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Author

Thaxton, Sherod

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**UN-GREGG-ULATED:
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Sherod Thaxton[†]

INTRODUCTION

In 2009, the American Law Institute (ALI) announced the withdrawal of its endorsement of the death penalty framework it had developed and promoted for more than four decades.¹ Particularly troublesome to the ALI was the persistence of arbitrariness, bias, and serious legal error in the administration of capital punishment, despite many decades of procedural reforms designed specifically to eliminate these problems.² In 1976, the U.S. Supreme Court expressly endorsed the ALI's framework when it approved Georgia's death penalty statute in *Gregg v. Georgia*,³ and in the forty years since *Gregg*, the Court has repeatedly defended the ALI's framework amid challenges to its legality.⁴ The Court's endorsement of the ALI's framework in *Gregg* was especially noteworthy because it resulted in the Court lifting the *de facto* death-penalty moratorium it imposed four years

[†] Assistant Professor of Law, UCLA School of Law.

¹ American Law Institute, *Report of the Council to the Membership of the American Law Institute On the Matter of the Death Penalty* (2009). This framework, described in § 210.6 of the ALI's Model Penal Code, both set forth the procedure for imposing a death sentence, Model Penal Code § 210.6(1)–(2), and provided a list of aggravating, Model Penal Code § 210.6(3)(a)–(h), and mitigating factors, Model Penal Code § 210.6(4)(a)–(h), for judges and juries to consider when sentencing convicted capital defendants.

² *Id.*

³ *Gregg v. Georgia*, 428 U.S. 153 (1976). Georgia's capital statute provided a list of aggravating factors, but not mitigating factors. Under the Georgia scheme, any constitutionally permissible mitigation evidence could be considered by the sentencing authority. The distinction between death penalty statutes providing enumerated mitigating factors and those, like Georgia, that did not list mitigating factors would become immaterial because two years later the Court would soon rule that death penalty defendants were allowed to permit any constitutionally permissible mitigation evidence. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁴ James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 50–89 (2007).

earlier in *Furman v. Georgia*.⁵ The Court's approval of Georgia's statute ushered in a wave of similarly structured capital statutes from states across the nation.⁶

Roughly fifteen years following the Court's ruling in *Gregg*, the U.S. General Accountability Office (GAO) commissioned a study to evaluate the existing evidence on capital charging-and-sentencing systems in the country.⁷ The report revealed that 82 percent of all methodologically sophisticated studies examining capital punishment processes uncovered evidence of arbitrariness and bias.⁸ A follow-up study conducted seven years later reported an even more troubling result: 93 percent of studies discovered evidence of arbitrariness and bias.⁹ In fact, since the GAO's initial study in 1990, only two scientifically valid studies have failed to discover arbitrariness and bias in the administration of the death penalty.¹⁰

So why have capital punishment systems failed to satisfy the conditions the Court set forth in *Furman*—which required the death penalty to be administered fairly and consistently, or not at all—despite functioning under the tremendous scrutiny of both the capital defense bar and general public? In this essay, I argue that at least part of the reason the promise of *Furman* remains unfulfilled has been the Court's overly restrictive reading of its own rulings in *Furman* and *Gregg*, notwithstanding the admonitions from

⁵ 408 U.S. 238 (1972).

⁶ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 269 (2002) (noting that “the Model Penal Code lived up to its name. Many states adopted the Code's general approach.”).

⁷ U.S. General Accountability Office, *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities*, GGD-90-57 (1990).

⁸ *Id.* at 5.

⁹ David C. Baldus & George Woodworth, *Race Discrimination in America's Capital Punishment System Since Furman v. Georgia (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing this Issue* (American Bar Association 1997); cf. David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (reporting that nearly all studies of the capital punishment process reveal arbitrary and bias decision-making).

¹⁰ See David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002); Scott Anderson, “As Flies to Wanton Boys”: *Death Eligible Defendants in Georgia and Colorado*, 40 Trial Talk 9, 9–16 (1991).

members of the Georgia legislature that enacted the death penalty statute approved in *Gregg* and the capital defense bar that challenged the constitutionality of the statute at issue in *Gregg*.

Part I describes the Court's ruling in *Furman*—the precursor to *Gregg*. Through its interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment, the *Furman* Court announced a conceptual framework governing the administration of the death penalty. *Furman*'s glaring omission was the lack of guidance to legislatures as to how to craft death penalty statutes that could successfully operationalize the core concepts articulated in the Court's ruling. Part II highlights the various states' responses to *Furman* and the Court's evaluation of these statutes in *Gregg*. Part III explains the two key objections to Georgia's post-*Furman* statute. The first criticism pertains to the inability of the newly crafted laws to eliminate arbitrariness and bias from the administration of the death penalty because of the statutes' inattention to front-end and back-end discretionary choices. The second complaint focuses on the lack of any empirical evidence suggesting the new death penalty regimes, in fact, operated in a non-arbitrary and unbiased manner.

Part IV discusses the Court's significant narrowing of its holding in *Gregg* eight years later, in *Pulley v. Harris*, by ruling that lower courts were not required to conduct comparative proportionality review, which entails comparing a defendant's case with similarly situated defendants when assessing the appropriateness of the death penalty in the defendant's particular case. *Pulley* removed what many believed to be the most important procedural safeguard approved in *Gregg*, especially in light of the growing evidence that the post-*Furman* statutes were still being applied arbitrarily and discriminatorily. This section also argues that comparative review of death penalty charging decisions—something emphasized by critics of the post-*Furman* statutes but rejected by the Court in *Gregg*—is particularly important in light of the strong incentives prosecutors have to leverage the threat of capital punishment against death eligible defendants to induce plea agreements. Part V describes and implements an analytical framework capable of assessing the level of arbitrariness in capital charging decisions—that is, the degree of instability or inconsistency in prosecutorial decision-making. This framework improves upon prior empirical research in three important ways. First, it measures arbitrariness in accordance with widely

acceptable standards adopted from the social sciences. Second, it properly disentangles arbitrariness in capital charging into *intra*- and *inter*-jurisdictional components—an important distinction in the Court’s current Eighth Amendment proportionality jurisprudence. Finally, the framework permits a statistically defensible assessment of comparative *jurisdictional* performance, and thereby allows the determination of which jurisdictions are hyper-punitive (and hyper-lenient) in their treatment of similarly situated defendants.

Part VI reports the results from the statistical model applied to death penalty charging decisions from Georgia over an eight-year period. The consistency of capital charging decisions *within* jurisdictions for similarly situated defendants is extremely low. A measure of homogeneity (i.e., consistency) in charging outcomes across similarly situated defendants in the same jurisdiction ranges from 0 (complete independence) to 100 (complete agreement),¹¹ with scores of 70 or higher indicate a reliable decision-making process. The capital charging practices in Georgia received a score of 19.¹² Moreover, there is considerable inconsistency in charging behavior *between* jurisdictions in Georgia. The probability that a factually similar case is noticed for the death penalty varies from 12 percent to 60 percent, depending on the jurisdiction.¹³

I. THE END OF STANDARDLESS DEATH PENALTY REGIMES

The capital statute at controversy in *Gregg* was the product of the Georgia General Assembly’s efforts to craft a death penalty law that would comport with the Supreme Court’s landmark ruling in *Furman v. Georgia*.¹⁴ William Henry Furman, an African-American male, was sentenced to death for the killing of William Micke, a Caucasian male, during a botched burglary of Micke’s home. Furman appealed his death sentence to the Georgia Supreme Court and argued that Georgia’s death penalty statute violated his

¹¹ JOOP J. HOX, MULTILEVEL ANALYSIS: TECHNIQUES AND APPLICATIONS 14 (2d ed. 2010).

¹² See *infra* Part VI.A.

¹³ *Id.*

¹⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

constitutional rights because the statute lacked sentencing guidelines and it was administered in a racially discriminatory manner.¹⁵ After the Georgia Supreme Court summarily rejected Furman's claims,¹⁶ he appealed to the U.S. Supreme Court. Furman's case was consolidated with two additional cases—one from Georgia and another from Texas.¹⁷ Both cases involved black men sentenced to death for raping white women. The Court believed that the defendants failed to prove their claims of racial bias,¹⁸ but held— five-to-four—that the lack of statutorily defined sentencing guidelines for juries in capital cases violated the Eighth Amendment. According to the Court, *all* existing capital punishment statutes—both state and federal—were unconstitutional as applied because they failed to articulate to decision makers any principled basis by which to distinguish those limited number of defendants sentenced to death from the thousands of other similarly situated defendants who were not subject to the death penalty. The practical consequence of the Court's ruling in *Furman* was that 558 death row inmates had their sentences commuted to life sentences.¹⁹ At the time of the *Furman* decision, there were 43 individuals on death row in Georgia: 29 convicted of murder, 12 convicted of rape, and two convicted of armed robbery.²⁰

Furman's ruling lacked a true holding because all nine Justices wrote separate opinions. The five Justices comprising the plurality opinion—William J. Brennan, William O. Douglas, Thurgood Marshall, Potter Stewart, and Byron White—were

¹⁵ *Furman v. State*, 167 S.E.2d 628 (Ga. 1969).

