RACE, PLACE, AND CAPITAL CHARGING IN GEORGIA

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Good afternoon. I want to begin by echoing some of the remarks from the earlier speakers and applaud the effort—the committee's effort—Professor Gerwig-Moore, and the Law Review staff for organizing this great Symposium. I admit that I had high expectations, but today has far-exceeded my expectations, and I am very happy and honored to be here. My talk today addresses patterns of prosecutorial charging behavior. I'm wearing my criminologist hat today, so that means I'll be presenting a lot of numbers and statistics in this talk. But I'll attempt to translate as much of those numbers into pictures. But before I get to those numbers, I want to first talk about the law.

One cannot talk about capital punishment in America without talking about Georgia. Approximately twenty cases that originated in Georgia have set national death penalty policy and practice. Twenty from one state! It's no exaggeration to say that some of the biggest triumphs and tragedies with respect to the administration—the fair administration—of capital punishment have occurred here in Georgia. I want to focus on three of those twenty cases before turning to my statistical analyses. These cases will provide some framing for why I engaged in the specific empirical analyses that I'm going to describe shortly. The first of those cases was *Furman v. Georgia,*[1] a 1972 case; the second was *Gregg v. Georgia,*[2] a 1976 case; and the third was *McCleskey v. Kemp,*[3] a 1987 case.

In *Furman,* the U.S. Supreme Court identified three types of constitutionally impermissible errors in the administration of capital punishment. First, arbitrariness and capriciousness violates the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the Cruel and Unusual Punishment Clause of the Eighth Amendment. Next,

[1] 408 U.S. 238 (1972).
[2] 428 U.S. 153 (1976).
[3] 481 U.S. 279 (1987).

discrimination and bias, such as racial and gender discrimination, violates the Equal Protection Clause of the Fourteenth Amendment. And finally, disproportionality and excessiveness, which also violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Now, in terms of thinking about these violations in a systematic fashion, we need a framework for actually defining, identifying, and measuring these concepts. We can think about these in different ways. One way to think about arbitrariness and capriciousness is with respect to the irrationality of capital punishment—that is, the trivial explanatory power of what we believe to be the most important legally relevant characteristics of the case. We could also think about arbitrariness and capriciousness with respect to the explanatory power of factors that should not matter and that are constitutionally impermissible. We can think about inconsistency in decision making from decision-makers—that is, treating legally similarly situated defendants differently and related, but slight different concept, is the lack of consensus. In *Furman,* the U.S. Supreme Court concluded that if states were going to administer capital punishment, they must do it fairly and even-handedly or not at all. Therefore, the aforementioned types of errors in the administration of the death penalty are not permissible.

Four years later, in the case *Gregg v. Georgia,* the Supreme Court evaluated Georgia's capital punishment statute, signed into law by then-Governor and future U.S. President Jimmy Carter, and ruled that Georgia's statute established some guidelines and added some structure to the capital charging and sentencing process that was capable of either eliminating or significantly reducing problems of arbitrariness, capriciousness, excessiveness, and so forth, in the administration of capital punishment. Interestingly, those standards contained in the Georgia statute and upon which the Supreme Court based its decision, were not based on any hard evidence, but merely the belief that the statute could bring forth the changes that the court said were required—just the belief, but with no evidence whatsoever.

Now let's move forward eleven years to *McCleskey v. Kemp.* There's hard statistical evidence based on data collected from a multi-year study in Georgia. This statistical evidence was presented on behalf of death row inmate, Warren McCleskey, to the Supreme Court showing the very problems that the Court said were unconstitutional and impermissible in *Furman*—and that the Georgia capital statute approved by the Court in *Gregg v. Georgia* was supposed remedy statute—were still prevalent. Simply put, the evidence showed that Georgia's statute didn't work the way it was intended to. There was evidence of strong racial bias with respect to defendants' race, victim's race, and also with respect to interracial crimes: blacks who were convicted of murdering white victims.

