and the juvenile lack the necessary level of culpability. In *Atkins v. Virginia*, the Court wrote that “[m]entally retarded persons . . . by definition . . . have diminished [mental] capacities,” and “[t]heir deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.”⁷² Two years later, in *Roper v. Simmons*, the importance of culpability was reemphasized: “The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”⁷³ If some feature of *who* you are diminishes your culpability sufficiently, then the Eighth Amendment bars your execution.

The same is true if *what* you did evidences reduced culpability—this is the second subset of categories, “the nature of the offense.”⁷⁴ The most important rule the Court has promulgated regarding this subset is that the death penalty may not be imposed for “instances where the victim’s life was not taken” (also called “nonhomicide crimes against individual persons”).⁷⁵ Thus, the culpability that matters when looking at the nature of an offense is culpability *with respect to a victim’s death*. As the Court wrote in *Kennedy v. Louisiana*, “[i]n considering the death penalty for nonhomicide offenses this [culpability] inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim.”⁷⁶ In other words, one is not culpable enough for a death sentence if the crime he committed did not involve the “wrong” of the death of someone else. This was suggested in the earlier case *Enmund v. Florida*: “The focus must be on [the defendant’s] culpability . . . [And the defendant] himself did not kill or attempt to kill . . . [or have] any intention of participating in or facilitating a murder.”⁷⁷

70. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

71. *Graham*, 560 U.S. at 60–61 (“The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics . . .”).

72. 536 U.S. at 318 (discussing reversal of *Penry*).

73. 543 U.S. 551, 572–73 (2005).

74. *Graham*, 560 U.S. at 61.

75. *Kennedy v. Louisiana*, 554 U.S. 407, 437–38 (2008). The opinion still allows crimes that are “offenses against the State” to be capitally punished.

76. *Id.* at 442.

77. 458 U.S. 782, 798 (1982).

III. OBJECTIVE INDICIA REGARDING INADVERTENT KILLINGS

This brings us to the contribution of this Article. The Eighth Amendment requires that the punished offense involve the death of a victim, and it requires culpability with respect to that death. But *how much culpability*? Can someone receive a death sentence for an inadvertent killing? As discussed in the first section and our previous Article, this outcome is legally possible in the majority of jurisdictions that have answered the question, but such a result undermines the purposes of the Eighth Amendment. Framing these arguments within the parameters laid out above, we would say that the “independent judgment” test weighs against capital punishment in these circumstances. Relative to the offender’s culpability, such punishment is cruel. In what follows, we will supplement these normative arguments with empirical data regarding both legislation and state practice. We will present an argument that the “objective indicia” of societal consensus indicate that capital punishment for inadvertent killing is “truly unusual.”⁷⁸

A. Legislation

We begin with the “clearest and most reliable” evidence of social consensus: legislation in the fifty-three criminal law jurisdictions.⁷⁹

The first cut is the easiest to make. Twenty jurisdictions do not permit the death penalty in any case.⁸⁰ According to the Court, a decision against the death penalty generally is also a decision against its various applications.⁸¹ Twenty jurisdictions, then, conclude that capital punishment for inadvertent killing is cruel and unusual, as they believe capital punishment is never merited.

Next, we add in those capital jurisdictions where there is no murder liability for an inadvertent killing. These include one additional jurisdiction that has no felony murder doctrine,⁸² and two additional jurisdictions that require recklessness with respect to the victim’s death during a felony in order for the felon to be liable for the murder of the victim.⁸³

78. *Roper*, 543 U.S. at 563 (quoting *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002)).

79. *Graham*, 560 U.S. at 62 (quoting *Atkins*, 536 U.S. at 312).

80. See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/X3WL-8MPW>] (listing Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and Washington, D.C.).

81. The Court counts abolitionist states as prohibiting a specific practice for the purpose of determining consensus. See *Roper*, 543 U.S. at 564 (“When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether . . .”).

82. See KY. REV. STAT. ANN. § 507.020 (LexisNexis 2014). One state without capital punishment, Hawaii, also has no felony murder doctrine. HAW. REV. STAT. ANN. § 707–701 (West 2007).

83. See ARK. CODE ANN. § 5-10-101 (2013); N.H. REV. STAT. ANN. § 630:1-b (2016). Four states without capital punishment, Massachusetts, Michigan, New Mexico, and Vermont, also require reckless indifference to human life for felony murder. See 9 N.M.

Now we turn to laws about the application of the death penalty to felony murderers in capital jurisdictions. Here, three jurisdictions have imposed a baseline requirement of at least recklessness with respect to the killing.⁸⁴ Two other jurisdictions require at least knowledge.⁸⁵ Seven jurisdictions require intent, deliberation, or premeditation.⁸⁶

Altogether, then, thirty-five of the fifty-three jurisdictions have rules that prohibit execution of an inadvertent killer. This is a healthy majority, and shows legislative indicia of a societal consensus. The eighteen jurisdictions where capital punishment for inadvertent killing is possible are: Arizona, California, Colorado, Florida, Georgia, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Washington, and Wyoming.⁸⁷ In fairness, this includes some very populous jurisdictions—California and Florida, for example. Still, this is a minority of the total.

It is important to compare these “statistics” regarding legislative consensus with past Supreme Court cases recognizing new Eighth Amendment rules (the Court itself does this).⁸⁸ As the above numbers indicate, the current percentage of jurisdictions prohibiting execution of inadvertent killers is thirty-five of fifty-three, or sixty-six percent. These are the statistics of the earlier cases that have recognized a *legislative* consensus:⁸⁹

STAT. ANN. § 30-2-1 (West 2016); *Commonwealth v. Brown*, 477 Mass. 805, 832 (2017); *People v. Aaron*, 299 N.W.2d 304, 319–20 (Mich. 1980); *State v. Doucette*, 470 A.2d 676, 682 (Vt. 1983).

84. For the rule in the U.S. Military, see *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998). The U.S. rule is provided by 18 U.S.C. § 3591(a)(2) (1994) (requiring intent to kill, intent to inflict serious bodily injury, contemplation that life would be taken, intent that lethal force be used, or reckless disregard for human life). The other jurisdiction is Alabama. *See* ALA. CODE § 13A-5-40 (LexisNexis 2012).

85. MO. ANN. STAT. § 565.020 (West 2012); UTAH CODE ANN. § 76-5-202 (LexisNexis 2012).

86. *See* KAN. STAT. ANN. § 21-5401 (Supp. 2016); LA. STAT. ANN. § 14:30 (2016); OHIO REV. CODE ANN. § 2929.04 (LexisNexis 2014); OR. REV. STAT. § 163.150 (2016); 42 PA. STAT. AND CONS. STAT. ANN. § 9711 (West 2014); TEX. PENAL CODE ANN. § 19.03 (West 2011); VA. CODE ANN. § 18.2-31 (2014).

87. ARIZ. REV. STAT. ANN. § 13-751 (2010); COLO. REV. STAT. ANN. § 18-3-102(1) (West 2013); FLA. STAT. ANN. § 782.04 (West 2017); GA. CODE ANN. § 16-5-1 (2007); IDAHO CODE § 18-4004 (2006); IND. CODE § 35-50-2-9 (2016); MISS. CODE. ANN. § 97-3-19(2)(e) (West 2016); MONT. CODE. ANN. § 45-5-102(1)(b) (2016); NEB. REV. STAT. § 28-303 (2016); NEV. REV. STAT. ANN. § 200.030(1)(B) (LexisNexis 2012); N.C. GEN. STAT. ANN. § 1417(A) (West 2014); OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 2016); S.C. CODE ANN. § 16-3-20 (2015); S.D. CODIFIED LAWS § 23A-27A-4 (1979); WASH. REV. CODE ANN. § 10.95.020 (West 2010); WYO. STAT. ANN. § 6-2-102 (West 2017); *People v. Anderson*, 742 P.2d 1306 (Cal. 1987); *State v. Pruitt*, 415 S.W.3d 180 (Tenn. 2013).

88. *See Kennedy v. Louisiana*, 554 U.S. 407, 425 (2008) (comparing “statistics” of child rape legislation versus that of legislation at issue in *Atkins* and *Enmund*).

89. *Graham v. Florida*, 560 U.S. 48 (2010) (recognizing the new rule based on state practice, not legislation).

Case	Punishment Practice	Jurisdictions Prohibiting	Percentage
<i>Kennedy v. Louisiana</i> , 554 U.S. 407, 425 (2008)	Offense: child rape	45/53	85%
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	Offender: juvenile <18	31/51	61%
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	Offender: mentally disabled	30/52	58%
<i>Thompson v. Oklahoma</i> , 487 U.S. 815, 829 (1988)	Offender: juvenile <16	32/51	63%
<i>Ford v. Wainwright</i> , 477 U.S. 399, 409 (1986)	Offender: insane	53/53	100%
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	Offense: vicarious felony murder	44/52	85%
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	Offense: adult rape	52/53	98%

If thirty-five of fifty-three jurisdictions (sixty-six percent) prohibit execution of inadvertent killers, this legislation shows evidence of an emerging national consensus against the practice. This number fits well with the more recent cases finding consensus through examination of statutes (surpassing the figures accepted in *Atkins* and *Roper*).

B. State Practice

We now turn to state practice. As the Court wrote in *Kennedy*, “[t]here are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the [conduct at issue] is regarded as unacceptable in our society.”⁹⁰ In what follows, we will present the results of an analysis of every post-*Furman* execution for felony murder in the eighteen jurisdictions where capital punishment for an inadvertent killing is possible. Then, we will do the same with death sentences not yet carried out. As we will show, capital punishment for this conduct has become “truly unusual” as a matter of state practice.⁹¹

1. Method—Focus Primarily on Executions

Before turning to the results of our study, we must say a brief word about method. We will first analyze the actual executions carried out and give these the most weight as indicators of societal consensus—not death sentences given by juries, which we will analyze as a secondary indicator that is relevant, but less probative. We believe this approach is justified by doctrine as well as by the nature of the current system of post-conviction review.

90. *Kennedy*, 554 U.S. at 433.

91. *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304 (2002)).