¹⁶ *Id.* at 629 (“The statutes of this State authorizing capital punishment have repeatedly been held not to be cruel and unusual punishment in violation of the Constitution. . . . Hence, there is no merit in this complaint.”).

¹⁷ *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969); *Branch v. State*, 447 S.W.2d 932 (Tex. Ct. Crim. App. 1969).

¹⁸ *See, e.g., Furman v. Georgia*, 408 U.S. at 310 (Stewart, J., concurring) (“Racial discrimination has not been proved, and I put it to one side.”) (citation omitted); *id.* at 450 (Powell, J., dissenting) (“The possibility of racial bias in the trial and sentencing process has diminished in recent years. . . . Because standards of criminal justice have evolved in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.”).

¹⁹ James W. Marquart and Jon R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 27 (1989).

²⁰ MICHAEL MEARS, *THE DEATH PENALTY IN GEORGIA: A MODERN HISTORY, 1970-2000*, at 16 (1999).

primarily troubled by three glaring problems with the existing practice of capital punishment: (1) the small number of death sentences handed out relative to potentially capital crimes; (2) the lack of statutory restrictions upon sentencing discretion of judges and jurors; and (3) sentencing disparities based on social class and race. Of these three factors, the first two seemed to gain the most traction.²¹ Justice Brennan believed that the administration of capital punishment was so arbitrary that it was “little more than a lottery system.”²² Similarly, Justice Stewart remarked that “death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”²³ Justice Marshall noted that it was extremely rare for convicted murderers to be sentenced to death.²⁴ Justices Douglas and White both explained that the Constitution required equality in the administration of capital punishment, requiring a principled manner in which to distinguish individuals who received the death penalty from those who did not.²⁵ Only Justices Brennan and Marshall concluded that the death penalty would violate the Constitution under any circumstances, albeit for slightly different reasons.²⁶

The four dissenting Justices—Harry Blackmun, Warren E. Burger, Lewis F. Powell, and William Rehnquist—all believed that the Court did not have the authority to strike down the death penalty because Congress and state legislatures were operating within their power to prescribe specific punishments. Similar to Justices Brennan and Marshall, Justice Blackmun believed that the death penalty was morally repugnant, but he concluded that the legality of capital punishment was an issue that legislatures, not

²¹ Justices Stewart and White’s opinions provided the narrowest ground for agreement, so their opinions were deemed controlling. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 11 (1990) [hereinafter *EQUAL JUSTICE*] (“Because each of the five justices wrote a separate concurring opinion stating a different rationale for the decision, the exacting meaning of *Furman* is difficult to decipher.”).

²² *Furman v. Georgia*, 408 U.S. at 293 (Brennan, J., concurring).

²³ *Id.* at 309 (Stewart, J., concurring).

²⁴ *Id.* at 362–63 (Marshall, J., concurring).

²⁵ *Id.* at 249 (Douglas, J., concurring); *id.* at 311 (White, J., concurring).

²⁶ Justice Brennan stressed that capital punishment did not comport with the notion of human dignity, primarily because of its infrequency, and therefore violated the Eighth Amendment. *Id.* at 291 (Brennan, J., concurring). Justice Marshall, on the other hand, concluded that retribution was an insufficient justification for capital punishment, irrespective of the infrequency of its occurrence. *Id.* at 342–45 (Marshall, J., concurring).

judges, should decide. Justices Burger and Powell both believed that death sentences were imposed with sufficient frequency and only reserved for the worst of the worst. Justice Burger remarked that the purpose of the Eighth Amendment was to ensure that certain punishments would not be imposed, and not to “channel discretion.” Justice Powell also concluded that it might be possible for a defendant to prevail on an Equal Protection Clause violation claim if the defendant could produce sufficient evidence that the death penalty was administered in a racially or economically discriminatory manner, but the Justice did not believe that the defendants had provided such proof.²⁷ Justice Rehnquist, who just joined the Court earlier that year, believed that it was better for the Court to err on the side of upholding the constitutionality of the death penalty rather than mistakenly upholding an individual claim against the validity of a legislative enactment.²⁸

Justice Burger concluded that the plurality’s ruling left legislatures who desired to retain the death penalty with two options: (1) provide sentencing standards for judges and juries or (2) enact a mandatory death penalty statute. With respect to the latter option, Justice Burger believed that abolition of the death penalty was preferable to a mandatory death penalty. With respect to the former option, Justice Burger noted that, just a year earlier, the Court held that developing sentencing standards in death penalty cases was an impossible task, so the Court should not revisit the issue so quickly.²⁹ In that case, *McGautha v. California*,³⁰ the Court ruled that capital defendants’ due process rights under the Fifth and Fourteenth Amendments were not violated by the lack of statutory restrictions on judges’ and jurors’ discretion to impose death sentences.³¹ The majority opinion in

²⁷ *Id.* at 450.

²⁸ *Id.* at 468 (Rehnquist, J., dissenting) (“But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual’s constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.”)

²⁹ *Id.* at 387 (Burger, C.J., dissenting).

³⁰ *McGautha v. California*, 402 U.S. 183 (1971).

³¹ *Id.*

McGautha, authored by Justice Harlan, expressly rejected the guided discretion framework advocated by the ALI and reasoned that it was both unwise and futile to attempt to determine, *a priori*, which factors would warrant a death sentence.³² The plurality in *Furman* was able to avoid explicitly overruling *McGautha* by reasoning that a constitutionally permissible process could still result in a constitutionally impermissible outcome.³³ But *Furman* failed to instruct states how they should develop death penalty systems that would, ostensibly, pass constitutional muster.³⁴

II. GEORGIA'S NEW DEATH PENALTY REGIME

Drafting new death penalty legislation and reenacting the death penalty was the top priority of the 1973 Georgia General Assembly when it convened the following January after the *Furman* ruling.³⁵ New death penalty bills were quickly filed in both the House and Senate. Several members of the General Assembly were prepared to defy the Court's *Furman* mandate and simply reenact the old death penalty statute.³⁶ Drawing from the ALI's Model Penal Code, one of the most important proposed amendments to the existing capital statute was the inclusion of a pre-sentencing hearing in which prosecutors were required to prove certain aggravating circumstances relating to the crime or the defendant.³⁷ Specifically, ten aggravating circumstances—nearly identical to those listed in the ALI's Model Penal Code—

³² *Id.* at 208 (“The infinite variety of cases and facets to each case would make general standards either meaningless ‘boiler-plate’ or a statement of the obvious that no jury would need.”).

³³ Justice Douglas remarked, “The high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. . . . [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments. Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.” *Furman v. Georgia*, 408 U.S. at 256–57 (Douglas, J., concurring).

³⁴ BALDUS ET AL., *EQUAL JUSTICE*, *supra* note 21.

³⁵ MEARS, *supra* note 20, at 18.

³⁶ *Id.*

³⁷ *Id.*

were developed.³⁸ During this pre-sentencing hearing, the defendant would also be allowed to present mitigating evidence suggesting why the death penalty should not be imposed.³⁹ Unlike the Model Penal Code, however, Georgia did not specify mitigating circumstances and the statute did not prescribe the manner in which juries should weigh aggravating and mitigating circumstances.⁴⁰

In addition to the requirement that statutorily-defined aggravating circumstances be proven and mitigating evidence be considered at separate pre-sentencing hearings,⁴¹ the revised statute required automatic review of all death sentences by the Georgia Supreme Court. During this review, the court is required to perform several interrelated tasks. First, it must review the record and determine whether the evidence supports the sentencing authority's findings of the aggravating circumstance. Second, it determines whether any other claims of legal error affecting guilt or sentencing are meritorious. Finally, and perhaps most importantly, the court determines whether the death sentence is excessive and disproportionate when compared to similar cases, considering both the crime and the defendant, and whether the imposition of the death sentence is the product of passion or prejudice.

Proponents of the new legislation amended the statute by adding three procedural reforms: (1) a list of statutory aggravating circumstances that juries were required to consider before imposing a sentence; (2) a bifurcated hearing for guilt/innocence and sentencing; and (3) automatic appellate review by the Georgia Supreme Court.⁴² They believed that these amendments would

³⁸ 1973 Ga. Laws 74; Ga. Code Ann. § 27-2534 (1973).

³⁹ *Id.*

⁴⁰ BALDUS ET AL., EQUAL JUSTICE, *supra* note 21, at 24.