After being presented with this evidence, the U.S. Supreme Court said, well, the statistics weren't enough to show intention discrimination. In order to prevail on the claim, a defendant would either need to show that legal actors are behaving in an intentionally discriminatory matter, in violation of the Equal Protection Clause, or that the influence of legally impermissible factors, such as race, is so great that the system itself is arbitrary and therefore violates the Eighth Amendment's prohibition against cruel and unusual punishment. So, basically, the court said that even if we take your statistical evidence to be correct, we're still not convinced that a constitutional violation has been proven. This ruling had the effect of really taking the wind out of the sails of death penalty reformers.

So, basically, in a fifteen-year time frame, we go from the point where the Court says the death penalty is supposed to be fairly administered or not at all, to the point where even valid statistic evidence of constitutional violations based on reliable data is not enough to convince the Court to rule on behalf of inmates sentenced to death. Luckily, what we know is that in recent years many Supreme Court Justices—typically after they leave the bench because people always find "religion" after they retire, but more recently even while still on the court—have really paid attention to this growing body of statistical evidence showing that all of the arrows point in the same direction: which is that the system is still unconstitutionally arbitrary, discriminatory, and excessive.

Justice Breyer, in a recent dissent in a case out of Oklahoma that dealt with the constitutionality of the state's lethal injection protocol, remarkably didn't focus on the legal questions concerning the execution protocol.[4] Instead, Justice Breyer focused on the fact that it's the judiciary's responsibility to hold current capital punishment practices to the standards established in *Furman,* or to intervene and judicially abolish capital punishment. As Professor Stephen Bright wrote in one of his famous articles, the constitutional "buck" stops with the courts. Justice Breyer argued that the Court cannot simply leave this issue up to the legislatures anymore. This signals a drastic switch from many decades of the court's capital punishment jurisprudence that gave tremendous deference to legislative judgements. Justice Breyer's dissent has been interpreted as a clarion call for the rigorous analysis of capital punishment charging and sentencing practices. So that is what I want to address now.

I collected data on every murder case in Georgia from 1993 to 2004, but my talk is going to focus on cases through 2000. The reason I focused on 1993 is because life without

[4] Glossip v. Gross, 135 S. Ct. 2726 (2015).

the possibility of parole was enacted in 1993. This sentencing option had significant influence on capital charging practices. I have looked at the data through 2004 as well, and they are essentially the same. There were about 1,900 murder convictions during this time period and almost 1,300 of them were death penalty eligible because they satisfied at least one the specific factors enumerated in Georgia's death penalty statute. In other words, about two-thirds of all homicides were eligible for the death penalty during this time period. Interestingly enough, Georgia's capital statute was designed to significantly narrow the class of defendants eligible for the death penalty; that is, it was supposed to reserve the death penalty for the worst of the worst. Well, death eligibility for two-thirds of all murder cases does not really sound like the statute is narrowing this class of defendants in a significant way, but that is a conversation for another day. There were 400 death notices filed during this time period. As you might imagine, there is also a geographical distribution of death notices. This map shows the Georgia judicial circuits (see Figure 1). The Macon Circuit, where Mercer University is located, had eight death penalty notices during this time period.

With respect to arbitrariness, which is the first constitutionally impermissible feature of capital charging-and-sentencing systems I mentioned, the data show that the handling of the cases is highly inconsistent both within and across judicial circuits. Momentarily, I will show you some graphs that demonstrate this inconsistency. The "Full Model" takes into account a wide range of legally relevant variables, such as the enumerated factors in Georgia's capital statute, as well as some legally suspect or legally impermissible variables that should not influence death penalty charging decisions. I wanted to examine how well these various factors explain charging decisions; that is, how well they predict charging outcomes. This relates to the rationality of those decisions. I discovered that the model does not do a good job of predicting charging decisions: only 44% of within-circuit variability in charging decisions is explained by the model. Within-circuit variability relates to how similarly situated defendants that are treated based on the factors included in the model. Only 21% of between-circuit variability is explained by the model. And what is meant by "explained between-circuit variability" is how well do the aggregated case characteristics in each judicial circuit explain the proportion of the cases that receive the death penalty in a judicial circuit. If death charging practices are rationale, then one would expect the most active death-noticing judicial circuits to have the most cases deserving of the ultimate penalty

When focusing on the "legal core" of the case—that is, just the legally relevant factors such as the number of statutory aggravating circumstances, the number of victims, the number of defendants, and defendant's prior criminal history, and removing variables such as race/ethnicity and other legally suspect variables—the model only explains one-third of the variability in capital charging within judicial circuits and just over one-tenth of the variability between judicial circuits.