First, as noted earlier, the Supreme Court has moved away from an emphasis on death sentences in favor of looking at executions. In both *Atkins* and *Roper*, only executions were counted during the discussion of state practice.⁹² The Court in *Kennedy* took note of the rarity of death sentences for the given conduct, but it seemed most persuaded by the total lack of executions, saying that it was this statistic that “confirm[ed] . . . that there is a social consensus”⁹³

This trend towards assessment of executions over death sentences, we believe, makes sense. As we will describe below, in the American capital punishment system, very few death sentences ever result in executions—and jurors know this. Thus, looking at the larger set of death sentences misportrays community morality as harsher than it is. The clearest, most distilled representation of community morality will be those death sentences that survive the various layers of review and are actually carried out.

In coming to this conclusion, we are heavily influenced by the path-breaking research conducted by James Liebman years ago. Asked in 1991 by the Senate Judiciary Committee to study the rate of error in capital cases, Liebman found stunning results: from 1973 to 1995, courts found prejudicial error in sixty-eight percent of all death sentences.⁹⁴ Such review takes place at three stages: first on state direct review, next on state collateral (post-conviction) review, and then finally on federal habeas review. In 2000, Liebman reported as follows:

Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence. Close to 100% of those sentences are reviewed on state direct appeal and, if affirmed, in a state post-conviction proceeding, and, if affirmed again, on federal habeas corpus. Remarkably, during the twenty-three-year period of our statistical study, 1973–1995, the result of this process was the reversal by state direct appeal or state post-conviction courts of at least 47% of the capital judgments they reviewed, and federal habeas reversal of 40% of the capital judgments that survived state review.⁹⁵

These observations continue to be true. According to a Bureau of Justice Statistics (BJS) study conducted in 2013, of the 8466 death sentences issued from 1973 to 2013, 3194 were overturned by appellate courts.⁹⁶

But it would be an exaggeration to think that even one-third of the death sentences are ultimately carried out even after running the appellate gauntlet. Many offenders

92. *Atkins*, 536 U.S. at 316. The Court did not count death sentences of the mentally disabled. *Roper*, 543 U.S. at 564–65.

93. *Kennedy*, 554 U.S. at 433.

94. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 8 (Colum. L. Sch., Working Paper No. 15, 2000) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712 [<https://perma.cc/W7KG-SCEJ>].

95. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052–54 (2000) (internal citations omitted).

96. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES (2014), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf> [<https://perma.cc/2N4K-F4ZM>].

simply die on death row of natural causes during the long period of review (an average of eleven years when Liebman was writing, and an average of fifteen years today).⁹⁷ Others are granted executive clemency, and some benefit from subsequent abolition of the death penalty in their state. According to the BJS, of the 8466 death sentences, 509 of the offenders died of other causes, and 392 were granted clemency.⁹⁸ Only 1359 of the 8466 sentences resulted in a completed execution, while a total of 2959 remained on death row.⁹⁹ Thus, of death sentences reaching final resolution in the forty years following *Furman v. Georgia*, only 22% were executed. According to data compiled by the Death Penalty Information Center, about 1 in 10 of those executed have been volunteers (e.g., defendants who declined to exhaust their legal remedies).¹⁰⁰ If these cases are removed, the portion of death sentences surviving all forms of review is 20%. Of all death sentences imposed from 1973 to 2013, only 16% were executed.

Liebman's exhaustive research demonstrated that the jury was not the primary decider of who lives and who dies, and that this task was instead mostly left to the appellate courts. "In the guise of enforcing criminal procedural rights," he wrote, "our post-trial review processes in fact have come to play an essential role in the substantive determination of who lives and who dies."¹⁰¹ Trial-level decisionmakers, therefore, "drastically overproduce death sentences."¹⁰² Liebman explains that this is the unintended consequence of an overtaxed death penalty defense bar that has invested most of its limited resources in the appeals stage.¹⁰³

For our purposes, it is significant that juries know that they are not running the show. Liebman shows that juries (correctly) understand that most of the death sentences they assign will never be carried out, and therefore feel diminished responsibility for their choice: "Realizing that intense post-trial scrutiny makes execution an unlikely outcome of a death sentence, they are encouraged to impose death verdicts that fully responsible jurors would realize are not deserved, thus necessitating intense post-trial scrutiny to catch their mistakes."¹⁰⁴ One study cited by Liebman found that,

97. *Id.* More recent executions show average wait times of fifteen years.

98. *Id.*

99. *Id.*

100. See *Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers,"* DEATH PENALTY INFO. CTR. (Aug. 13, 2015), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers> [<https://perma.cc/MF4Y-JBJD>].

101. Liebman, *supra* note 95, at 2032 (emphasis in original).

102. *Id.*

103. *Id.* at 2073 ("[V]ery early on they made a crucial (probably disastrous, though probably unavoidable) strategic decision to concentrate their efforts at the post-conviction stages, causing the state to expend huge amounts of resources at those same stages to counter their efforts. The result is that the pro-death penalty forces have their way at trial, essentially generating as many death sentences as it is professionally rewarding to generate, while anti-death penalty lawyers are able at the later stages of the process, if not to have their way, then at least to have substantial success exposing the astonishingly high amounts of error rates documented above." (emphasis omitted)).

104. *Id.* at 2119. On the other hand, prosecutors cannot tell jurors that their decision may have no effect. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

after interviews with 153 capital jurors, most “felt little responsibility for death sentences and less for executions.”¹⁰⁵ Carol and Jordan Steiker call this phenomenon “the diffusion of moral responsibility.”¹⁰⁶

A second consideration militating against excessive reliance on capital sentences as evidence of the moral standards of society is the practice of restricting capital jury service to “death-qualified” jurors, as permitted in *Witherspoon v. Illinois*,¹⁰⁷ *Wainwright v. Witt*,¹⁰⁸ *Lockhart v. McCree*,¹⁰⁹ and *Uttecht v. Brown*.¹¹⁰ Social science research indicates that death-qualified juries are more prone to convict and condemn than members of the general public,¹¹¹ and likely underrepresent racial minorities.¹¹² In a recent study of capital juries in Louisiana, Aliza Cover found that 22.5% of potential jurors and 33% of black jurors were struck on grounds of opposition to the death penalty.¹¹³ Cover concluded that:

The process of death qualification produces jury verdicts that diverge from community estimations of the cruelty of the death penalty; from a statistical standpoint, the data set of capital jury verdicts is a biased sample. Disqualified jurors are excluded not only from capital jury service in each

105. Liebman, *supra* note 95, at 2118 n.213 (citing Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 352–54, 362–64 (1996)) (“[D]iscussing post-sentencing interviews with 153 actual capital jurors, revealing that they felt little responsibility for death sentences and less for executions and that, ‘[o]n the whole, jurors simply do not believe that defendants sentenced to death will in fact ever be executed,’ with ‘[a] clear majority say[ing] that “very few” death-sentenced defendants will ever be executed, and about 70 percent . . . believ[ing] that “less than half” or “very few” will be executed.’”).

106. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 435 (1995).

107. 391 U.S. 510 (1968) (permitting exclusion for cause of jurors who would vote against a capital sentence regardless of the evidence or whose judgment of guilt would be influenced by their reluctance to impose capital punishment).

108. 469 U.S. 412 (1985) (permitting exclusion of jurors whose opposition to capital punishment would prevent or substantially impair their ability to follow jury instructions).

109. 476 U.S. 162 (1986) (rejecting claim that death qualification of jurors before guilt phase of capital trial unfairly skews jury toward more prosecution-prone jurors, in violation of the Sixth Amendment’s fair cross section principle).

110. 551 U.S. 1 (2007) (requiring deference by appellate courts to the judgment of trial judges that jurors meet the *Witt* standard).

111. BENJAMIN FLEURY-STEINER, JURORS’ STORIES OF DEATH 24–25 (2004); Mike Allen, Edward Mabry & Drue-Marie McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 L. & HUM. BEHAV. 715, 724–25 (1998); Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons’ Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 L. & HUM. BEHAV. 175, 183 (2002); Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 121 (2016).

112. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31, 46 (1984).

113. Cover, *supra* note 111, at 113.

individual case but also from the constitutional conversation about whether the death penalty violates the Eighth Amendment.¹¹⁴

Given these observations, we believe that death sentences are not the most probative index of the moral viewpoints in our society. The Court's movement towards assessment of actual executions—those that have survived the various layers of review—makes sense. These layers of review provide important opportunities for moral input.

During state appellate review, many high courts independently review the record and reweigh aggravating and mitigating factors, and this task often requires the application of moral considerations (e.g., whether a murder was “heinous”).¹¹⁵ In other states, independent review goes even beyond reweighing, and allows for completely open-ended considerations of justice. For example, in Colorado the supreme court reviews the “propriety” of the sentence “having regard to . . . the public interest”;¹¹⁶ in Nevada, the court can consider “[w]hether the sentence of death is excessive, considering both the crime and the defendant.”¹¹⁷

Also indicative of the moral consensus of society is the final hurdle: the decision by the state executive to withhold clemency, and ultimately to issue a death warrant. These decisions are usually highly publicized, and allow for public opinion to affect the execution.

2. The Execution Data

Now, we turn to the “statistics” of executions for inadvertent killing.¹¹⁸ As we will demonstrate, at least three and no more than five defendants have been executed where the evidence presents a plausible case of inadvertent killing.

Before reaching this result though, we must further clarify our methods.¹¹⁹ Our aim is to determine the number of instances where a defendant, convicted on a theory of felony murder, as a principal (i.e., an actual killer) rather than an accomplice, is executed even when the facts present a colorable claim that the death of the victim was inadvertently caused.¹²⁰

To achieve this aim, we employed a team of research assistants—all law students—to determine the facts of every case in which a principal in a felony murder was executed, in the eighteen states where execution for inadvertent killing is doctrinally permissible.¹²¹ Research assistants were supplied with murder and capital sentencing

114. *Id.* at 115–16.

115. *See, e.g.*, *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989), *aff'd*, 497 U.S. 639 (1990).

116. COLO. REV. STAT. ANN. § 18-1.3-1201(6)(a) (West 2016).

117. NEV. REV. STAT. ANN. § 177.055(2)(e) (LexisNexis 2015).

118. *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

119. We acknowledge recent calls for legal scholarship to more precisely state the basis of positive claims about doctrine. *See* William Baude, Adam S. Chilton & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37 (2017).