⁴¹ Prior to *Furman*, Georgia, as well as a handful of other states, adopted a bifurcated procedure for the guilt/innocence and sentencing determination. Beginning in 1970, the Georgia death penalty statute required that a penalty trial was established in which the prosecutor was authorized to present information on the defendant's prior record. See 1970 Ga. Laws 949. After the *Furman* ruling, the penalty-trial process became much more extensive because the prosecutor was required to both allege and prove, beyond a reasonable doubt, the existence of at least one of the statutorily defined aggravating circumstances listed in the revised death penalty statute. BALDUS ET AL., EQUAL JUSTICE, *supra* note 21, at 8.

⁴² BALDUS ET AL., EQUAL JUSTICE, *supra* note 21, at 24–25.

comport with *Furman*'s heightened reliability mandate for death penalty systems, and render the statute constitutional.⁴³

However, members in both houses immediately challenged the House and Senate versions of the new death penalty legislation. Opponents of the proposed legislation argued that the changes to the statute were merely cosmetic and that the new legislation did very little to prevent the unconstitutional application of the death penalty, particularly with respect to poor and black defendants.⁴⁴ The legislation ultimately passed by a vote of 154 to 16 in the Georgia House of Representatives on February 13, 1973 and by a vote of 47 to 7 on February 22, 1973 in the Georgia Senate. Prior to the final vote on the new bill in the Senate, several amendments to make the death penalty mandatory were struck down.⁴⁵ On March 28, 1973, Governor Jimmy Carter signed the bill into law and it immediately became effective.⁴⁶ Georgia's new death penalty was originally published in the *Georgia Laws 1973 Session*.⁴⁷ With very few changes, Georgia's death penalty legislation has remained in place since Governor Jimmy Carter first signed it into law.⁴⁸

Less than a month following the enactment of Georgia's new death penalty legislation, on April 27, 1973, Jesse Lee Coley—an African-American male convicted of the non-homicidal rape of a Caucasian woman—became the first person sentenced to death under the revised statute.⁴⁹ Coley appealed his sentence to the Georgia Supreme Court and challenged, *inter alia*, the constitutionality of Georgia's revised death penalty statute. Similar

⁴³ *Id.*

⁴⁴ MEARS, *supra* note 21.

⁴⁵ *Id.* at 35.

⁴⁶ During his campaign for the U.S. Presidency in 1976, Carter issued a position paper that brings into question his comprehension of the Georgia death penalty statute that he signed into law. Carter stated that Georgia's death penalty was limited to "a few aggravated crimes like murder committed by an inmate with a life sentence." JAMES E. CARTER, PRESIDENTIAL CAMPAIGN, 1976 (1976). The Georgia statute, however, authorized the death penalty for a wide range of crimes, including rape, armed robbery, and kidnapping with bodily injury.

⁴⁷ 1973 Ga. Laws 74, § 3; Ga. Code Ann. § 27-2534.1 (1973).

⁴⁸ Subsequent to the enactment of the death penalty legislation, there were attempts to lower the age of eligibility for the death penalty to sixteen and authorize the death penalty in the event a person was convicted of the rape of a child under the age of twelve. MEARS, *supra* note 20, at 46.

⁴⁹ MEARS, *supra* note 20.

to its ruling five years earlier in *Furman v. State*,⁵⁰ the court held that the new statute neither violated the Georgia Constitution nor the U.S. Constitution; nevertheless, the court overturned Coley's death sentence, deeming it excessive when compared to penalties imposed in similar cases.⁵¹ Soon after the *Coley* decision, the Georgia Supreme Court reversed the death sentences of two other defendants convicted of armed robbery, holding that such sentences were excessive and disproportionate to the sentences imposed in similar cases.⁵²

The following year, in 1974, Troy Leon Gregg—a Caucasian male convicted of murdering two Caucasian men in Georgia—received four death sentences: one for each murder and one for each armed robbery. Once again, the Georgia Supreme Court held that the new death penalty statute was constitutional and affirmed his death sentences for the two murder counts.⁵³ Gregg then appealed the sentences to the U.S. Supreme Court, again challenging the constitutionality of Georgia's death penalty statute.⁵⁴ The Court granted certiorari to hear Gregg's challenge to the Georgia death penalty system, and also agreed to hear challenges to death penalty schemes from four other states: two guided-discretion death penalty states (Florida and Texas) and two mandatory death penalty statutes (Louisiana and North Carolina).⁵⁵

⁵⁰ *Furman v. State*, 167 S.E.2d 628 (Ga. 1969).

⁵¹ *Coley v. State*, 204 S.E.2d 612 (Ga. 1974).

⁵² *Floyd v. State*, 210 S.E.2d 810 (Ga. 1974); *Jarrell v. State*, 216 S.E.2d 258 (Ga. 1975). In both of these cases, however, the defendants were also given death sentences for murder, and these sentences were affirmed by the Court. In *Jarrell*, the Court also affirmed the death sentence for the crime of kidnapping.

⁵³ *Gregg v. State*, 210 S.E.2d 659 (Ga. 1974). The death sentences for the two armed robbery charges were deemed disproportionate and vacated.

⁵⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁵ The statutes crafted by legislatures in Florida, Georgia, and Texas imposed somewhat different requirements on juries and reviewing courts. The most important distinction between the statutes was the manner in which the sentencing authority was required to consider aggravation and mitigation evidence. In Georgia, once the jury found *at least* one aggravating circumstance, it was required to weigh all the aggravating and any permissible mitigating evidence when deciding whether to impose a death or life sentence. *Id.* Under Florida's scheme, the sentencing authority was required to weigh aggravating and mitigation evidence and impose a death sentence if the latter did not sufficiently outweigh the former. The jury issued an "advisory" sentence by majority vote, and the judge was authorized to override the jury's sentencing recommendation. *Proffitt v. Florida*, 428 U.S. 242 (1976). Texas's statute required the government to prove the existence of at least one of the aggravating circumstances enumerated in the statute and only impose the death sentence if

On July 2, 1976, by a vote of seven-to-two, the Court approved Georgia's modified death penalty statute in *Gregg*, as well as the modified guided-discretion death penalty statutes in Texas⁵⁶ and Florida,⁵⁷ but it invalidated the mandatory death penalty statutes in North Carolina⁵⁸ and Louisiana.⁵⁹ The Court was convinced that the guided-discretion statutes adequately addressed *Furman*'s primary concern—the arbitrary and capricious manner in which defendants were being condemned to death—and would result in greater consistency in the administration of the death penalty.⁶⁰ The Court justified invalidating the mandatory death penalty systems by underscoring that not only must the death penalty be reserved for the worst-of-the-worst offenses, but even among that limited group of offenders, the death penalty is only permissible for the most culpable offenders.⁶¹

Another key commonality of guided-discretion statutes was the mandatory appellate review of death sentences by the jurisdiction's highest criminal court that would assess the appropriateness of every death sentence imposed. The Court noted that the reviewing courts in Georgia, Florida, and Texas were required to determine whether each defendant's death sentence was arbitrarily imposed, disproportionate, or the product of any impermissible consideration.⁶² Thus, the Court once again signaled that the consideration of both procedure (i.e., narrowing death-eligibility) and results (i.e., appellate review of capital sentences irrespective of whether the process was followed) were indispensable components of a constitutionally permissible death penalty system. In other words, the Court emphasized that a "fair" death penalty system must satisfy procedural and distributive justice concerns.⁶³ In addition to constraining the discretion of the

the killing was unprovoked, deliberate, and the defendant was likely to commit violent acts in the future. *Jurek v. Texas*, 428 U.S. 262 (1976).

⁵⁶ *Jurek*, 428 U.S. at 262.

⁵⁷ *Proffitt*, 428 U.S. at 242.

⁵⁸ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁵⁹ *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁶⁰ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (noting that the Court's concern about arbitrariness in *Furman* could be adequately addressed by carefully drafted statutes that ensure the sentencing authority is provided relevant information and guidance).

⁶¹ *Woodson*, 428 U.S. at 280; *Roberts*, 428 U.S. at 325.

⁶² *Gregg*, 428 U.S. at 153.

⁶³ Glaring omissions from both the revised statutes and the Court's analysis of them, however, were *workable* definitions of arbitrariness, bias, and

sentencing authority, a logical consequence of the guided-discretion statutes was the narrowing of the discretion of the charging authority because certain elements of the crime that were enumerated in the statute had to be proven to the sentencing authority in order for the death penalty to be an available sentencing option. The Court would repeatedly emphasize that capital statutes must “genuinely narrow” the death-eligible class to encompass only defendants materially more depraved than the average murderer.⁶⁴

III. THE CAPITAL DEFENSE BAR’S REACTION TO *GREGG*

Critics of the post-*Furman* capital statutes echoed the aforementioned concerns highlighted by legislators in the Georgia General Assembly who opposed the revised statute: (1) the new laws were incapable of ensuring the constitutionally permissible administration of capital punishment required under *Furman* and (2) the lack of any empirical evidence that the new regimes were non-arbitrary and unbiased.⁶⁵ With respect to the first criticism, opponents of the new statutes posited that the statutes merely shifted the “unbridled discretion” of the pre-*Furman* era statutes to the front-end (charging and plea bargaining) and back-end (clemency) of the process.⁶⁶ These critics argued that the revised statutes did not sufficiently address the various decision points commencing with an indictment.⁶⁷ The *Furman*’s “death is

disproportionality. The Court and legislatures employed intuitive understandings of these concepts, but they failed to translate these general principles into terms that frontline legal actors—e.g., prosecutors, juries, and appellate courts—could actually put into operation. How were errors of arbitrariness, bias, and disproportionality to be measured in the capital sentencing context? What baselines should be used? What threshold showings must be made before these various claims of constitutional error were cognizable by the Court? These key unresolved questions jeopardized the very “heightened reliability” required under the Court’s “death is different” approach to the Eighth Amendment.