Moving from numbers to pictures, Figure 2 is a map of Georgia displaying the variability in the probability that a death-eligible case will be noticed for the death penalty across the judicial circuits.   This results are from the "Unadjusted Model," which means the model does not expressly take into account potentially important dissimilarities across the cases. The range in the expected probability of a death-eligible case receiving the death notice goes from about 6% to 62%; huge variability. Figure 3 provides a slightly different depiction of the same information. The thick horizontal line represents the statewide average probability of receiving a notice death. Approximately 33% of death-eligible murder cases across the entire state were noticed for the death penalty. The small circles represent the expected probability of a death eligible case receiving a death notice for each circuit. The name of the corresponding judicial circuit is listed on the horizontal axis. Again, we notice is huge variation. But I want to reiterate that the model does not take into account what could be important differences between cases that might account for the different charging behavior across judicial circuit. Therefore, it is important to take into account factors relevant to offender culpability that influence the level of aggravation and mitigation in a particular case.

Figure 4 displays the results from the "Adjusted Model," which takes into account many of the factors that could legitimately explain some, if not most, of the variability between circuits. Again, there are significant variations in charging practices across judicial circuits even for cases that are factually similar across important legally legitimate, and even legally suspect, dimensions. The range in the expected probability that a case receives a death notice is from 12% to nearly 60% across the judicial circuits. Similar to Figure 3, Figure 5 displays the expected probability of receiving the death penalty for each judicial circuit relative to the statewide average.

Figure 6 overlays the "Unadjusted Model" (Figure 3) on the "Adjusted Model" (Figure 5) and gives a sense of how much "narrowing" is Georgia's capital statute actually achieving. The filled circles are from the Adjusted Model and the hollow circles are from the Unadjusted Model. The statute was specifically designed to make prosecutors reserve the death penalty for the worst-of-the-worst crimes and defendants, so how much work is the statute doing? Figure 6 shows that there has not been a lot of change. Whether or not one takes into account the specific factors of the case—including the statutorily specified aggravating circumstances listed in the statute—the amount of variation in death noticing behavior across the judicial circuits essentially remains the same.

Now I want to give you some numbers that will, hopefully, crystalize the significance of what is going on in Georgia. These statistical models permit us to create scenarios or counterfactuals: "What if 'X' happens?" So what if we asked, "How many death notices would have been filed against death eligible defendants in Georgia if the entire state resembled a specific judicial circuit? In other words, what if the practices of the whole state mirrored the practices of a particular judicial circuit? As I mentioned earlier, there were 400 death notices filed in Georgia from 1993-2000. Now, if the entire state's charging practices were similar to Cobb Circuit, which can be considered a judicial circuit with low punitiveness because it ranks in the fifth percentile of all of the judicial circuits in terms of the probability a case will be noticed for the death penalty, there would have only been 274 death notices from 1993-2000. Again, the actual number was 400. If statewide charging practices mirrored Northeastern Circuit, the median judicial circuit, there would have been 413 death notices. [The reason the model predicts thirteen more death notices than what was actually observed (413 versus 400) is because the Northeastern Circuit is the median circuit, not the mean circuit, and the median circuit was slightly more "punitive" in its charging practices than the mean circuit.] Looking at a more punitive jurisdiction, the Griffin Circuit, which is at the ninety-fifth percentile in terms of aggressive death notice practices, we would have expected 680 death notices. These are very *big* differences with respect to how many death notices were filed for cases that were factually similar along important legally relevant dimensions.