120. *Id.* at 38 (first feature of “systematic” data review is to state research question clearly).

121. *Id.* (second feature of systematic review is transparency about how the sample is defined and obtained).

statutes in the pertinent states. They used capital punishment databases to identify every defendant executed in each of these states since the reestablishment of capital punishment in 1976,¹²² and then examined high court opinions to identify defendants clearly convicted of premeditated murder and defendants convicted of felony murder as accomplices who did not kill personally. For the remaining cases—possible felony murders in which the defendant actually killed—research assistants examined state high court opinions and newspaper articles to discover the facts of the underlying homicide.

The research assistants then coded each case involving the perpetrator of felony murder for five categories of information: the predicate felonies underlying the felony murder charge, the method of attack, the duration of attack, the coder's impression of the intentionality of the attack, and the victim's characteristics. In describing the method of attack, research assistants particularly noted any weapons used. In describing the duration of the attack, research assistants noted available information regarding the number and nature of blows or injuries. Research assistants were not asked to identify a culpable mental state with respect to death in judging the intentionality of the attack. Instead, the focus was on whether shots, blows, or other types of injurious contact were intentionally directed at victims. However, research assistants were encouraged to explain their judgments, and these explanations sometimes noted an admission of intent to kill or evidence of a motive for killing. Finally, in describing victim characteristics, research assistants noted characteristics such as youth, age, disability, or ill-health that might have rendered the victim more fragile, or less able to resist the predicate felony.

The authors then reviewed the summaries created by the research assistants. The authors independently assessed the culpability with respect to death in all cases where we concluded that the variables coded by the students gave rise to a potential case of inadvertent killing. We took special care to independently review the facts of any killing where a weapon was not used; where a weapon was not clearly identified; where death was produced by a single shot or blow; where the type of weapon used is not commonly lethal; where the primary method of attack was bludgeoning, asphyxiation, strangulation,¹²³ drowning, or vehicular collision; where the student researcher expressed doubt as to whether the attack was intentional; or where the basis of the researcher's judgment that the attack was intentional was not apparent. All of the borderline cases that we found are discussed below in detail.¹²⁴

Having outlined our method, we are ready to discuss our results. Before we begin, we should note that this discussion is necessarily quite graphic. Because the Supreme Court has not required any official determination of culpability with respect to death in these cases, researchers must often infer the defendant's culpability from his or

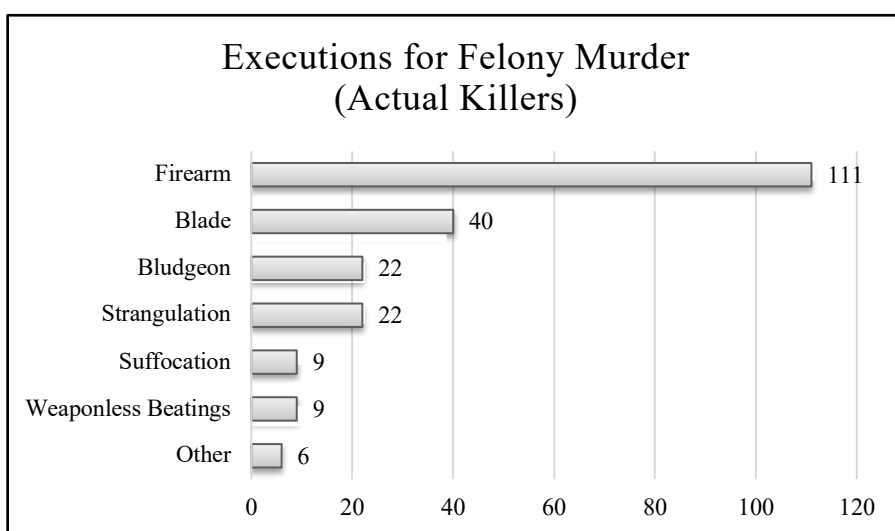
122. *Gregg v. Georgia*, 428 U.S. 153 (1976).

123. In considering strangulation cases, we viewed the use of a ligature as evidence of intent to kill, while viewing manual strangulation as more ambiguous. Conceivably an assailant could fatally strangle in the attempt to restrain or silence a victim.

124. Baude et al., *supra* note 119, at 38 (fourth feature of systemic review is transparency about analysis of sample cases reviewed). Note that the third feature—weighting to certain data—is inapplicable to our endeavor.

her conduct. From 1976 through 2016, the eighteen jurisdictions where capital punishment for inadvertent killing is possible executed 487 people.¹²⁵ Of these 487, a little less than half—220 people—were convicted for actually killing a victim, under a felony-murder theory of liability only.¹²⁶

Of the 220 felony murders, 195 involved the use of a gun, blunt weapon, knife, or strangulation.¹²⁷ One hundred and eleven felony murderers killed their victims with firearms. Forty felony murderers were executed for using a bladed weapon to kill their victims. Twenty-two felony murderers were executed for bludgeoning their victims. Twenty-two felony murderers were executed for strangling their victims. Six felony murderers were executed for using other means of killing, such as vehicles, drowning, or fires. Nine murders were committed by means of suffocation. Nine murders were committed by means of a weaponless beating.



We will now discuss each case we have identified as a possibly inadvertent killing, and every other case in which an argument for inadvertence could have been made.

Of the 195 executions involving homicides committed with weapons or strangulation, almost all involve clear evidence of intentional killing. Take, for example, the North Carolina case of David Lawson, who committed the following acts during a burglary: “He ordered the man out of the truck; and, although the man begged defendant not to shoot, defendant forced him to walk toward the patio and shot him in

125. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (Oct. 6, 2017), <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> [<https://perma.cc/745V-EQ7Q>] (Arizona 37, California 13, Colorado 1, Florida 92, Georgia 69, Idaho 3, Indiana 20, Mississippi 21, Montana 3, Nebraska 3, Nevada 12, North Carolina 43, Oklahoma 112, South Carolina 43, South Dakota 3, Tennessee 6, Washington 5, and Wyoming 1).

126. *See infra* Appendix A and Executions Spreadsheet on file with the Indiana Law Journal.

127. *See infra* Appendix A.

the back of his head.”¹²⁸ Even without facts as egregious as this—say a victim was running away when an assailant shot him once in the back—the intentional use of a deadly weapon provides strong evidence of a culpable mental state of at least recklessness with respect to the victim’s death. The same is true of the cases involving the intentional use of bladed weapons, bludgeons, and strangulation: the deadly nature of the mechanism of injury permits a very strong inference of recklessness. Recklessness here is the conscious disregard of a “substantial and unjustifiable risk” of the victim’s death, which is created by conduct that is a “gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”¹²⁹ The use of a deadly weapon or a deadly technique (strangulation) to effectuate a felonious end poses a substantial and unjustified risk to life; and the unprivileged use of deadly force is the paradigmatic example of a deviation from law-abiding conduct.

In a few cases, defendants claimed they used deadly weapons unintentionally, but these claims were not credible. In the Oklahoma case of *Fields v. State*, the burglary victim was shot with her own gun.¹³⁰ Fields claimed that the victim’s finger was on the trigger when the gun fired as he struggled with her for possession of it,¹³¹ but both forensic evidence and eyewitness testimony belied his account.¹³² The bullet entered the victim’s head from the rear and was fired from at least six inches away. A witness described a shooter who calmly looked at the witness, looked back at the victim, and then fired.¹³³ In the South Carolina case of *State v. Drayton*, defendant robbed a store, abducted the store clerk, forced her to drive him to a secluded riverside pier, shot her between the eyes, dropped her body off the pier, and then took her car.¹³⁴ He later claimed that the victim willingly accompanied him to the pier, and that he shot her involuntarily, when he stumbled against a railing.¹³⁵ In the South Carolina case of *State v. McWee*, the defendant shot a store clerk twice in the head before robbing the cash register.¹³⁶ At trial he claimed that he shot the victim the first time “by accident” and the second time “by mistake”; but during the sentencing phase he instead claimed he was forced to shoot the victim by a co-felon.¹³⁷

One bludgeoning case involved a similarly hollow claim of exculpation. In the North Carolina case of *State v. Powell*, defendant claimed he panicked while robbing a store clerk and had no intention of hurting her. When she slapped him, he picked up a tire iron and bludgeoned her repeatedly on the head, causing multiple fractures and a fatal brain hemorrhage, and left her in a pool of blood.¹³⁸ We found no cases

128. *State v. Lawson*, 314 S.E.2d 493, 496 (N.C. 1984).

129. MODEL PENAL CODE § 2.02 (AM. LAW. INST. 1985).

130. 923 P.2d 624 (Okla. Crim. App. 1996).

131. *Id.* at 628.

132. *Id.*

133. *Id.*

134. 361 S.E.2d 329, 331 (S.C. 1987).

135. *Id.*

136. 472 S.E.2d 235, 237 (S.C. 1996).

137. *Id.*

138. 459 S.E.2d 219 (N.C. 1995).

where defendants claimed to have stabbed or strangled their victims unwittingly. All of the killings by “other means” were clearly intentional.¹³⁹

The eight suffocation cases include two cases where the defendants’ intentions are harder to determine, because the circumstantial evidence left some doubt as to exactly how the suffocation was accomplished. In the Oklahoma case of *Lott v. State*, the defendant broke into the homes of four elderly women and raped them.¹⁴⁰ Two of the women died by asphyxiation. It appears that in both cases the defendant brought a knotted rag to gag the victims, but also forced pillows over their faces.¹⁴¹ In the South Carolina case of *State v. Middleton*, an escaped prisoner raped and asphyxiated two victims on successive days and mutilated the bodies after death.¹⁴² In the second case (for which he was executed), he claimed to have left the victim bound and gagged while he went to a store, and found her dead on his return.¹⁴³ Because he burned the body, this account could not be corroborated.¹⁴⁴ Neither Lott nor Middleton was proven to have killed intentionally, but both assailants persisted in a life-threatening method of sexual assault after fatally asphyxiating a prior victim. We therefore consider these killings reckless.