⁶⁴ *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (“An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”); *Atkins v. Virginia*, 536 U.S. 304 (2002) (mentally disabled defendants are not sufficiently morally culpable to face the death penalty).

⁶⁵ BANNER, *supra* note 6, at 273.

⁶⁶ *Id.*

⁶⁷ Five major decision points were identified by these critics: (1) charging; (2) plea bargaining; (3) guilt/innocence; (4) sentencing; and (5) clemency. BALDUS

different” logic required heightened reliability and accuracy standards, so potential abuses of executive branch power needed to be monitored and, when appropriate, remedied by the courts. According to these opponents, the legislatures were required to craft capital statutes that imposed greater justificatory and evidentiary burdens on prosecutors during the front-end discretionary processes and on governors and pardon and parole boards during the back-end.

During oral argument in *Gregg*, Chief Justice Burger dismissed this criticism by suggesting that charging and clemency discretion were inevitable components of any capital scheme and outside of the effective control of legislatures.⁶⁸ Justice Stewart, authoring the plurality opinion for the Court, remarked “Nothing in any of our cases suggests that the decision to afford an individual defendant mercy [through, *inter alia*, not seeking the death penalty] violates the Constitution.”⁶⁹ According to the Justice, *Furman* merely required that death penalty statutes channel the discretion of the sentencing authority and that the petitioner’s argument about prosecutorial discretion in charging was “nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use.”⁷⁰

The second objection to the revised statutes was the lack of empirical evidence suggesting that the new death penalty regimes actually eliminated or at least significantly reduced the arbitrariness and bias that animated *Furman*. The model death penalty statute proposed by the ALI was an “untested innovation,”⁷¹ and neither the ALI nor the legislatures in Georgia, Florida, and Texas provided the Court with any data concerning the practical impact of the newly adopted death penalty laws.⁷² In *Furman*, the Court distinguished its Eighth Amendment holding from its Fourteenth Amendment ruling in *McGautha* by

ET AL., EQUAL JUSTICE, *supra* note 21, at 7–8. These various discretionary decision points were also expressly recognized in *Gregg*. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

⁶⁸ BANNER, *supra* note 6, at 273.

⁶⁹ *Gregg*, 428 U.S. at 199.

⁷⁰ *Id.* at n.50. Eleven years later, in *McCleskey v. Kemp*, Justice Powell reiterated that *Furman* was only concerned with limiting the discretion of the sentencing authority and the inconsistency in charging decisions did not violate the Constitution. 481 U.S. 279, 307 (1987).

⁷¹ American Law Institute, *supra* note 1, at 4.

⁷² CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM (2005).

emphasizing the unacceptable risk of arbitrary and discriminatory outcomes, irrespective of a constitutionally permissible process.⁷³ When the attorneys for the defendants highlighted the glaring omission of any hard facts that the capital schemes could actually do what they purported to do, the Court criticized the attorneys for failing to provide evidence that those schemes did not (or could not) satisfy the constitutional mandate of *Furman*.⁷⁴ By failing to require state legislatures to prove that their statutes could, in practice, satisfy the heightened reliability and accuracy requirements, the Court appeared to all but abandon distributive justice concerns.⁷⁵ Instead, the Court turned its focus to what could theoretically be accomplished by the new procedural protections of the amended capital statutes.⁷⁶

Gregg foreshadowed the Court's capital punishment jurisprudence for the next four decades. The Court has continued to deemphasize *Furman*'s strong concerns about actual outcomes of death penalty cases, has refused to test *Gregg*'s assumption that the guided-discretion statutes would result in accurately and consistently imposed death sentences, and has ignored social science evidence on the arbitrary, capricious, and discriminatory operation of the death penalty.⁷⁷ Some scholars have suggested that the Court's reluctance to embrace social scientific evidence of the constitutionally impermissible realities of capital charging-and-sentencing practices can be attributed to its lack of expertise in evaluating statistical evidence.⁷⁸ Instead, the Court has continually focused its attention on whether state statutes have sufficiently

⁷³ See *supra* Part I.

⁷⁴ HANEY, *supra* note 72. Statistical evidence of racial bias in the administration of the death penalty was presented to the Court in *Furman*, but this evidence did not form the basis for the Court's ruling. Only Justices Douglas and Marshall cited statistical evidence in their opinions.

⁷⁵ Liebman, *supra* note 4.

⁷⁶ *Id.*

⁷⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistical evidence of racially disproportionate death penalty charging and sentencing, even if believed, was insufficient to deem Georgia's capital statute unconstitutional as applied).

⁷⁸ Carol S. Steiker and Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 282 (2015) ("[M]any . . . justices may have felt that their personal legitimacy as jurists was threatened in cases involving statistical proof.").

narrowed the class of death-eligible defendants,⁷⁹ whether the capital trial process was constitutional,⁸⁰ and which crimes and defendants were beyond the reach of the death penalty.⁸¹ According to Professor Craig Haney, the Court's "continued treatment of the social facts and empirical data that document systemic failures in the administration of the death penalty as somehow irrelevant to constitutional decision-making seems increasingly indefensible."⁸² As Justices Breyer and Ginsburg's recent dissent in *Glossip v. Gross* emphasized, the Court must reengage with the social facts of capital charging-and-sentencing practices:

Four decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence. But that no longer seems likely Despite the *Gregg* court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands.⁸³

⁷⁹ *Godfrey v. Georgia*, 446 U.S. 420 (1980) (vaguely defined aggravating factors are unconstitutional); *Walton v. Arizona*, 497 U.S. 639 (1990).

⁸⁰ *Lockett v. Ohio*, 438 U.S. 586 (1978); *Walton*, 497 U.S. at 639; *Kansas v. Marsh*, 548 U.S. 163 (2006); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

⁸¹ *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for non-homicidal rape of an adult is unconstitutional); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (death penalty is unconstitutional for non-homicidal kidnapping); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty unconstitutional for juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty unconstitutional for defendants suffering mental retardation); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty unconstitutional for non-homicidal rape of a child); *Ford v. Wainwright*, 477 U.S. 399 (1986) (death penalty unconstitutional for insane defendants).

⁸² HANEY, *supra* note 72, at 216.

⁸³ *Glossip v. Gross*, 135 S. Ct. 2726, 2760–62 (2015) (Breyer & Ginsburg, JJ., dissenting).

IV. INVESTIGATING ARBITRARINESS IN CAPITAL CHARGING

The Court in *Gregg* was careful to note that its approval of Georgia's revised statute was neither a blanket endorsement of any statute similarly constructed, nor was it the only manner in which death penalty statutes could comport with *Furman*.⁸⁴ Rather, "each distinct [death penalty] system must be examined on an individual basis."⁸⁵ The aggravating factors enumerated in Georgia's revised statute encompassed a wide range of capital crimes, including both homicide and non-homicide offenses.⁸⁶ Thus, it was clear to the Court from the outset that it was improbable that those broadly written factors, in and of themselves, could sufficiently narrow the death-eligible pool to make the administration of capital punishment less arbitrary or discriminatory.⁸⁷ The Court expressly recognized this potential shortcoming, but highlighted the indispensable role of appellate review of death sentences: "While such standards are by necessity somewhat general . . . the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."⁸⁸

As explained above, Georgia's revised capital statutes simply redistributed discretionary authority to prosecutors (charging) and governors/pardons boards (clemency). As a result, appellate review of capital sentences would be neither the first nor last word in the death penalty process. Nevertheless, the appellate court's review could, in theory, correct errors of inadequate charge screening by identifying factors in the cases it reviewed that warranted a punishment less than the death penalty, irrespective of the defendant's eligibility under the governing statute. The appellate court had flexibility to engage in a more thorough assessment of each case with respect to the appropriateness of the death penalty, and not merely limit its review to trial error. The

⁸⁴ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

⁸⁵ *Id.*

⁸⁶ For example, at the time *Gregg* was decided, Georgia's statute permitted the death penalty for defendants convicted of rape, kidnapping, and armed robbery when the victim was *not* killed.

⁸⁷ See, e.g., Chelsea Creo Sharon, *The Most Deserving of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223 (2011).