Okay, I've discussed arbitrariness and capriciousness, so now I would like to talk about bias. Most of the research shows that white victim cases are treated more punitively than non-white victim cases. As Professor Bright noted earlier this afternoon, "Black Lives Don't Seem to Matter," or when capital punishment is concerned, at least not as much. Table 1 summarizes some of the robust statistical studies on race and capital punishment. What I mean by "robust statistical studies" is rigorous social science research that takes into account key variables believed to influence capital charging-and-sentencing decisions. These studies were conducted in different jurisdictions, different time frames, different sample sizes, under different statutes, but they all obtained very similar results. Even taking into account a host of legally relevant characteristics, researchers discovered that the odds of a white-victim cases receiving a death notice, relative to non-white victim case, were four times higher in Colorado. The famous Baldus study, which was with the centerpiece of the seminal *McCleskey v. Kemp* case discovered that white-victim cases were 3.1 times more likely to receive a death notice. And pay attention to the time-frame for the Baldus study, 1969 to 1979. My research on Georgia from 1993-2000 discovered that white-victim cases were 2.4 time more likely to receive a death notice. Granted, the number has gone down slightly, from 3.1 to 2.4, but many years after *McCleskey,* it appears that the more things change, the more things stay the same.

It is also informative to explore the racial distribution of death eligible cases in Georgia from 1993-2000 in greater detail. Of the 1,300 death eligible cases, 320 involved white defendants and 887 involved black defendants. When turning to the race of the victim, the racial distribution is a bit more even: 516 cases involved white victims and 579 involved black victims. By simultaneously looking at the race-of- defendant and race-of-victim, we can examine the various racial combinations. The vast majority of death-eligible homicides are intra- racial: 83% of white defendant cases involved a white victim and 63% of black defendant cases involved a black victim. [Consistent with prior research, cases involving both white and non-white victims were classified as white victim cases.] Nevertheless, the probability of receiving a death notice does vary across the different defendant/victim racial combinations, for the Adjusted Model—that is, the model that takes into account key legal variables relevant to defendant culpability—white-defendant/white-victim cases have the greatest likelihood of receiving a death notice (51%), followed by black-defendant/white-victim (37%), white-defendant/black-victim (33%), and black-defendant/black-victim (21%). It should be noted that there are only sixteen white-defendant/black-victim cases, so it is difficult to draw meaningful conclusions about that particular racial combination.

What I find even more interesting than the defendant-victim racial combinations is the variability in this race-of-victim effect across judicial circuits in Georgia. Recall that white-victim cases are 2.4 times more likely to be noticed for the death penalty than non-white victim cases, all else being equal. Exploring how much this racial disparity varies across jurisdictions may permit us to determine which judicial circuits seem to be the most racially biased in terms of their death penalty charging practices. Figure 7 is a map of Georgia displaying the variability of the race-of-victim effect across the judicial circuits. The effect ranges from negative 6% to approximately 41%. This means that the likelihood of a white-victim case receiving a death notice can be six percentage points lower than the likelihood of similar black-victim case all of the way up to forty percentages points higher. Figure 8 displays the same information and the thick vertical line represents the statewide race-of-victim effect, which is fifteen percentage points. So it is one thing for Justices on the U.S. Supreme Court to conclude that a defendant, like Warren McCleskey, did not present sufficiently strong statistical evidence to permit an inference of purposeful racial discrimination; however, when one discovers race-of-victim effects in some judicial circuits that are four times as strong, if not more, than other circuits, what else can one infer?

One can also think about the relationship between racial bias and aggressive charging practices in a judicial circuit. As I noted earlier, some judicial circuits treat similar situated defendant much more punitively than others. Interestingly, the U.S. Supreme Court acknowledged that one of the major concerns with arbitrary decision-making in the capital charging-and-sentencing process is that it opens the door for racial bias. When there's a system that is not operating according to established standards, then factors that shouldn't matter, or that are legally prohibited from mattering, may start to matter. And that is what one sees in Georgia. The thick vertical line in Figure 9 represents the statewide race-of-victim effect and the horizontal is the statewide probability of receiving a death notice for the typical death eligible case. The hollow circles represent how each judicial circuit scores on both the racial bias and punitiveness dimensions, and the diagonal line shows the association (correlation) between these two dimensions. One can see from this figure is that those judicial circuits that tend to have the strongest race-of-victim effect are also the ones that are the most punitiveness.