Determining the killer’s mental state in a weaponless beating case can be more difficult. Relevant considerations might be the number, force, and location of the blows, and the fragility of the victim. In three of our nine weaponless beating cases, *Gilson v. Simmons*, *Workman v. Mullin*, and *State v. Berry*, findings of a culpable mental state of recklessness or intent to kill were made by the jury or a reviewing court.¹⁴⁵ In a fourth case, the Georgia case *Young v. State*, we consider the evidence

139. These consisted of three deliberate drownings (combined with other assaults) (*Chandler v. State*, 702 So. 2d 186 (Fla. 1997); *Waterhouse v. State*, 429 So. 2d 301 (Fla. 1983); *Hawkins v. State*, 891 P.2d 586 (Okla. Crim. App. 1994)); the bludgeoning of two victims followed by splashing them with accelerant and igniting them (*Henry v. State*, 613 So. 2d 429 (Fla. 1992)); a firebombing in which the intended victim survived, but the occupant of a neighboring apartment was killed (*Short v. State*, 980 P.2d 1081 (Okla. Crim. App. 1999)); and repeatedly running a car over a victim, who was also attacked by other means (*State v. Gerlaugh*, 698 P.2d 694 (Ariz. 1985)).

140. 98 P.3d 318 (Okla. Crim. App. 2004).

141. *Id.* at 319.

142. 368 S.E.2d 457 (S.C. 1988).

143. *Id.* at 459.

144. *Id.*

145. *Gilson v. Simmons*, 520 F.3d 1196, 1217 (10th Cir. 2008) (making a judicial determination of recklessness: “[Gilson] subjectively appreciated that his conduct would likely result in the taking of innocent life”); *Workman v. Mullin*, 342 F.3d 1100, 1106 (10th Cir. 2003) (judicial determination of recklessness: U.S. Court of Appeals found that the district court’s finding that Workman had acted with “reckless disregard of the consequences” of striking a two-year-old in the abdomen and head constituted a finding of “reckless indifference to the value of human life”), *aff’g*, *Workman v. State*, 824 P.2d 378 (Okla. Crim. App. 1991); *Berry v. State*, 703 So. 2d 269, 286 (Miss. 1997) (Defendant abducted victim intending to rape her, carried her into the woods and then beat her fatally, and then carried her further into the woods to conceal the body. The jury found, according to the Mississippi Supreme Court, “that [defendant] intended to kill and actually did kill . . . while contemplating that lethal force would be used” under MISS. CODE ANN. § 99-19-107(7) (1994), which requires them to find one or more of the following: killing, intending to kill, attempting to kill, or contemplating that lethal force would be used.).

of reckless indifference to human life to be sufficient. Here the defendant broke into the homes of six elderly victims in one night and “severely [beat], kicked and stomped” them.¹⁴⁶ Three of the victims died, and the defendant afterwards made statements implying that he wished to harm more people in the same way.¹⁴⁷ Here, as in the *Lott* and *Middleton* cases, we find the repeated use of a fatal method of attack on multiple victims to be strong evidence of conscious disregard of a substantial risk of death.

The remaining five weaponless cases offer less evidence of culpability with respect to death. In discussing these, we will note the year of the offense and the year of sentencing, to consider whether any trend is discernible.

The Georgia case of Roy Blankenship, sentenced in 1980, resentenced in 1982 and 1986, and executed in 2011, presents a potentially inadvertent killing.¹⁴⁸ The defendant broke into the home of a seventy-eight-year-old woman with respiratory illness, and beat her and raped her.¹⁴⁹ She became unconscious during her initial encounter with the defendant, and then during the rape she was apparently beaten and penetrated with foreign objects.¹⁵⁰ According to the court, “Forensic evidence established that the victim died from heart failure brought on by the trauma.”¹⁵¹ While the defendant knew that his victim was a frail elderly woman, he did not know of her pre-existing medical conditions, and he did not use a weapon.¹⁵² Blankenship committed his crime in 1978.¹⁵³

A California case presents another possibly inadvertent killer—Manuel Babbitt, sentenced in 1982 and executed in 1999.¹⁵⁴ *Babbitt* is another case arising from a burglary where the victim was an elderly woman with medical conditions:

According to the pathologist, [the victim] died from a heart attack brought on by a severe beating and possible suffocation. She also showed signs of possible rape. Her body had suffered numerous lacerations and abrasions. Had [the victim] not suffered from coronary disease, and had she not experienced physical and psychological stress caused by fright, the struggle, and pain from her wounds, the physical blows she received would not of themselves have proved fatal.¹⁵⁵

As in Blankenship’s case, Babbitt’s victim died mostly because of her peculiar frailty.¹⁵⁶ This particularity of the victim’s condition, unknown as it was to Babbitt, diminishes his culpability; moreover, no deadly weapon was used. Babbitt’s crime was committed in 1980.

146. 236 S.E.2d 1, 2 (Ga. 1977).

147. *Id.*

148. *Blankenship v. State*, 277 S.E.2d 505 (Ga. 1981).

149. *Id.* at 507.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *People v. Babbitt*, 755 P.2d 253 (Cal. 1988).

155. *Id.* at 260.

156. *Id.*

Next to consider is the North Carolina case of Frank Chandler, sentenced in 1993 and executed in 2004.¹⁵⁷ This is another homicide that occurred during the burglary of an elderly female's home.¹⁵⁸ A pathologist testified that the ninety-year-old victim "died from a single 'massive blow' to the head. The blow resulted in a hinge fracture to the scalp, which effectively caused the skull to snap in two . . ."¹⁵⁹ Nevertheless, the defendant gave a statement saying he had punched the victim once, and apart from the force of the blow, there was no evidence to prove that any weapon had been used. Chandler committed the murder in 1992.

The Oklahoma case of James Malicoat, sentenced in 1998 and executed in 2006, also raises questions about the defendant's mental state.¹⁶⁰ In this case, the defendant engaged in a long course of child abuse that the court described as "torture" of a thirteen-month-old victim.¹⁶¹ The conduct that ultimately caused the child's death was (1) hitting her head against a bed frame, causing two subdural hematomas and (2) punching her twice in the abdomen with such force as to break her ribs and detach her internal organs from the abdominal wall.¹⁶² The pathologist described the abdominal injuries as "non-survivable."¹⁶³ The defendant claimed that after the child stopped breathing he revived her with CPR, yet he made no effort to get medical assistance for the child and instead went to sleep. Nor did he alert anyone on later finding the child dead.¹⁶⁴ At trial, though, Malicoat stated that he had no intention of killing the victim and thought she would withstand the punishment: "he claimed he had suffered through such extreme abuse as a child that he did not realize his actions would seriously hurt or kill Tessa."¹⁶⁵ This case may fall below the level of recklessness with respect to death; it is rare that punches to the stomach result in death, and pushing someone's head into a fixed object is often less forceful than striking the head with a bludgeon. On the other hand, a reasonable person would recognize the great fragility of a thirteen-month-old baby, and a jury is always entitled to disbelieve a defendant's claims that unreasonable beliefs were sincerely held. The facts of this case are comparable to those in the *Berry*, *Workman*, and *Gilson* cases, where findings of recklessness or intent were made. But while a jury or reviewing court could certainly have found reckless indifference to human life on these facts, no such finding was made. Malicoat committed the crime in 1997.

Last to consider is another Oklahoma case, that of Charles Warner, originally sentenced in 1997, resentenced in 2003, and finally executed in 2015.¹⁶⁶ The defendant raped and killed an eleven-month-old child.¹⁶⁷ The evidence showed two skull fractures and two jaw fractures, and a doctor also found retinal hemorrhages

157. *State v. Chandler*, 467 S.E.2d 636 (N.C. 1996).

158. *Id.*

159. *Id.* at 639.

160. *Malicoat v. State*, 992 P.2d 383, 391 (Okla. Crim. App. 2000).

161. *Id.* at 399.

162. *Id.* at 392.

163. *Id.* at 398.

164. *Id.* at 392.

165. *Id.*

166. *Warner v. State*, 144 P.3d 838, 857 (Okla. Crim. App. 2006).

167. *Id.* at 880.

“consistent with a violent shaking.”¹⁶⁸ The medical examiner “determined the cause of death to be multiple injuries to the victim’s head, chest, and abdomen.”¹⁶⁹ The cause of the fractures was not identified—the medical examiner referred to a “crushing type injury” of the head.¹⁷⁰ The defendant claimed that they came from impact with a wooden bedframe.¹⁷¹ There was no direct evidence of the use of a weapon, and the jury did not find this fact. Still, there was eyewitness evidence of both blows to the child and shaking, failure to summon medical help, and forensic evidence of sexual assault.¹⁷² As in *Malicoat*, these facts could have justified a finding of reckless indifference to human life, but none was made. Warner committed his crime in 1997.

In our view, these five cases are the only executions where there is a plausible claim that the killing was inadvertent. Some readers might exclude baby abusers Malicoat and Warner from this group. Thus, the number of inadvertent killers executed since the reinstatement of capital punishment in 1976 is at least three and no more than five.

Regardless of the precise figure chosen, the important implication of this analysis is that executions of even possibly inadvertent killers are *truly unusual*. Our conclusion is that in the forty-four years since *Furman v. Georgia*,¹⁷³ in all jurisdictions where such an execution is legislatively possible (eighteen), only five defendants were executed for a possibly inadvertent killing, and in only four states out of fifty. Moreover, two of the five cases came from one state—Oklahoma—and both Oklahoma cases were prosecuted under the State’s troubling child abuse murder statute, which requires no culpability towards death, or even injury.¹⁷⁴ These two cases represent the only defendants executed for a possibly inadvertent killing who were sentenced within the last twenty years. None of the five felony murders was committed within the last twenty years.

168. *Id.* at 857.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 858. For a skeptical view of post-mortem diagnoses of shaking, see DEBORAH TURKHEIMER, *FLAWED CONVICTIONS: “SHAKEN BABY SYNDROME” AND THE INERTIA OF INJUSTICE* (2014).

173. 408 U.S. 238 (1972).