⁸⁸ *Gregg*, 428 U.S. at 194–95.

process of comparative proportionality review, entailing a systematic inquiry into similar and dissimilar cases, provided the vehicle through which these culpability assessments could be carried out. Moreover, arbitrariness and bias, on a systemic level, could be reduced by rigorous proportionality assessments at the case level. Individual punishments, both potential and manifest, that were appropriately calibrated based on the disciplined consideration of legitimate defendant and crime factors could increase overall consistency and accuracy.

The Court significantly narrowed the scope of comparative proportionality review in *Pulley v. Harris*⁸⁹ when it held that comparative proportionality review was not an indispensable feature of constitutional death penalty statutes.⁹⁰ Consistent with its logic announced in *Gregg* pertaining to “individualized assessments” of capital statutes,⁹¹ the Court did not go so far as to completely negate the possibility that comparative proportionality review might be required for a particular death penalty statute.⁹² However, it reasoned that the California statute being challenged in *Pulley* was not “so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.”⁹³ Justice White, who authored the majority opinion in *Pulley*, claimed that “[a]ny capital sentencing scheme may occasionally produce aberrational outcomes, [but] such inconsistencies are a far cry from the major systemic defects identified in *Furman*.”⁹⁴ But Justice White failed to reference any concrete evidence supporting his assertion that those major pre-*Furman* defects were relics of the past—a point not lost on other members of the Court. In his dissenting opinion, Justice Brennan (joined by Justice Marshall) described a growing body of evidence suggesting the exact opposite: the post-*Furman* statutes had failed to live up to their promise of increasing consistency, rationality, and fairness in the death penalty systems.⁹⁵ The Justice explained:

⁸⁹ *Pulley v. Harris*, 465 U.S. 37 (1984).

⁹⁰ *Id.* at 45 (“Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.”).

⁹¹ *Gregg*, 428 U.S. at 195.

⁹² *Pulley*, 465 U.S. at 51–52.

⁹³ *Id.*

⁹⁴ *Id.* at 54.

⁹⁵ *Id.* at 65–66 (Brennan, J., dissenting) (emphasis added) (arguing that there was a growing body of scholarly literature documenting racial, gender,

If the Court is going to fulfill its constitutional responsibilities, then it cannot sanction continued executions on the unexamined assumption that the death penalty is being administered in a rational, nonarbitrary, and noncapricious manner. Simply to assume that the procedural protections mandated by this Court's prior decisions eliminate the irrationality underlying application of the death penalty is to ignore the holding of *Furman* and whatever constitutional difficulties may be inherent in each State's death penalty system Some forms of irrationality that infect the administration of the death penalty—unlike discrimination by race, gender, socioeconomic status, or geographic location within a State—cannot be measured in any comprehensive way. That does not mean, however, that the process under which death sentences are currently being imposed is otherwise rational or acceptable.⁹⁶

Justice Brennan was also troubled by the Court's refusal to consider whether "comparative proportionality review *should* be required in order to ensure that the irrational, arbitrary, and capricious imposition of the death penalty invalidated by *Furman* does not still exist" and what form should such review take.⁹⁷ He explained:

Chief among the reasons for this unpredictability [in the death penalty system] is the fact that similar situated defendants, charged and convicted for similar crimes within the same state, often receive vastly difference sentences. The problem of error in imposing capital punishment is much more serious if we consider the chances of error in the system to be more than the execution of someone who is completely innocent [but] when we execute someone whose crime does not seem so aggravated when compared to those of many who escaped the death penalty. It is in this kind of case—which is extremely common—that we must worry whether,

socioeconomic, and geographical discrimination in the administration of capital punishment in the post-Furman era).

⁹⁶ *Id.* at 67–68.

⁹⁷ *Id.* at 74.

first, we have designed procedures which are appropriate to the decision between life and death and, second, whether we have followed those procedures. Comparative proportionality review is aimed at eliminating this second type of error.⁹⁸

Paying closer attention to capital charging decisions is especially important because prosecutors may have strong incentives to seek the death penalty against defendants even in cases that do not appear to warrant such a severe potential punishment. By pursuing the death penalty in eligible cases, prosecutors increase their leverage in plea-bargaining negotiations in several ways.⁹⁹ First, it permits them to more easily extract a higher (i.e., more severe) plea bargain—typically life without the possibility of parole—that would not be possible without the threat of the death penalty.¹⁰⁰ Second, it enables the government to empanel a more “conviction-prone” jury through the process of “death qualification.”¹⁰¹ Third, seeking the death penalty substantially increases the defense’s workload without a concomitant increase in the government’s burden by vastly expanding the defense attorney’s role and the requisite skill set and financial resources.¹⁰² Fourth, the risk of an acquittal even in cases with genuine evidentiary problems is substantially lower because prosecutors recognize that defense attorneys pursue risk-averse pretrial and litigation strategies and practices.¹⁰³ Fifth, prosecutors understand that both trial and appellate judges, especially elected

⁹⁸ *Id.* at 69 (quoting John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555 (1983)).

⁹⁹ See, e.g., Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313 (2008); Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013).

¹⁰⁰ Thaxton, *supra* note 99, at 505.

¹⁰¹ HANEY, *supra* note 72, at 118–21 (describing the conviction proneness of death qualified juries); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 (2000) (explaining that death qualification allows prosecutors to jettison “death qualified” potential jurors who are most likely to hold skeptical attitudes of law enforcement). Death qualification is a process during jury selection when potential jurors are questioned about their views regarding capital punishment in order to discover whether they will be able to follow the law in deciding what sentence to impose.

¹⁰² Thaxton, *supra* note 99, at 485.

¹⁰³ Defense attorneys in capital cases are more likely to prioritize developing mitigation for the penalty phase than challenging the prosecution’s case for guilt for the underlying murder charge. *Id.* at 486. *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (discussing the potential tensions between guilt and penalty phase strategies).

judges, are more likely to give prosecutors greater leeway because of fear that they will publicly blame judges for losses based on legal technicalities.¹⁰⁴ Lastly, prosecutors' concerns about reelection, career advancement, and potential public backlash encourage overreaching.¹⁰⁵ Prosecutorial overreaching is facilitated, particularly in the capital context, by the availability of broad and overlapping statutory aggravating circumstances that permit prosecutors to seek the death penalty in nearly every murder case.¹⁰⁶ Discouraging the overly aggressive use of the death penalty may likely be the most effective way to reduce the overall prevalence of error in capital charging-and-sentencing systems.¹⁰⁷

V. A STATISTICAL MODEL OF ARBITRARINESS

A. Data

There are limited examples of jurisdictions requiring the collection and analysis of data on prosecutors' discretionary capital charging decisions. The Department of Justice (DOJ), for example, collects data on all potential federal death penalty cases and front-end charge screening is performed by a committee with input from attorneys for both parties.¹⁰⁸ Legislatures in Kentucky and North Carolina enacted legislation mandating the collection and analysis of capital punishment litigation data, as well as providing legal causes of action for defendants raising certain claims that were supported by the statistical evidence, such as racial/ethnic discrimination in charging decisions.¹⁰⁹ In order to more accurately

¹⁰⁴ Thaxton, *supra* note 99, at 486.

¹⁰⁵ See generally Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

¹⁰⁶ Kathryn W. Riley, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U. L. REV. 835, 853–54 (1980–1981) (explaining that the vagueness and overbreadth of Georgia's aggravating circumstances are in conflict with the narrowing requirement articulated in *Furman* and *Gregg*).

¹⁰⁷ See, e.g., Adam M. Gershowitz, *An NTSB for Capital Punishment*, 47 TEX. TECH L. REV. 151 (2014); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1996–1997).

¹⁰⁸ U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (2001).

¹⁰⁹ Kentucky Racial Justice Act, KY. REV. STAT ANN. § 532.300 (1998); North Carolina Racial Justice Act of 2009, N.C. GEN. STAT. § 15A–2010 (2010)

assess the potential arbitrariness in death penalty charging decisions in Georgia, I collected data on these charging dynamics from 1993 through 2000. The dataset was constructed from a complete list of potentially capital cases (i.e., death eligible) from which the prosecutor identified and selected defendants for the death penalty.¹¹⁰ Specifically, the list of death-eligible defendants is comprised of all persons above the age of 16 who were convicted of murder and at least one statutory aggravating factor enumerated in the Georgia post-*Furman* statute was present.¹¹¹ For each case in the dataset, information was recorded for the defendant, codefendant(s), victim(s), judge, prosecutor, defense counsel, the crime, and whether a notice of intent to seek the death penalty was formally filed by the prosecutor. During the period under investigation, prosecutors filed a notice of intent to seek the death penalty in 400 cases and fifty-four defendants ultimately received the death penalty.¹¹²

Table 1 provides a summary of the variables employed in this study. The variables can be grouped into several general categories: *crime* (e.g., year, weapon used, statutory aggravating circumstances, contemporaneous felonies committed, and location), *defendant* (number of defendants, race/ethnicity, gender, age, prior felony convictions, number of children, marital status, employment status, education, family background,

(repealed 2013). Under the North Carolina statute, for example, a capital defendant can have his or her sentence reduced to life in prison without parole if there is evidence proving "that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."