What does this tell us and why is this important? Returning to the model-based predictions, one can also classify the judicial circuits based on their level of racial biasedness and make predictions about the number of expected death notices across the state if statewide charging practices mirror the practices of specific judicial circuits. If state charging practices were similar to Dougherty Circuit, a low racial bias jurisdiction scoring in the fifth percentile, one would expect 259 death notices. Remember that the actual number of death notices during this time period was 400. If we chose a median judicial circuit, such as Toombs Circuit, one would expect 397 death notices. Selecting a high racial bias circuit, such as Southern Circuit (ninety-fifth percentile) yield 505 death notices. So moving from the fifth percentile to the ninety-fifth percentile increases the number of expected death notices by nearly double. In my humble opinion, these are compelling statistics. I believe these are the type statistics to which Justice Breyer was referring that need to be presented to the judiciary to really empower them, to give them the narrative to engage in this type of judicial intervention, because the Constitutional buck does stop with the court.

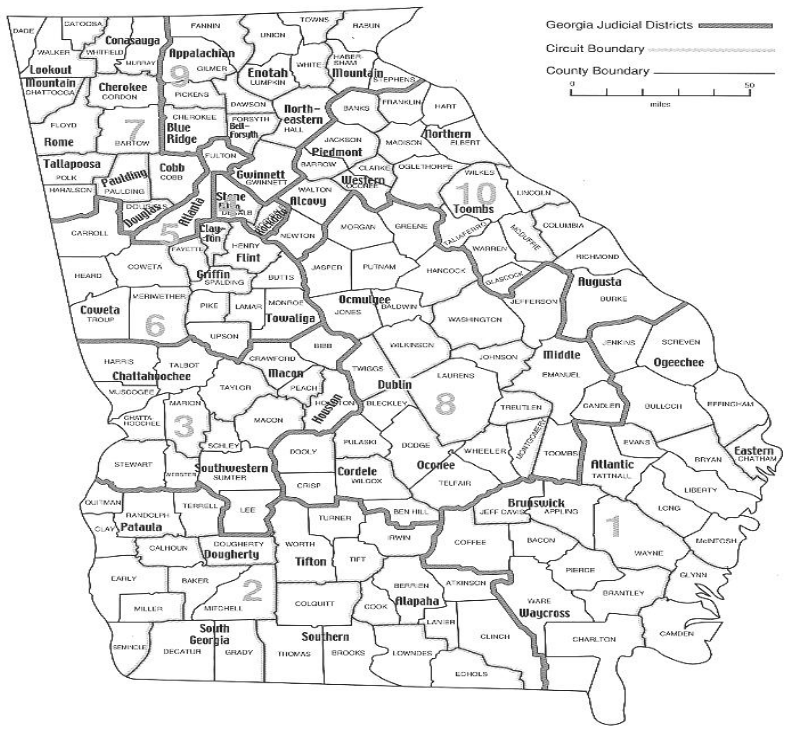

Figure 1: Map of Georgia

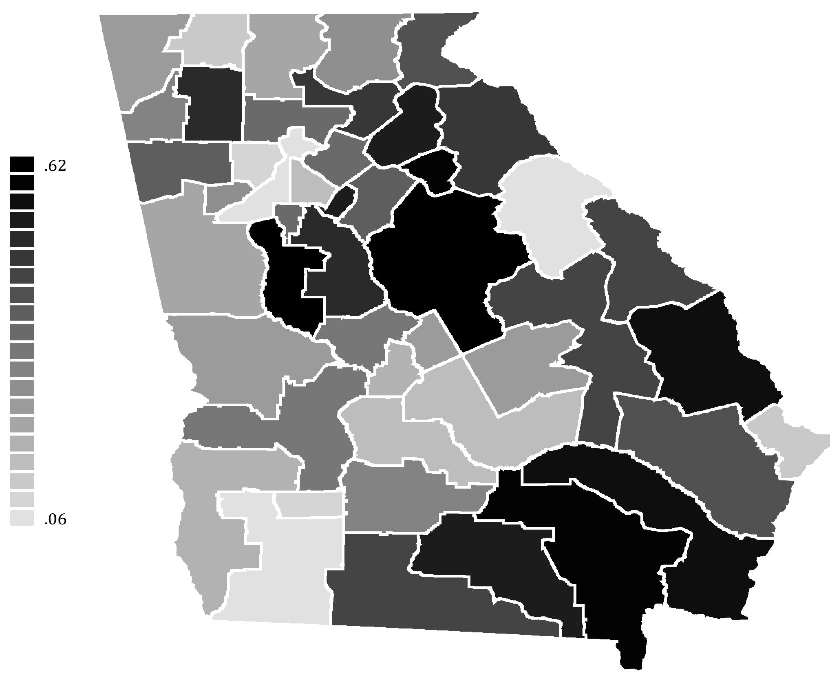

Figure 2: Jurisdictional Variability in the Probability of Receiving a Death Notice (Unadjusted)