174. “A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or *using of unreasonable force*.” OKLA. STAT. ANN. tit. 21, § 701.7(C) (West 2016) (emphasis added). This statute is subject to criticism on two grounds. First, felonious assault offenses, such as assault with intent to seriously injure, are disfavored as predicate felonies for felony murders because they fall under the “merger” doctrine—that is, they lack a felonious purpose independent of injury to the person. Second, the intentional infliction of a serious injury that causes death is arguably nothing more than a reckless homicide, which is manslaughter in many jurisdictions. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 519–20 (2011). Aggravated child abuse has been criticized as a predicate felony for this reason. *Id.* at 535–36. Yet the Oklahoma statute is still more troubling in requiring neither reckless indifference to human life nor intent to injure, but merely the intentional use of unreasonable force.

The second objective indicator, state practice, confirms the conclusion supported by the first (legislation): a societal consensus has emerged against capital punishment for inadvertent killing.

As with legislation, it is helpful to compare the “unusualness” with past cases recognizing new Eighth Amendment standards of decency:

Case	Punishment Practice	Death Sentences	Executions
<i>Kennedy v. Louisiana</i> , 554 U.S. 407 (2008)	Offense: child rape	2 on death row, in one state	0 (1964–2008)
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	Offender: juvenile <18	70 on death row	In 6 states (1989–2005); in 3 states (1995–2005).
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	Offender: mentally disabled	Not provided	In 5 states (1989–2002)
<i>Thompson v. Oklahoma</i> , 487 U.S. 815, 829 (1988)	Offender: juvenile <16	5 (1982– 1986)	0 (since 1948)
<i>Ford v. Wainwright</i> , 477 U.S. 399, 409 (1986)	Offender: insane	Not provided	Not provided
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	Offense: vicarious felony murder	3 on death row (in 1982)	6 (1954–1982)
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	Offense: adult rape	5 (1973–1977)	Not provided

If only five potentially inadvertent killers have been executed in forty years, in only four jurisdictions, then this number aligns closely with the numbers in past Supreme Court holdings regarding the frequency of state practice. It is fewer than the six executions in a twenty-eight-year period cited in *Enmund*, the executions in five states in a thirteen-year period in *Atkins*, and the executions in six states in a sixteen-year period in *Roper*. It seems that state legal decision makers, whether prosecutors, juries, reviewing courts, or governors, have rejected the application of the death penalty for this conduct.

3. Sentencing Data

We have discussed what we believe to be, and what the Court has treated as, the most probative metric of societal standards of decency in the imposition of capital punishment—actual executions. We now turn to a supplementary data set: current

death row inmates. This data shows the conduct for which sentencers—mostly juries, but sometimes judges¹⁷⁵—are willing to sentence offenders to death. It includes all those sentenced to death since the first guided discretion statutes were passed in 1973, except those actually executed (we have already analyzed these), and those who died from other causes, or whose sentences were overturned or commuted.¹⁷⁶ We consider death row cases less probative of standards of decency than executions, yet still of value. Although the Supreme Court considered only executions in *Atkins*, and emphasized executions in *Kennedy* and *Roper*, it also considered death row cases in *Coker*, *Enmund*, *Thompson*, *Roper*, and *Kennedy*.

We now turn to the data. As of the end of 2016, there were 1755 death row inmates in the eighteen states permitting execution of inadvertent felony murderers.¹⁷⁷ Of these, 570 were sentenced to death for actually killing under a felony murder theory of liability alone, and without any other finding of intent or premeditation. In determining these numbers, we employed the same methods described earlier with respect to executions, but with one important difference. Because the process of post-conviction review is still ongoing for current death row inmates, there are some cases for which there is not yet any reported opinion. For these cases, we relied on appellate briefs when they were available, and journalistic accounts of the trial when they were not.¹⁷⁸

The methods of killing break down as follows.¹⁷⁹ Most prevalent were shootings, which constituted 250 of the death sentences. Stabbings made up 133 of the set, followed by seventy-nine strangulations. The next largest category is bludgeonings, with forty-seven capital sentences. The remaining methods of killing involving dangerous weapons or instrumentalities are less frequent: eleven victims were burned to death, ten were suffocated, four were drowned, and two were killed with vehicles. Twenty-four death sentences were given for weaponless beatings, and two for deaths caused by injuries from sexual penetration alone. In one case, the victim was bound and gagged and left in a room alone for three days. Finally, in four cases there is either insufficient evidence in the record to determine cause of death, or there is insufficient public information. Absence of evidence of intent does not equate with presence of evidence of inadvertence, but we do note that

175. In *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court upheld Arizona's sentencing scheme leaving to a judge the determinations of the aggravating circumstances rendering the defendant death-eligible. This decision was overturned in *Ring v. Arizona*, 536 U.S. 584 (2002). However, defendants may still be sentenced by judges if they waive their right to jury sentencing.

176. Although death sentences of people who died of natural causes in prison without winning appellate relief could in theory be relevant to our survey, restricting our data set to the people currently on death row (about 2800) accommodates the logistical constraints of getting detailed information from official and journalistic sources about the conduct of defendants. In addition, since the average time on death row for current inmates is about twenty years, this dataset reasonably reflects death sentencing for a large part of post-*Gregg* history.

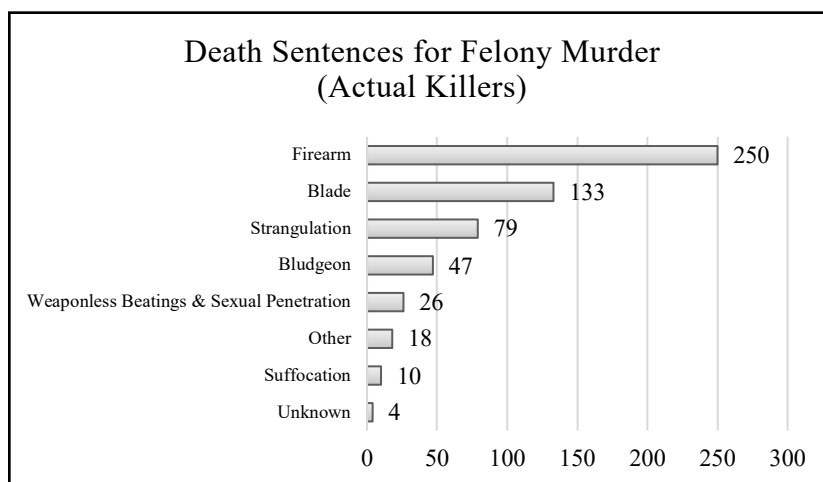
177. Deathrow Coding Spreadsheet on File with the Indiana Law Journal. A surprisingly large number of these inmates, 748, were in one state, California.

178. We had to rely on such sources for ninety-one of 316 California cases, but only thirteen of the remaining 251 cases from other jurisdictions. See *infra* Appendix B.

179. See *id.*

these cases represent troubling manifestations of the felony murder rule's tendency to allow capital juries to ignore culpability altogether.¹⁸⁰

This information is represented graphically below:



180. Three cases involved the discovery of a body under circumstances making foul play obvious, but where the condition of the body obscured the cause of death. Brief of Respondent-Appellee, *People v. Baker* (Cal. 2015) (No. S170280), 2015 CA S. Ct. Briefs LEXIS 1016 (finding that decomposed state of body dumped in desert made cause of death impossible to determine, but defendant had threatened victim and physical evidence indicated he sexually assaulted her in her home and disposed of her body); Informal Response to Petition for Writ of Habeas Corpus, *In re Ghobrial*, 2015 WL 3491924 (Cal. 2015) (No. S218292) (dismembered body of child victim of sexual assault makes cause of death uncertain); Brief of Respondent, *People v. Westerfield* (Cal. 2012) (No. S112691), 2012 WL 5392372 (decomposed body of child victim found in desert made cause of death and occurrence of sexual assault impossible to determine, but circumstantial evidence implicated defendant in abduction of victim and disposal of body). These circumstances make it hard to rule out an inadvertent killing, but the combination of a motive to eliminate a witness and elaborate efforts to dispose of a body provide some evidence of intent to kill. A fourth case, *People v. Jackson*, 376 P.3d 528 (Cal. 2016), is problematic for other reasons. The defendant was implicated in the brutal rape of an eighty-four-year-old woman. In the course of a rambling and inconsistent statement about that crime, the defendant misdescribed the victim to police as having red hair and claimed to have stabbed her and pushed her out of a car on a highway leading to Las Vegas. The rape victim experienced neither of these types of attacks. However, an eighty-two-year-old woman with red hair residing in the same neighborhood had disappeared after a break-in around the same time and her car was later found in Las Vegas. No physical evidence tied the defendant to the scene of the break-in or the car, and no body was ever found. However, a canine officer testified that a scent dog tracked the defendant to an interrogation room after smelling an envelope taken from the scene of the break-in. The jury, hearing this evidence, including evidence about the brutal interracial rape of the other victim, convicted and sentenced the defendant to death. Because the defendant described stabbing a victim and pushing her out of a car, the case arguably presents evidence of recklessness. Yet it seems unlikely that the jury would have convicted him of murder or condemned him to death on such scant evidence if they did not know the defendant had committed the rape of another victim.

After examining the facts of these 570 cases, we have determined that only fifteen cases present death sentences for arguably inadvertent killings. In what follows, we will begin by examining cases of weaponless beatings and sexual penetrations, where culpability with respect to death is often lowest. Then, we will turn to cases where unquestionably deadly instrumentalities are claimed to have nevertheless caused death inadvertently. These cases involve fire and firearms.

Before we begin this factual review in some detail, an acknowledgment and a caveat are in order. First, we again acknowledge that the details are disturbingly graphic. Indeed, they often reflect conduct of great heinousness. Yet it is important to remember that we are not here presenting the evidence offered in support of mitigation in these cases, often including tragic life circumstances that are similarly disturbing.

Second, we offer the caveat that our inferences about the facts of cases—the few we discuss and the many we do not—based only on the sources we have had at hand, are in no way meant to bear on the factual merits of the claims of any inmates who are currently litigating nor are likely to litigate these claims on appellate or post-conviction review. Nor do we imply any judgments about the manner in which the attorneys litigated the cases—including their choice to raise defenses (or not), or their chosen emphasis of certain facts.

i. Weaponless Beatings & Sexual Penetration

As stated earlier, weaponless beatings often present questionable cases of recklessness with respect to death because of the correct perception that blows from hands and fists do not usually kill. This causal uncertainty is even more significant with sexual penetration (except perhaps in the case of very small infants). This ambiguity bears itself out in a number of actual cases—all of which involve either children or elderly victims.