¹¹⁰ The data used for these analyses were collected from six different sources: the Georgia Bureau of Investigation (GBI), the Georgia Department of Corrections (GDC), the Office of the Georgia Capital Defender (GCD), the Clerk's Office of the Georgia Supreme Court (CO), the Atlanta Journal-Constitution (AJC), and the U.S. Census Bureau.

¹¹¹ In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court ruled that the death penalty was unconstitutional for defendants who were juveniles at the time they committed their crimes. Prior to *Roper*, Georgia permitted the death penalty for defendants ages 17 and older. The data examined in this paper focus on the pre-*Roper* period. Slightly under 3% of offenders in the data were technically death eligible but under 17 years of age.

¹¹² Of the 395 capitally charged cases in which the method of disposition is known, 59% (234) were ultimately resolved by plea and 41% (161) were resolved by trial. With respect to cases that were technically death eligible under the Georgia statute but in which the prosecutor declined to seek the death penalty, 39% (350) were disposed by plea and 61% (551) disposed by trial.

writing/reading/spelling ability, IQ, and psychiatric status), *victim* (number of victims, race, gender, and relationship to defendant) and *case processing* (filing of death notice).¹¹³ The dataset contains a much broader set of variables than included in the analytical model, but these specific variables have been shown to be most predictive of capital charging behavior.¹¹⁴ It also must be emphasized that many of the factors impacting *capital sentencing* are unknown to prosecutors or defense attorneys at the time of *capital charging* decision, and specifics about aggravation and mitigation evidence come to light in preparation for trial. As a result, an analytical model predicting capital sentencing decisions would necessarily include a more comprehensive set of variables stemming from the fact that prosecutors and defense counsel have access to a much wider range of information at the stage of the adjudicatory process.

B. Multilevel Framework

In this section, I describe an analytical framework, referred to as multi-level modeling (MLM), that is capable of assessing the level of arbitrariness present in Georgia's capital charging decisions along one of the key dimensions identified by the Court: reliability. MLM avoids two primary shortcomings of current sentencing proportionality review practices: (i) the failure to develop general measures of culpability that enable courts to identify comparable cases irrespective of factual differences and (ii) the failure to explicitly take into account the multilevel nature of capital decision-making arising from the fact that cases are nested within counties (or similar sub-state administrative units).¹¹⁵ With respect to the former, I provide a general measure of culpability, based on the relationship between numerous case-level

¹¹³ Consistent with prior research, I limit my analysis to cases that ultimately resulted in a murder conviction via plea or trial. Cases vary in terms of strength of evidence, so limiting the focus to cases in which there was sufficient evidence to obtain a conviction serves as a proxy for the strength of evidence. BALDUS ET AL., *EQUAL JUSTICE*, *supra* note 21, at 40–42, 477.

¹¹⁴ See, e.g., BALDUS ET AL., *EQUAL JUSTICE*, *supra* note 21, at 49. Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 *CRIMINOLOGY* 971, 984 (2008); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 *MICH. J. RACE & LAW* 135, 171 (2009).

¹¹⁵ BALDUS ET AL., *EQUAL JUSTICE*, *supra* note 21, at 286.

factors and actual capital charging outcomes. Consequently, the statistical model is not unnecessarily limited by the requirement of the identification of factually identical (or at least very similar) cases.¹¹⁶ The culpability measure is comprised of a weighted scale of the explanatory variables listed in Table 1. Weights for each individual variable are determined by the variable's observed relationship with capital charging behavior, net of the other explanatory variables in the model. Each case is given a culpability score based on a summation of the specific values of the explanatory variables for the case, multiplied by the empirically derived weight for that specific variable. Therefore, even when cases are not factually identical, they can be compared based on their overall *empirically derived* culpability score.

In terms of the latter, I employ a statistical framework specifically developed to measure variability in outcomes for "grouped" data that properly distinguishes between *intra*- and *inter*-jurisdictional processes. Relevant for the purposes of this project, Georgia's Administrative Office of the Courts (AOC) organizes the state's 159 counties into 49 superior court judicial circuits.¹¹⁷ Cases from the various counties are nested into corresponding judicial circuits because there is one district attorney per judicial circuit. Large counties typically comprise a single judicial circuit, but many smaller counties are grouped together to form a single judicial circuit. As a result, a single prosecutor may be responsible for charging and plea bargain decisions for several counties under her or his judicial circuit.¹¹⁸ Treating counties that share a single judicial circuit as if they were independent ignores the similarities they share in the administration of capital punishment resulting from shared decision-makers. The distinction between intra-circuit and inter-circuit dynamics is constitutionally relevant because the U.S. Supreme Court has explicitly recognized that reviewing courts are required to compare punishments imposed on similarly situated defendants in the same jurisdiction *and* compare punishments imposed for similar situated defendants in other jurisdictions when determining the proportionality of a given punishment under the Eighth Amendment.¹¹⁹ Thus, my

¹¹⁶ *Id.*

¹¹⁷ JUDICIAL COUNCIL OF GEORGIA, YOUR GUIDE TO THE GEORGIA COURTS (AOC 2003).

¹¹⁸ See *infra* Table 2.

¹¹⁹ *Solem v. Helm*, 463 U.S. 277, 294 (1983).

statistical model offers the dual advantages of removing much of the difficulty that has continued to plague the proportionality review of death sentences: inadequate/inappropriate case comparisons and improper handling of the diffuse nature of capital charging decision-making.

Prior to discussing the virtues of employing the MLM approach to capital charging decision-making in greater detail, it is necessary to briefly describe the major shortcomings of prior research resulting from the use non-MLM approaches and how those shortcomings have impeded a comprehensive understanding of the complex dynamics at play when examining the capital punishment process. While these prior studies *recognize* that between-jurisdiction processes may be an important source of variability in capital charging and sentencing, they have not properly incorporated this information in the analysis of capital charging dynamics. This has resulted in an incomplete account of the operation of capital punishment systems, and thereby limiting our understanding as to whether the death penalty is being administered in a constitutionally (and morally) permissible manner. Earlier studies have attempted to account for inter-jurisdictional differences through the use of “fixed effects”—that is, the estimation of a set of jurisdiction-specific regression coefficients that captures differences between jurisdictions for similar cases.¹²⁰ This modeling framework is typically called “fixed effects” models, although the terminology has been the source of much confusion.¹²¹

The jurisdiction-specific effects estimated from the data can be substantively interesting in-and-of themselves, but the fixed effects modeling framework is ill-suited for the investigation of death penalty charging data for several reasons. First, the models discard information from jurisdictions that contain only one death-

¹²⁰ These jurisdiction-specific parameters represent differences between the jurisdictions in the probability of receiving a death notice for similarly situated defendants. The parameters are deviations from a baseline jurisdiction selected, *a priori*, by the analysts, so their particular values will change depending on which circuit is chosen as the reference category. In practice, one less parameter is estimated because a single circuit must serve as the reference.

¹²¹ PAUL D. ALLISON, FIXED EFFECTS REGRESSION MODELS 2 (2009). Prior studies have preferred the fixed effects approach, in part, because it can take into account any jurisdiction-level unobserved effects on case outcomes that may be potentially correlated with case-level explanatory variables. *Id.*

eligible case. These jurisdictions, sometimes called *singleton clusters* in the statistics literature, are not unusual for death penalty data. Homicides are relatively rare compared to other violent crimes, and death-eligible crimes constitute a smaller subset of homicide cases, so it is important to utilize as much available data as possible to understand the capital punishment process. By throwing away valuable information due to the assumptions of the fixed effects model, the investigation of case-level processes, as well as between- jurisdiction variability, can be appreciably undermined. Second, fixed effects models require that a substantial portion of cases within a jurisdiction to differ in their case-specific characteristics because the model focuses exclusively on within-jurisdiction variation.¹²² If most of the variation in case characteristics is between jurisdictions, then the fixed effects models can give misleading answers to questions about the effects of these case-level characteristics. Third, fixed effects models are particularly sensitive to the number of cases in each jurisdiction because removing just a few cases from a jurisdiction with a small number of cases can dramatically change the size of the jurisdiction-specific effect estimated from the data. This diminishes the reliability of the estimated jurisdiction-specific effect because slight changes in data unduly influence substantive conclusions about the individual jurisdictions. As a result, individual jurisdictions tend to look more different than they actually are when we focus on a broader population of cases or similar jurisdictions. Finally, fixed effects models do not allow inferences to be made about the between- jurisdiction variability in capital charging, including whether or not the variability is substantively meaningful. All of these aforementioned problems originate from a common source: the inability of the fixed effects framework to simultaneously consider within- and between-jurisdiction variability.¹²³

¹²² The estimation of the jurisdiction-specific effects removes the between-jurisdiction variability from the model, so all that remains to be examined is within-jurisdiction variability. This is also why singleton clusters are dropped from the analysis—there can be no within-jurisdiction variation with a single case or multiple cases that are identical across the variables examined in the model.