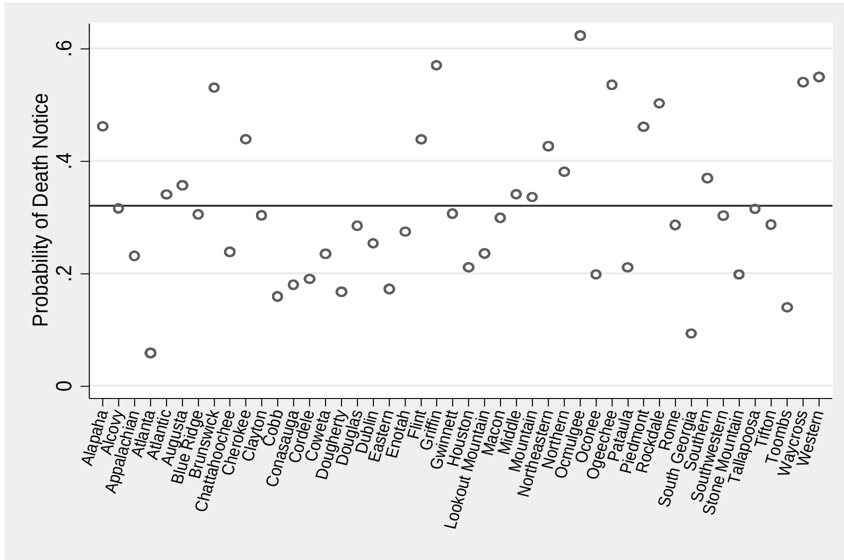

Figure 3: Jurisdictional Variability in the Probability of Receiving a Death Notice (Unadjusted)

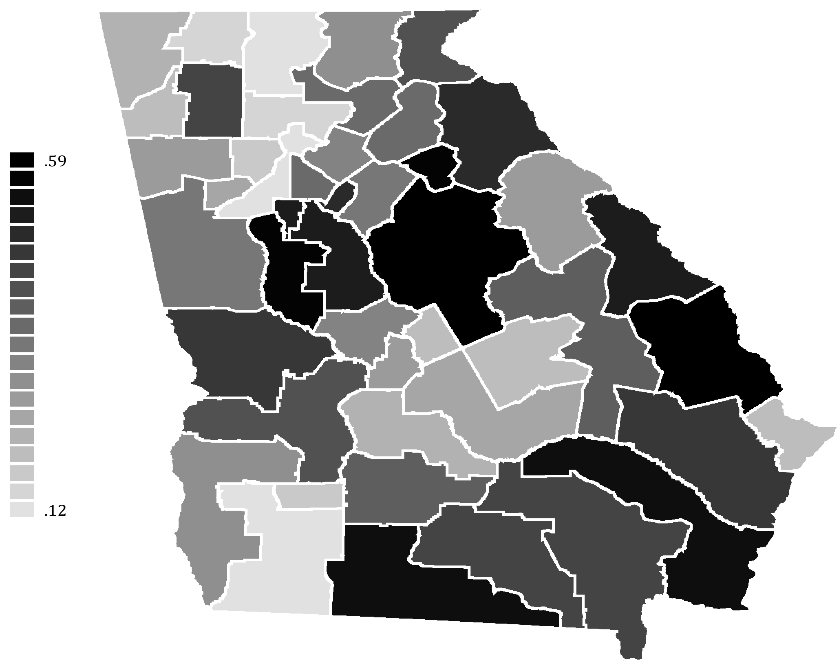

Figure 4: Jurisdictional Variability in the Probability of Receiving a Death Notice (Adjusted)