Benjamin Cole was sentenced to death by an Oklahoma jury in 2004 for killing his nine-month-old daughter by snapping her spine in half: he “grabbed [her] by the ankles and pushed her legs toward her head until she flipped over.”¹⁸¹ He claimed this was in an attempt to get her to stop crying.¹⁸² As she lay dying, he took no action to call for aid and denied that the child was hurt when his wife confronted him.¹⁸³ Cole was convicted of “child abuse murder” for the “willful or malicious” use of “unreasonable force.”¹⁸⁴ This killing was arguably inadvertent: there was only one act of force, no weapon, and no witnesses. However, the failure to seek medical attention does bespeak potential recklessness.

Devin Bennett was sentenced to death by a Mississippi jury in 2003 for what was likely shaking an infant and causing a head injury (either by striking the head or by throwing the infant to the floor).¹⁸⁵ Three medical experts testified that the baby suffered a closed head injury as a result of “shaken baby syndrome, or the severe and

181. *Cole v. Trammell*, 755 F.3d 1142, 1147 (10th Cir. 2014).

182. *Id.*

183. *Id.*

184. *Id.* at 1164.

185. *Bennett v. State*, 933 So. 2d 930, 936 (Miss. 2006).

violent shaking of an infant.”¹⁸⁶ One physician testified that the injuries were consistent with “someone taking the ten week old baby and just shaking them[sic] throwing them[sic] to the ground.”¹⁸⁷ We discussed above the problems with the “shaken baby” cases, and we reiterate those concerns here. The shaking could have been done without an awareness of its deadly potential, and the same could be said about the single blow to the head. This is an arguably inadvertent killing.

Jeffrey Havard was sentenced to death by a Mississippi jury for the 2002 murder of a six-month-old child.¹⁸⁸ Medical experts testified that the cause of death was a closed head injury “consistent with shaken baby syndrome.”¹⁸⁹ The only other injuries were abrasions in the mouth and penetration of the anus (likely by an object), but neither was a contributing cause of death, and the defendant’s DNA was not found inside the victim’s vagina or anus.¹⁹⁰ Here, there is little evidence showing the defendant’s recklessness with respect to death—just the shaking.

William Wilson was sentenced to death by a Mississippi judge in 2007.¹⁹¹ The victim in his case was a two-year-old child who died “due to a closed head injury,” and Wilson “confessed that he had hit Malorie in the head with his fist three times.”¹⁹² The court noted that the victim was “less tha[n] 20 pounds” in weight, and that she died eight hours after the blows.¹⁹³ The defendant waited to call for help during most of this period, “because of fears associated with bruises on the face and body of the child and suspicions that might be aroused when they were seen by health care providers.”¹⁹⁴ While striking a child with a closed fist repeatedly is dangerous, it is unclear whether or not Wilson recognized the danger of death. This is possibly an inadvertent killing.

Andrew Lukehart was sentenced to death by a Florida jury in 1997 for the killing of a five-month-old infant.¹⁹⁵ The medical examiner testified that “prior to death the baby had received five blows to her head, two of which created fractures.”¹⁹⁶ He stated that “these injuries could have resulted only from the use of substantial force” and that to break a skull such force would be “equal to the force of dropping a child from a height greater than four to five feet.”¹⁹⁷ Lukehart’s version of the story was

186. *Id.*

187. *Id.* at 937.

188. *Havard v. State*, 928 So. 2d 771, 778 (Miss. 2006). Note that in September 2018, Havard’s death sentence was vacated and remanded for a new sentencing hearing. Jerry Mitchell, *After 16 years, Jeffrey Havard Is Off Mississippi’s Death Row*, CLARION LEDGER (Sept. 14, 2018), <https://www.clarionledger.com/story/news/2018/09/14/after-16-years-jeffrey-havard-off-mississippi-death-row/1296190002> [<https://perma.cc/3CWJ-WP8E>]. This was based on new doubts about the cause of death given increasing skepticism of “shaken baby syndrome” in medical literature. *Id.* However, the death penalty is still a valid option for the resentencing jury.

189. *Havard v. State*, 988 So. 2d 322, 326 (Miss. 2008).

190. *Havard*, 928 So. 2d at 778–79.

191. *Wilson v. State*, 21 So. 3d 572, 576 (Miss. 2009).

192. *Id.* at 574, 575.

193. *Id.* at 592.

194. *Id.*

195. *Lukehart v. State*, 776 So. 2d 906, 910 (Fla. 2000).

196. *Id.* at 911.

197. *Id.* at 922.

that, during diaper changing, he forcibly pushed the baby onto the floor to prevent it from moving during the cleaning.¹⁹⁸ The court noted that, even taking this motive as true, because Lukehart had applied such force, “[t]he jury could have reasonably concluded that Lukehart was frustrated by the baby’s need for a clean diaper and by the baby’s movement”¹⁹⁹ Lukehart attempted to hide the body and create a false story, but claimed that he did so because he “did not intend to kill the baby”²⁰⁰ He eventually revealed the body’s location.²⁰¹ *Lukehart* involves a complicated set of facts, and presents an arguable case of inadvertent killing. While the infant received five blows, the defendant’s explanation of their origin is plausible, and acting out of “frustration” at a squirming baby does not equate with intent to kill or recklessness with respect to death. Note, however, that the jury found that Lukehart “‘intentionally or knowingly’ caused great bodily harm,” and the infliction of such harm on an infant may be seen as recklessly indifferent to life.²⁰²

Toney Davis was sentenced to death by a Florida jury²⁰³ in 1994.²⁰⁴ The victim, a two-year-old child, died of “bruising, swelling of the brain, and pools of blood in the skull.”²⁰⁵ There was evidence of vaginal penetration, but this did not contribute to the death.²⁰⁶ The medical examiner testified that the death was caused by “four separate blows to the head”²⁰⁷ A bystander testified that she heard a child crying, and then “a lot of thumping noises,” and then “[s]he heard Davis say in a loud, angry voice, ‘Sit down.’”²⁰⁸ She said that the “ruckus” lasted thirty minutes.²⁰⁹ The defendant was witnessed giving mouth-to-mouth resuscitation in an attempt to revive the child.²¹⁰ This is possibly an inadvertent killing, although the repeated blows to the head indicate potential recklessness. Also, the short time frame between the injury and the death (approximately one hour) indicates a severe beating.²¹¹

Juan Velazquez was sentenced to death by an Arizona jury in 2004 for the beating of a twenty-month-old child:²¹² “Velazquez held Liana’s mouth shut to prevent her from crying, squeezed her stomach, and then repeatedly swept her feet out from under her, causing her to fall backwards and hit her head on the floor.”²¹³ He did this “several times,” after which the child became unresponsive.²¹⁴ He then “placed her on the couch and covered her with a pillow,” and told the child’s mother that she was

198. *Id.* at 911.

199. *Id.* at 922.

200. *Id.* at 911.

201. *Id.*

202. *Id.* at 922.

203. *Davis v. State*, 703 So. 2d 1055, 1057–58 (Fla. 1997) (jury recommendation, judge accepted).

204. *Id.*

205. *Id.* at 1057.

206. *Id.*

207. *Id.*

208. *Id.* at 1056.

209. *Id.* at 1056–57.

210. *Id.* at 1056.

211. *See id.*

212. *State v. Velazquez*, 166 P.3d 91, 96 (Ariz. 2007).

213. *Id.*

214. *Id.*

asleep and should be left alone.²¹⁵ Later, after the mother discovered the child's dead body, Velazquez dumped the body in a canal.²¹⁶ According to the medical examiner, the cause of death was "blunt force trauma" to the head, with a "'full thickness' skull fracture . . ."²¹⁷ He opined that the victim suffered "at least six separate blows before her death."²¹⁸ This is arguably an inadvertent killing: according to the defendant's statement, he did not strike the victim, but instead caused her to fall repeatedly. It is unlikely that falling, on its own, would have been understood by the defendant to carry a substantial risk of death.

Corinio Pruitt was sentenced to death by a Tennessee jury in 2005.²¹⁹ Pruitt killed a seventy-nine-year-old victim during a carjacking: "Mr. Pruitt ran up behind the older man and pushed him into the car. Although [a witness] could not see clearly into the car, it appeared to [the witness] that the two men were 'tussling.' . . . After about fifteen seconds, she saw Mr. Pruitt throw the older man to the ground, slam the car door, and drive away."²²⁰ The victim died of head injuries, but was found to have a condition that made him prone to bleeding (coagulopathy), and also to have reduced bone density due to age (osteoporosis).²²¹ His conditions together made him "particularly vulnerable to injury."²²² Three medical experts testified, and all disagreed on whether the head injury was caused by punches, a mere fall, or being slammed into the ground. According to the prosecution's medical examiner, the cause of death was "at least three separate blows or impacts to the left side of the head," and the injuries were "consistent with being beaten."²²³ A medical expert for the defense found evidence that the injury was of the type caused "when a moving head hits a fixed object," and not when a moving object (such as a fist) strikes a fixed head.²²⁴ He opined that the cause of death was "a fall to a flat surface," and "ruled out the possibility that blows or strikes to [the] body were the sole cause of [the] injuries."²²⁵ A third medical expert, for the prosecution, testified that the injuries were "indicative of at least two separate blows," and concluded that the cause of death was likely being thrown with force into the ground.²²⁶ This is likely an inadvertent killing, and the divergent medical testimony shows that there was a dispute as to how much force the killer used. Even assuming the worst scenario—punches and slamming to the ground—it is hard to see this conduct as rising to the level of recklessness with respect to death. Although Pruitt knew the victim was elderly, he could not have known of his bleeding

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *State v. Pruitt*, 415 S.W.3d 180, 186 (Tenn. 2013).

220. *Id.* at 187.

221. *Id.* at 192.

222. *Id.*

223. *Id.* at 191–92.

224. *Id.* at 193 ("contre-coup" or "decelerating" injury).