¹²³ See *infra* Part V.C. Fixed effects models present additional complications when the outcome variable is binary (e.g., Yes/No), such as a death noticing decision because estimating a separate parameter for each judicial circuit tends to produce incorrect results for case-level explanatory variables, and results in

While prior examinations of death penalty charging-and-sentencing dynamics treated inter-circuit variability as a nuisance that needed to be minimized or corrected in order to properly analyze intra-circuit variability, MLM views the processes influencing intra- and inter-circuit variability in death noticing decisions as both substantively interesting. This has the direct advantage of addressing questions about intra- and inter-jurisdictional variability in capital charging that is relevant. Within-jurisdiction *homogeneity* in capital case processing is attributable to between-jurisdiction *heterogeneity*. When factually similar cases are treated differently depending on the jurisdiction where the case arises, knowledge of the institutional setting where the case is litigated is necessary to adequately understand death-charging dynamics. This is because, even after taking into account relevant case characteristics, the jurisdictional context induces interdependence between the cases in that particular jurisdiction. Between-circuit and within-jurisdiction heterogeneity can be investigated through the use of MLM because this framework provides the appropriate analytical tools to take into account case- and jurisdiction-level dynamics in death penalty charging through the careful recognition of the hierarchical nature of the data.¹²⁴ Inferences drawn from analytical frameworks that do not explicitly account for the fact that death eligible cases are nested in different jurisdictions are often misleading because relationships measures at one level of analysis (e.g., between cases) do not necessarily hold at another level of analysis (e.g., between jurisdictions).¹²⁵

parameter estimates that are very sample-dependent. An alternative approach for fixed effects binary outcomes does produce correct answers, but at the cost of omitting jurisdictions where all cases received the same outcome and not being able to obtain the circuit-specific effects. Tom Coupé, *Bias in Conditional and Unconditional Fixed Effects Logit Estimation: A Correction*, 13 POL. ANAL. 292, 292–95 (2005).

¹²⁴ In the current context, within-jurisdiction heterogeneity can also be interpreted as “between-case” heterogeneity.

¹²⁵ Interpreting associations at the higher level as pertaining to the lower level is known as an *ecological fallacy*. The opposite of the ecological fallacy is an *atomistic fallacy*, and this occurs when one draws inferences about the relationships between group-level variables based on information about individual-level relationships. These fallacies are problems of *inference*, not of measurement. It is permissible to characterize a higher-level collective using information obtained from lower-level members. The fallacies occur when relationships discovered at one particular level are inappropriately assumed to occur in the same fashion at some other (higher or lower) level. DOUGLAS A. LUKE, MULTILEVEL MODELING 5–6 (2004).

MLM avoids making these inferential errors by examining how case-level responses are influenced by case-level characteristics, and how jurisdiction-level factors influence the average response for the jurisdiction. These case- and jurisdiction-level processes are examined simultaneously, thereby allowing the accurate evaluation of how jurisdiction-level characteristics also influence case-level dynamics with improperly substituting jurisdiction-level dynamics for case-level dynamics.¹²⁶ In fact, the MLM approach to modeling variability in capital charging behavior is central to correctly understanding capital charging dynamics.¹²⁷

C. *The Formal Statistical Model*

The basic idea of MLM is to estimate the mean and variance of the *distribution* of the jurisdiction-specific effects, but not the individual jurisdiction-specific parameters like the aforementioned fixed effects models. The estimation of these features of the distribution is possible because MLM imposes a modest constraint on the variability of the between-jurisdiction effects: the specification of a probability model for the jurisdiction-specific effects.¹²⁸ This probability model assumes the jurisdiction-specific effects arise deviations from “typical” jurisdiction (i.e., county, judicial circuit, or similar sub-state administrative unit). Through the imposition of this constraint, MLMs avoid the aforementioned shortcomings of the fixed effects by: (1) utilizing all available information from cases, even those in singleton clusters, in order to provide better estimates of the effects of case-

¹²⁶ See *infra* Part V.C.

¹²⁷ MLMs have been used in other criminal justice settings—particularly corrections research. See, e.g., GERALD G. GAES ET AL., MEASURING PRISON PERFORMANCE: GOVERNMENT PRIVATIZATION AND ACCOUNTABILITY 71 (2004).

¹²⁸ Typically, a normal/continuous distribution is assumed, and search strongly suggests that results are usually robust to violations of this assumption; nonetheless, more flexible distributions (both parametric and semi-parametric) departures from but other probability distributions are available. ANDERS SKRONDAL & SOPHIA RABE-HESKETH, GENERALIZED LATENT VARIABLE MODELING: MULTILEVEL, LONGITUDINAL, AND STRUCTURAL EQUATION MODELING 113–17 (Chapman & Hall 2004). I examined the robustness of the findings using alternative distributions and obtained similar results for the jurisdiction-level effects.

level explanatory variables and jurisdiction-level variability;¹²⁹ (2) measuring the true/general effect of case-level explanatory variables by combining both within- and between-jurisdiction effects of those variables;¹³⁰ (3) providing sensible calculations of effects for individual jurisdictions that are much less sensitive to random fluctuations in the data through “shrinking” those particular jurisdictional effects towards the typical jurisdiction;¹³¹ and (4) permitting direct inferences about the variability of the between-jurisdiction effect by specifying a model for the distribution of that effect.¹³²

A key advantage of explicitly modeling between-jurisdiction effects, rather than attempting to naively estimate the effect from the data using fixed-effects when data are unsuitable for such estimation, is the ability to comparatively rank the “institutional performance” of the jurisdictions.¹³³ As explained

¹²⁹ In MLM, it is acceptable to have one case in a significant portion of the jurisdictions. When jurisdictions have few observations, their jurisdiction-specific effects will not be estimated with much accuracy, but the circuits still provide information that allows estimation of the coefficients and variance parameters of the case- and circuit-level regressions. ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 276 (2007).

¹³⁰ MLMs offer a compromise between within- and between-jurisdiction effects (called *partial pooling*). The effect of case-level factor is neither purely a between-jurisdiction effect (because the case-level factor can vary across cases within jurisdictions) nor purely within-circuit effects (because the case-level factor may be constant across cases within a particular circuit). *Id.* at 476–77. The variance of the parameter estimate will also be impacted by the weighting because the uncertainty around the effect of any particular variable related to the (dis)similarity of the jurisdictions. *Id.*

The proper measurement of the effects of case-level explanatory variables is not only important in its own right, but also key to examining arbitrariness because the analytical models must adequately take into account the effects of legally relevant variables on death-noticing behavior.

¹³¹ The jurisdiction-level intercepts (i.e., average probabilities of death noticing given explanatory variables) are precision-weighted, taking into account the reliability of the jurisdiction-level effect. In practice, this means estimates from “rogue” jurisdiction (i.e., the number of cases in a jurisdiction is small or the within-jurisdiction variance is large relative to the between-jurisdiction variance) are pulled or “shrunk” towards the statewide intercept, thereby bringing estimates from the rogue jurisdictions closer to the more stable pooled estimate. GELMAN & HILL, *supra* note 129, at 476.

¹³² *Id.* at 448.

¹³³ SOPHIA RABE-HESKETH & ANDERS SKRONDAL, MULTILEVEL AND LONGITUDINAL MODELING USING STATA: CONTINUOUS RESPONSES 50 (3d ed. 2012) (noting that MLMs have been frequently employed in education research

earlier, this assessment is possible because MLM provides the proper framework linking jurisdiction-level processes to individual-level outcomes without incorrectly assuming that individual and jurisdiction-level processes are fungible. For the purpose of this article, this approach permits an assessment of the level of potential arbitrariness in the death noticing process. Jurisdictions—i.e., *judicial circuits* in Georgia—characterized by large deviations in death noticing behavior, relative to the statewide baseline, for similarly situated defendants may be interpreted as being unjustifiably idiosyncratic given existing constitutional constraints on the capital charging-and-sentencing process.¹³⁴

MLMs can be mathematically described in alternative, but equivalent, ways. For this project, I adopt the formulation popularized by Raudenbush and Bryk,¹³⁵ which is helpful for interpreting and specifying the hierarchical structure of the model. The model can be written in two parts: a Level 1 and Level 2 model. The Level 1 model is, essentially, a series of regressions for each Level 2 unit (e.g., judicial circuit). The unit of analysis is the death-eligible murder case and the sample size for each regression is number of death-eligible cases for each particular judicial circuit. This model captures variability in death noticing among cases within the judicial circuit. Formally, the Level 1 model can be written as: $\Pr(y_{ij} = 1) = g^{-1}(\beta_{0j} + \beta_k X_{kij} + \epsilon_{ij})$, where the subscripts i and j index the i th defendant and j th judicial circuit, respectively, y_{ij} is a binary outcome indicating “1” if the defendant is noticed for the death penalty and “0” if otherwise, $\Pr(y_{ij} = 1)$ is the probability that the defendant i th in circuit j th is noticed for the death penalty, β_{0j} (*beta*) is the circuit-level probability that a defendant is noticed for the death penalty (conditional on all explanatory variables being equal to zero), X_k

to examine the “value added” by the school (or teacher) for the “typical” student).