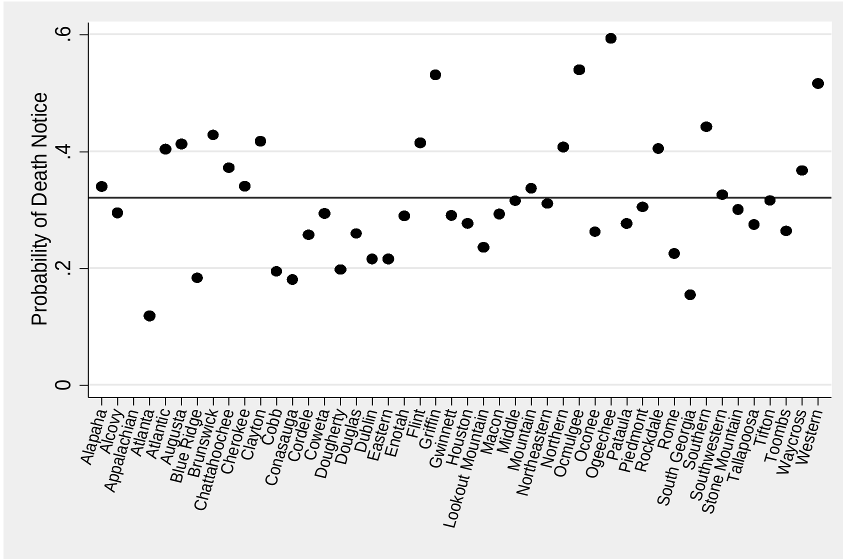

Figure 5: Jurisdictional Variability in the Probability of Receiving a Death Notice (Adjusted)

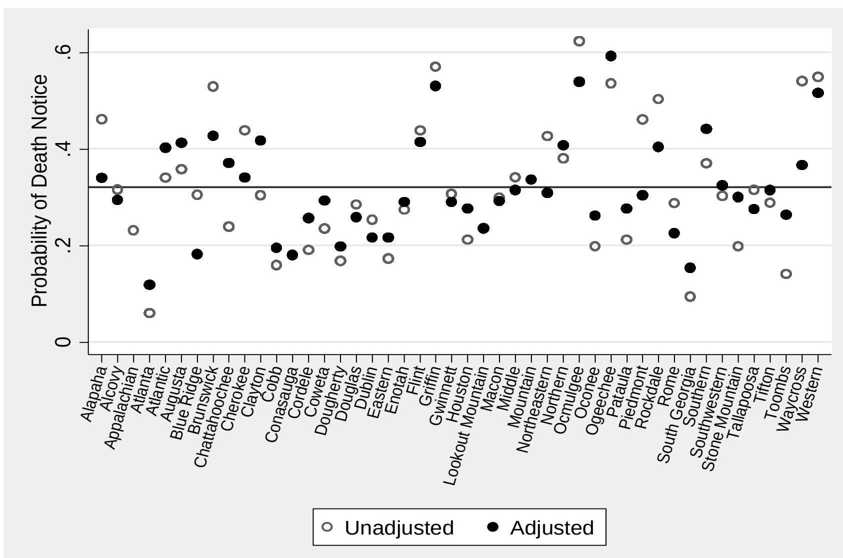

Figure 6: Jurisdictional Variability in the Probability of Receiving a Death Notice (Unadjusted & Adjusted Estimates)