225. *Id.*

226. *Id.* at 194.

and bone conditions that made him particularly vulnerable. The jury found the aggravating circumstance of a “knowing” killing by one having a “substantial role” in a predicate felony,²²⁷ but the presence of “knowledge” on these facts seems dubious.

Brandon Taylor was sentenced to death by a California jury in 1996 for the death of an eighty-year-old woman following a forcible rape.²²⁸ He broke into the woman’s home, and pushed her and her sister into the bedroom.²²⁹ A witness overheard him say, “I don’t want to have to hurt you,” after which he grew frustrated at her resistance and “slammed her onto the floor near the side of the bed, banging her head . . .”²³⁰ During the ensuing rape, the victim “started breathing hard and gasping for air.”²³¹ After ejaculating, he let go of the victim’s head, “and let it drop to the floor,” at which point she was “ashen and no longer breathing or moving.”²³² Medical experts testified that the cause of death was “the extreme fear, pain, and stress the sexual assaults caused,” with “natural hormonal responses . . . caus[ing] . . . abnormal heart rhythms, which led to cardiac arrest . . .”²³³ According to these experts, the victim’s age was crucial to the deadly result, and “a younger woman would have survived the attack.”²³⁴ We believe this is an inadvertent killing. It was certainly unintentional: even the California Supreme Court noted that “there was no evidence suggesting defendant harbored any intent to kill the victim . . .”²³⁵ In our view, it was not reckless, either. The only injuries the defendant intentionally caused were sexual penetration and the slam to the floor, but these physical injuries did not kill the victim. The likelihood that the victim would die out of pure fright was not a likelihood that would have been appreciated by the perpetrator or by most people.

A California jury sentenced Vincente Benavides to death in 1993 for causing the death of a twenty-one-month-old girl during a rape.²³⁶ The cause of death was internal bleeding caused by penile penetration of the victim’s anus, which had expanded the anus to “seven or eight times its normal size.”²³⁷ Other injuries (that did not cause death) included broken ribs and bleeding in the head, suggesting shaking during the rape, and facial abrasions indicating a hand covering the victim’s mouth.²³⁸ It is unlikely that the defendant adverted to the possibility of death in this case. First, anal penetration is not usually a deadly act, and in this case, there was evidence that the defendant had indeed sodomized the victim before (of course, without causing death).²³⁹ Moreover, when the victim was taken to the hospital, the nature of her

227. *Id.* at 205.

228. *People v. Taylor*, 229 P.3d 12, 29 (Cal. 2010).

229. *Id.*

230. *Id.* at 30.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 31.

235. *Id.* at 59.

236. *People v. Benavides*, 105 P.3d 1099, 1104–05 (Cal. 2005).

237. *Id.* at 1105.

238. *Id.* at 1106.

239. *Id.* at 1113 (“Medical evidence established Consuelo had suffered prior internal injuries similar to the fatal injuries suffered on November 17, 1991.”).

injuries were not apparent for multiple hours, and not until the abdomen became distended due to bleeding.²⁴⁰ Finally, given the age of the victim, there was no motive to kill her so as to eliminate a witness.

Victor Miranda-Guerrero was sentenced to death by a California jury in 2003 for a death that occurred during a rape.²⁴¹ The defendant claimed that the victim was squatting between cars to urinate and fell over and hit her head on a curb due to inebriation.²⁴² However, at one point he also admitted to hitting her in the head.²⁴³ The victim was found in the street in a coma, with an apparent punch to the face.²⁴⁴ The attending physician at the emergency room opined that the victim suffered multiple impacts to the head.²⁴⁵ After the victim died, the cause of death was determined to be a skull fracture from blunt force trauma.²⁴⁶ The victim had a laceration on the back of the head, but the pathologist “did not believe the laceration . . . and the skull fracture were caused by the same event.”²⁴⁷ He also stated that the injury probably did not come from a fall, but that it was “conceivable” that it did.²⁴⁸ A defense expert opined that the injury could have been caused by an unbroken fall from a standing position, but also that it was consistent with “intentionally slamming” the head into the curb.²⁴⁹ This is an arguably inadvertent killing. First, it is unclear whether the fatal head injury was caused by the defendant at all. But even assuming the worst version of the facts—that the defendant grabbed the victim and slammed her into the pavement—Miranda-Guerrero may not have adverted to death when he engaged in this conduct. Forcefully pushing a body into a hard surface (imagine if it were a wall instead) is not normally a deadly act.

ii. Fire and Firearms

In a second category of cases, we address the use of instrumentalities that are inherently deadly, but which can be set upon a victim accidentally: fires and firearms. Here, diminished culpability with respect to death will not be evident from the means of killing but must be established by testimony from the defendant witnesses, or from circumstances surrounding the instrumentality’s use. Consider the below cases.

Jonathan Binney was sentenced to death by a South Carolina jury in 2002 for a shooting.²⁵⁰ Binney was facing a long prison term for a charge of child molestation, and in his despair, he purchased a gun. He then staked out a neighbor’s house and waited outside with the intent “to commit suicide or rape someone, or to just shoot all of them and kill [himself].”²⁵¹ When the victim returned home, she startled

240. *Id.* at 1105.

241. *People v. Miranda-Guerrero*, 2014 WL 3378902, No. S118147, at *1 (Cal. June 10, 2014).

242. *Id.* at *13.

243. *Id.* at *94.

244. *Id.* at *5–*6.

245. *Id.* at *94.

246. *Id.* at *45.

247. *Id.* at *7.

248. *Id.*

249. *Id.* at *15.

250. *State v. Binney*, 608 S.E.2d 418, 419 (S.C. 2005).

251. *Id.* at 420.

Binney, who in response “fired the gun in her direction and then chased her out of the house.”²⁵² “Once outside, he shot in her direction again to ‘keep her scared and running,’” according to his confession, and then he ran away not knowing what happened.²⁵³ She was hit and died.²⁵⁴ While in jail, Binney was suicidal and repeatedly asked for the death penalty because his crime “warrant[ed] it.”²⁵⁵ This is arguably an inadvertent killing. While he admitted that he had considered entering the house to commit a murder, he stated that his shot was fired to “scare” the victim. Binney had no reason to lie about this, as he was actively seeking his own execution, and he did seem remorseful based on his statements.

Julius Jones was sentenced to death by an Oklahoma jury in 2002 for a shooting.²⁵⁶ Jones killed the victim during a carjacking, shooting twice, with one bullet entering the head of the victim.²⁵⁷ These facts seem to be evidence of intentionality with respect to the killing, yet a cooperating witness testified that Jones told him immediately after the event that the “gun had discharged accidentally”²⁵⁸ Moreover, Jones testified that their original plan was to merely steal the victim’s car.²⁵⁹ Jones had little motive to lie to his co-felon at the time that he made the claim of inadvertence, and the co-felon had no incentive to falsely diminish Jones’s culpability. For these reasons, this is arguably an inadvertent killing. While the gun was clearly pointed at the head of the victim, it may have fired accidentally.

Paul Watkins was sentenced to death by a California jury in 1992 for a shooting.²⁶⁰ Watkins and a co-felon were casing a convenience store in anticipation of a robbery, and to blend in they raised their hoods and feigned having vehicle problems.²⁶¹ When the victim approached to offer assistance, they told him to leave, at which point he walked away rapidly, indicating to the defendant, as he testified, that “it was obvious that he knew something wasn’t right about us”²⁶² The defendant then fired a single shot from a pistol, which hit the victim’s abdomen and caused his death.²⁶³ The defendant claimed that the gun fired accidentally when he attempted to close the door of the car while the gun was in his hand.²⁶⁴ The gun

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 420.

256. *Jones v. State*, 128 P.3d 521, 532 (Okla. Crim. App. 2006).

257. *Id.*

258. *Id.* at 533.

259. *Id.*

260. *People v. Watkins*, 290 P.3d 364, 370 (Cal. 2012). It should be disclosed that two of the authors, Robert Weisberg and Guyora Binder, filed an amicus brief in this case arguing that capital punishment without a finding of recklessness with respect to death is unconstitutional.

261. *Id.* at 370.

262. *Id.* at 372.

263. *Id.* at 370.

264. *Id.* at 373 (“Defendant testified that he opened the passenger door and positioned his left foot onto the floorboard but was unable to sit down with the gun stuffed into the front of his pants, and so, he removed the gun with his right hand while balancing himself with his left hand on the seat. [Watkins] asserted that he next thrust his right hand, then holding the firearm, outside the open passenger window and brought his right leg into the vehicle as he pulled the

did have a “‘heavy’ trigger pull,”²⁶⁵ making accidental discharge somewhat less likely, but a single gunshot could be inadvertent or an attempt to frighten a witness away, rather than an attempt to wound or kill.

Raymond Oyler was sentenced to death by a California jury in 2009 for starting a wildfire that eventually killed five firefighters.²⁶⁶ Judicial findings of fact are limited in this case, which has not yet been reviewed by the California Supreme Court.²⁶⁷ However, even if we assume that the prosecution’s theory of the case was the one accepted by the jury—thus, viewing the facts most unfavorably towards the defendant—Oyler’s killings were arguably inadvertent. The prosecution argued that Oyler was a serial arsonist who had previously set a number of wild fires in the summer of 2006, and that in October 2006, he lit other fires, including the “Esperanza Fire” that killed the firefighters.²⁶⁸ However, the prosecution also introduced evidence regarding Oyler’s motives in October 2006: “Oyler planned to start a fire in the mountains where the Esperanza fire burned over Engine 57 in order to create a diversion so he could break his dog out of the Banning dog pound”²⁶⁹ Moreover, the defense did not challenge the credibility of testimony by a witness that shortly before the fire, Oyler “ranted about starting a fire near the [] dog pound to create a diversion so he could break his dog out”²⁷⁰ If this was the motive, then Oyler did not advert to the death of the firefighters. Surely the intended “distraction” of the fire would be that rescue personnel would flock to the scene of the fire, and possibly that the staff of the pound would be evacuated, but Oyler’s motives did not seem to include or contemplate the rescuers’ deaths. He had no “axe to grind” with the fire department, but instead wanted to *use* them in order to achieve another goal (the freeing of the dog). Curiously, though, Oyler’s girlfriend apparently paid to have the dog released the day before the fire started.²⁷¹

door closed with the back of his right hand—at which point the gun fired accidentally.”).

265. *Id.* at 371–72.

266. Appellant’s Opening Brief at *1, *People v. Oyler*, 2015 WL 10553050, No. S173784 (Cal. 2015).

267. *Id.* The so-called “Esperanza Fire” occurred in 2006, and Oyler came to trial on murder and arson charges in 2009. He was found guilty of arson and first-degree felony murder, with the special circumstance of murder in the course of arson. *Id.* at *6. In California, arson requires the willful and malicious burning of a structure, forest land, or property. CAL. PENAL CODE § 451 (West 2010). Oyler was charged with and convicted of 451(c) wildland arson (“[a]rson of a structure or forest land”), as opposed to 451(b) (“arson that causes an inhabited structure to burn”). *Id.* Yet, the special circumstance charged and found in the case, CPC 190.2(a)17(H) requires killing in the course of 451(b). CAL. PENAL CODE § 190.2 (West 2014). The standard instruction for the felony murder special circumstance CPC 190.2(a)17, CALCRIM 730 requires intent to commit the relevant felony, here 451(b). *Id.* The Court’s instruction, based on CALCRIM 1502, required only that defendant’s wildland arson burned an inhabited structure in fact. *See Oyler*, 2015 WL 10553050, at *6.

268. *Oyler*, 2015 WL 10553050, at *2.

269. *Id.* at *79.

270. *Id.*

271. *Id.* at *153.

iii. Analysis

Having now discussed the facts of the currently pending death sentences for arguably inadvertent killings, we are able to assess the “unusualness” of this sentencing practice. We have identified 15 such death sentences, and these sentences were given out in 7 jurisdictions.²⁷² Florida, Mississippi, Oklahoma, and California accounted for 12 of the 15 sentences. Also, 12 of the 15 sentences were given before 2005. Recall, for comparison, the statistics on death sentencing practices that the Court has evaluated in the past:

Case	Punishment Practice	Death Sentences
<i>Kennedy v. Louisiana</i> , 554 U.S. 407 (2008)	Offense: child rape	2 on death row, in one state
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	Offender: juvenile <18	70 on death row (1973–2005)
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	Offender: mentally disabled	Not provided
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	Offender: juvenile <16	5 (1982–1986)
<i>Ford v. Wainwright</i> , 477 U.S. 399, 409 (1986)	Offender: insane	Not provided
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	Offense: unintended vicarious felony murder	3 on death row (1973–1982)
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	Offense: adult rape	5 (1973–1977)

If only 15 potentially inadvertent killers are under sentence of death after 43 years of modern capital sentencing, and in only 7 jurisdictions, this brings the practice within the ambit of being unconstitutionally rare. The number of death row inmates condemned for inadvertent killing is lower than the number condemned for killing as juveniles at the time of *Roper*. The 15 possibly inadvertent killers on death row are slightly more numerous than the 5 young adolescents considered in *Thompson*, the 3 vicarious unintentional felony murderers considered in *Enmund*, and the 5 inmates condemned for raping adults considered in *Coker*. However, when one considers the time period over which these sentences were given, this difference disappears. The 15 sentences we have identified include all those issued over the past 43 years that are still pending.²⁷³ One of these sentences is 25 years

272. California (3); Oklahoma (2); South Carolina (1); Tennessee (1); Arizona (1); Florida (2); Mississippi (3). This number would be reduced to 14 if we were to assess the numbers in light of the recent vacatur of Jeffrey Havard’s death sentence.

273. Current death row inmates include California inmate Douglas Stankewitz, sentenced in 1978. Ashleigh Panoo, *California’s Longest-Serving Death Row Inmate Returns to Fresno Courtroom*, FRESNO BEE (June 23, 2017), <http://www.fresnobee.com/news/local/crime/article157899009.html> [https://perma.cc/KD2D-J8YQ]; see also *People v. Stankewitz*, 648 P.2d 578 (Cal. 1982).

old.²⁷⁴ By contrast, *Thompson's* and *Coker's* 5 sentences each were issued in four-year periods. *Enmund's* three death sentences accumulated over only 8 years, from 1973 to 1981. Significantly, only three arguably inadvertent felony murderers have been sentenced to death in the last 12 years. The Court in *Enmund* examined the cases of 739 of 796 death row inmates, of which 3 were accomplices without intent to kill. Thus, the sentencing practice challenged in *Enmund* was applied in only 0.4% of the death row cases studied. The denominator in this calculation consists of death row inmates from all states, including 19 jurisdictions where *Enmund* could not have been executed. Dividing our 15 possibly inadvertent killers by the 2863 death row inmates in all states as of 2016²⁷⁵ yields a very comparable rate of 0.5% of that death row population. Even if we narrow the denominator to death row cases in states where execution of inadvertent felony murderers is permissible, the 15 cases that we identified are only 0.8% of these 1755 death row cases in the 18 jurisdictions that permit execution of inadvertent felony murderers. In conclusion, the rarity of death sentences for inadvertent killers is comparable to that of past sentencing practices deemed to be cruel and unusual by the Supreme Court.

CONCLUSION

Eighth Amendment jurisprudence has forbidden the execution of accomplices in felony murder unless they acted with a culpable mental state of at least reckless indifference to human life. Such execution was deemed “cruel” in violating the permissible purposes of capital punishment and “unusual” in violating evolving standards of decency as reflected in patterns of legislation, sentencing, and execution.

Yet, the United States Supreme Court has not conditioned the execution of an actual killer on any culpable mental state. This effectively permits the execution of one who kills inadvertently—accidentally or negligently—in the course of a felony.

In a previous article, we demonstrated that such executions, like executions of inadvertent accomplices in felony murder, fail to rationally advance the constitutionally permissible purposes of capital punishment, deterrence, and retribution. These purposes preclude the selection of any but the most culpable of killers for execution. Executing inadvertent felony murderers, like executing inadvertent accomplices in felony murder, is pointlessly “cruel.”

In this Article, we have argued that execution of felony murderers who kill inadvertently is also “unusual” in violating community moral standards. Objective indicia, as reflected in legislation, sentencing, and—most probatively—actual executions, demonstrate a nationwide consensus against capital punishment of inadvertent killers. Thirty-five jurisdictions forbid such sentences. Of the remaining 18 jurisdic-

274. See *People v. Watkins*, 290 P.3d 364, 370 (Cal. 2012).

275. *Death-Row Prisoners by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR. (July 1, 2017), <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> [<https://perma.cc/Q3WS-5KY3>]. Again, given this cutoff date, the vacatur of Jeffrey Havard's death sentence is not incorporated in our data. This would bring the percentage of this sentencing practice out of all death row inmates down, though, and therefore only strengthens our argument.

tions, 11 have no inadvertent killers under a death sentence. Only three jurisdictions—California, Mississippi, and Tennessee—have sentenced an arguably inadvertent killer to death in the last twelve years.

Most significantly, of the 18 states permitting execution of inadvertent killers, 14 have not executed a single inadvertent killer since *Furman*. Thus only 4 of our 53 jurisdictions—California, Georgia, North Carolina, and Oklahoma—have executed an arguably inadvertent killer since *Furman*, and in only five cases. Even those states executing inadvertent killers have done so very infrequently. Only Georgia and Oklahoma have executed an arguably inadvertent killer in the last twelve years.

Even where legally permitted, condemnation and execution of inadvertent killers has been and is now truly unusual. Accordingly, a new Eighth Amendment standard of decency should be recognized, and the capital punishment of inadvertent killing should be declared unconstitutional.

* * *

APPENDIX A: FELONY MURDER EXECUTIONS

Shooting

Arizona

State v. Ceja, 612 P.2d 491 (Ariz. 1980);
 State v. Chaney, 686 P.2d 1265 (Ariz. 1984);
 State v. Comer, 799 P.2d 333 (Ariz. 1990);
 State v. Greenawalt, 624 P.2d 828 (Ariz. 1981);
 State v. Gretzler, 612 P.2d 1023 (Ariz. 1980);
 State v. Harding, 670 P.2d 383 (Ariz. 1983);
 State v. Jones, 4 P.3d 345 (Ariz. 2000);
 State v. Kemp, 912 P.2d 1281 (Ariz. 1996);
 State v. Ross, 886 P.2d 1354 (Ariz. 1994).

California

Anderson v. Calderon, 232 F.3d 1053 (9th Cir. 2000);
 Williams v. Calderon, 48 F. Supp. 2d 979 (C.D. Cal. 1998).

Colorado

People v. Davis, 849 P.2d 857 (Colo. App. 1992).

Florida

Banks v. State, 700 So. 2d 363 (Fla. 1997);
 Bryan v. State, 533 So. 2d 744 (Fla. 1988);
 Chavez v. State, 832 So. 2d 730 (Fla. 2002);
 Clark v. State, 379 So. 2d 97 (Fla. 1979);
 Daugherty v. State, 419 So. 2d 1067 (Fla. 1982);
 Darden v. Wainwright, 513 F. Supp. 947 (M.D. Fla. 1981);
 Diaz v. State, 945 So. 2d 1136 (Fla. 2006);
 Ferguson v. Sec'y for the Dep't of Corr., 580 F.3d 1183 (11th Cir. 2009);
 Francois v. State, 407 So. 2d 885 (Fla. 1981);

Gore v. Dugger, 763 F. Supp. 1110 (M.D. Fla. 1989);
Grossman v. State, 525 So. 2d 833 (Fla. 1988);
Hamblen v. Dugger, 719 F. Supp. 1051 (M.D. Fla. 1989);
Hendrix v. State, 637 So. 2d 916 (Fla. 1994);
Henyard v. State, 689 So. 2d 239 (Fla. 1996);
Hill v. Moore, 175 F.3d 915 (11th Cir. 1999);
Johnson v. State, 442 So. 2d 185 (Fla. 1983);
Kennedy v. State, 455 So. 2d 351 (Fla. 1984);
Kormondy v. Sec'y, Fla. Dep't of Corr., 688 F.3d 1244 (11th Cir. 2012);
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APPENDIX B: FELONY MURDER DEATH SENTENCES

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