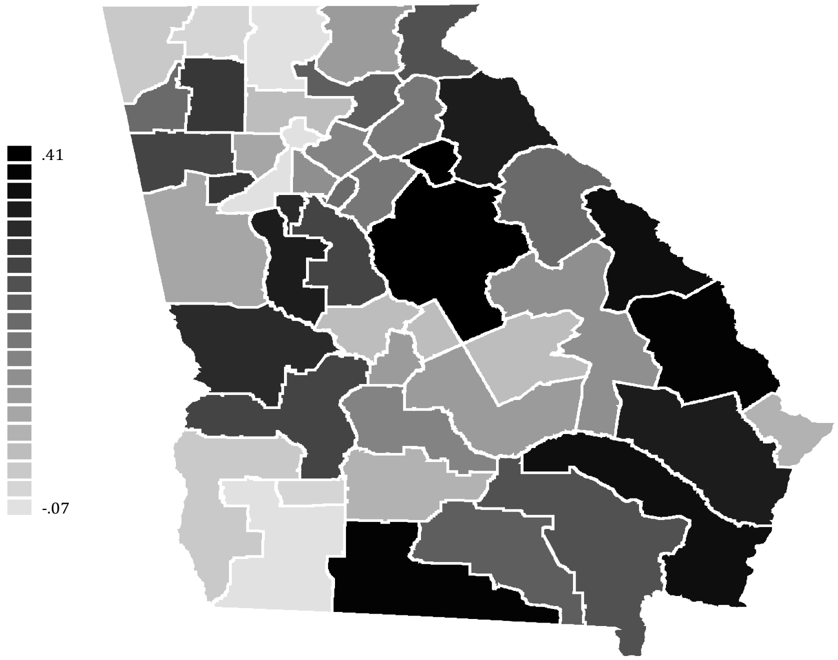

Figure 7: Jurisdictional Variability in the Race of Victim Effect (Caucasian)

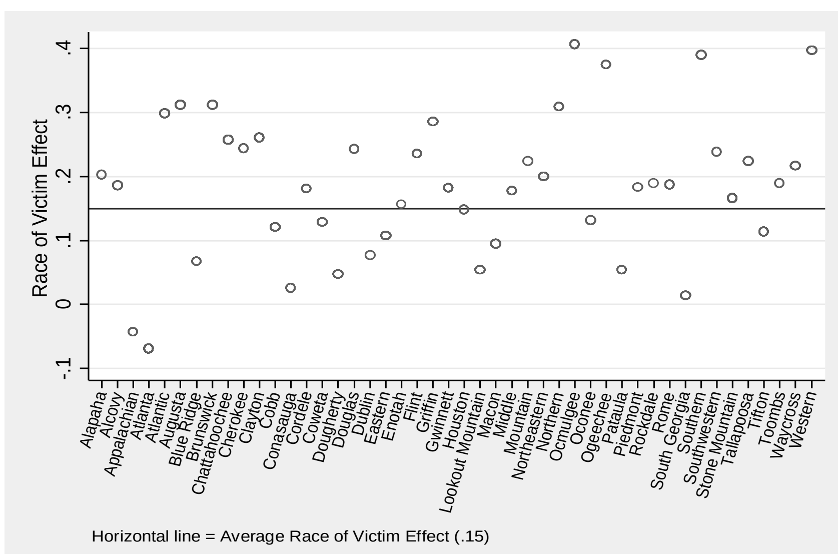

Figure 8: Jurisdictional Variability in the Race of Victim Effect (Caucasian)

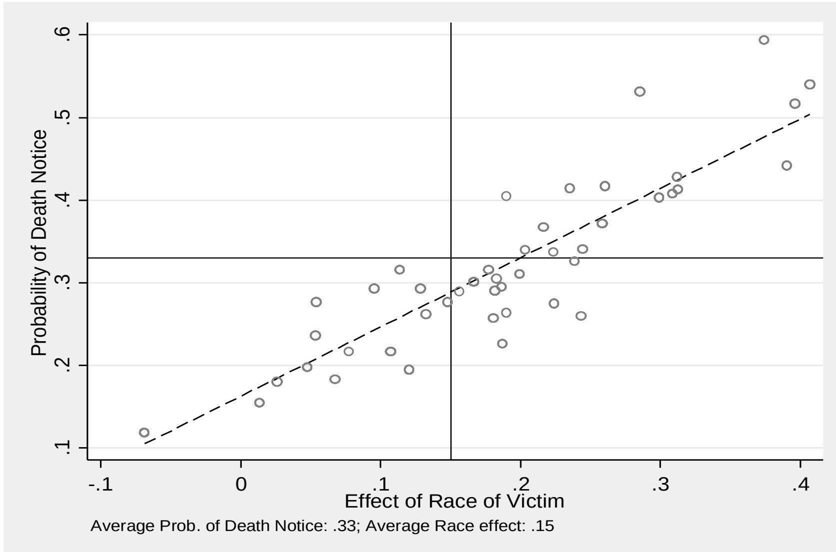

Figure 9: Relationship between Aggressive Charging Practices and Victim-Based Racial Bias (Caucasian)