¹³⁴ “By learning and employing multilevel techniques to provide actionable information based on an institutional perspective, analysts can position themselves as key partners in organizational dialogue and decision making.” Ann A. O’Connell & Sandra J. Reed, *Hierarchical Data Structures, Institutional Research, and Multilevel Modeling*, in *NEW DIRECTIONS IN INST. RES.* 5, 7 (Joe L. Lott, II, James S. Antony, eds., 2012).

¹³⁵ STEPHEN W. RAUDENBUSH & ANTHONY S. BRYK, *HIERARCHICAL LINEAR MODELS: APPLICATIONS AND DATA ANALYSIS METHODS* (2002).

are k explanatory variables with β regression coefficients, and ϵ_{ij} (*epsilon*) are Level 1 errors (case-level the deviation from the expected probability for the i th defendant in the j th judicial circuit).¹³⁶ In order to meaningfully interpret β_{0j} , explanatory variables, X_k , are centered at their overall (i.e., statewide) average values, $\bar{X}_k = 0$, so the intercept is the probability of a “typical” case in Georgia receiving the death notice in the j th circuit.¹³⁷

For the Level 2 model, the unit of analysis is the judicial circuit, not the individual death-eligible cases, and the outcome variable is the circuit-specific probability (β_{0j}). Formally, the Level 2 model is: $\beta_{0j} = \gamma_{00} + \zeta_{0j}$, where β_{0j} is the same as described above, γ_{00} is the probability of a death notice for the typical circuit (i.e., the statewide average across circuits, not cases), and ζ_{0j} (*zeta*) is a circuit-specific deviation from the statewide average.¹³⁸ This Level 2 model is sometimes referred to as a “intercepts as outcomes” or “means as outcomes” model.¹³⁹

¹³⁶ Here $g^{-1}(\cdot)$ is the *inverse link function* (also called the logistic function), so $\Pr(y_{ij} = 1) = \frac{\exp(\beta_{0j} + \beta_k X_{kij} + \epsilon_{ij})}{1 + \exp(\beta_{0j} + \beta_k X_{kij} + \epsilon_{ij})}$. Technically speaking, there is no Level 1 residual error (ϵ_{ij}) in this mathematical expression, but ϵ_{ij} appears in another equivalent formulation: $y_{ij}^* = \beta_{0j} + \beta_k X_{kij} + \epsilon_{ij}$, where y_{ij}^* represents the propensity to notice a case for the death penalty, such that $y_{ij} = 1$ if $y_{ij}^* > 0$ and $y_{ij} = 0$ if $y_{ij}^* \leq 0$. The equivalence of the two equations can be shown: $\Pr(y_{ij} = 1) = \Pr(\beta_{0j} + \beta_k X_{kij} + \epsilon_{ij} > 0)$. Nevertheless, I include ϵ_{ij} in the prior equation in order to make the interpretation of the regression coefficients more intuitive and relationship of the variance components more apparent in the MLM framework.

¹³⁷ As an alternative to explanatory variables centered at the average values for all of the judicial circuits combined (called “grand-mean” centering), one can center explanatory variables at their average circuit levels (called “group-mean” centering). Now the interpretation of the intercept becomes the probability that the “typical” case in the j th judicial circuit (not the entire state) receives a death notice.

¹³⁸ The ζ ’s are not model parameters, but are quantities of interest predicted from the estimated parameters (the β ’s and ψ) which are treated as known. The ζ ’s can be used to compare the various circuits in terms of their punitiveness (or leniency) with respect to death noticing behavior because ζ ’s are residual deviations—that is, they measure the circuit deviation for factually similar cases.

¹³⁹ The Level 2 model cannot be estimated on its own because the random intercept, β_{0j} , is not observed. Instead, the Level 2 model must be substituted in the Level 1 model to obtain a reduced form model for the observed responses: $y_{ij}^* = \gamma_{00} + \zeta_{0j} + \beta_k X_{kij} + \epsilon_{ij}$, where $(\gamma_{00} + \zeta_{0j}) = \beta_{0j}$.

It should be emphasized that MLM accomplishes more than simply providing a means of assessing the independent contributions of compositional

The total variance of the random intercept, $Var(\beta_{0j}) = Var(\zeta_{0j}) + Var(\epsilon_{ij}) = \psi + \theta$, where ψ (*psi*) is the between-circuit variance, $Var(\zeta_j)$, and θ (*theta*) is the within-circuit variance, $Var(\epsilon_{ij})$.¹⁴⁰ When case-level explanatory variables, X_k , are included in the model ψ and θ are *residual variances*—i.e., variability left unexplained after taking into account the explanatory variables. Under the assumption that the key legal features of the death noticing process have been included in the model (see Table 1) or have been proxied by other variables included in the model, these two variance components can be used to measure the level of arbitrariness in death noticing decision-making.

and contextual effects because MLM also provides a way of showing how, and for which types of cases, contextual effects matter. The effect of a particular case-level factor, such as race/ethnicity or sex, may be stronger (or weaker) in one jurisdiction compared to another, and circuit-level characteristics are likely to account for the magnitude of these effects. I examine variation in the effect of case-level factors on death noticing elsewhere, see Sherod Thaxton, *Disciplining Death*, 49 ARIZ. ST. L.J. ____ (forthcoming 2017).

¹⁴⁰ For the logistic regression model, θ has a fixed variance that is specified, *a priori*, by the logistic distribution: $\theta = \frac{\pi^2}{3} \approx 3.29$. The use of a linear probability model (LPM), which treats a binary outcome variable as continuous, to examine clustered data will give misleading results because θ will be incorrectly estimated from the data, and therefore inferences based on those statistics (e.g., circuit-level effect) will be unreliable.

The LPM suffers from two additional limitations that makes it ill-suited for the current project. First, the LPM assumes that the relationship between the explanatory variables and the binary outcome variable is linear, which is an unrealistic assumption for this project because the explanatory variables attempt to index a defendant's culpability level. For example, it is improbable that the impact of an increase in the number of victims in a homicide case on the probability that a defendant receives the death penalty is the same when the number increases from one to two as it would be from five to six. The logistic regression model explicitly takes this nonlinearity into account to properly estimate the relationships between explanatory variables and the probability of receiving a death notice. Second, with respect to forecasting probabilities—i.e., predicting the likelihood of the death penalty for cases, particular cases not included in the estimation sample—the LPM is much more likely give probabilities that are less than “0” and greater than “1”. These out-of-range predictions are caused, in part, by the erroneous assumption of a linear relationship between the explanatory variables and the binary outcome variable. Although it is possible to round the predictions up or down to obtain probabilities bounded at zero and one, the out-of-range predictions are strong evidence that data do not meet the assumptions of the model.

As noted above, a key feature of MLM is the ability to calculate a measure of the (in)consistency in outcomes from observations nested in circuits. One such measure, the intra-class correlation (ICC), captures the (in)stability of in death noticing decisions. Specifically, this statistic represents dependence among the death-noticing outcomes in the same circuit (i.e., within-circuit dependence), conditional on the explanatory variables, and can be thought of “as an estimate of the extent to which rat[ings] are interchangeable—that is, the extent to which one rat[ing] from a group may represent all the rat[ings] within the group.”¹⁴¹ Formally, $ICC = (\psi/\psi + \theta)$, where ψ and θ are the same as described above. The statistic is the proportion of the total residual variability in death noticing that is attributable to between-circuit processes. Within-circuit similarity or consistency will be especially apparent when a large proportion of the total residual variability in death noticing behavior is between-circuit. When the ICC is large, a death-noticing decision from single case from a circuit is likely to represent other factually similar cases in the circuit, therefore one can infer a strong dependency (i.e., consistency) across cases within the circuit.¹⁴² On the other hand, when the ICC is small, charging decisions for individual cases can be viewed as inconsistent (or independent). At this point it should be apparent that both within-circuit dependence and between-circuit heterogeneity are different ways of describing the same phenomenon. Both are zero when there is no between-circuit variance ($\psi = 0$) and both increase when the between-circuit variance increases relative to the within-circuit variance. The ICC ranges from 0 to 1. Although there are no hard and fast rules for interpreting the ICC, a general rule of thumb is an ICC value above

¹⁴¹ Katherine J. Klein and Steve W.J. Kozlowski, *From Micro to Meso: Critical Steps in Conceptualizing and Conducting Multilevel Research*, 3 ORG. RES. METHODS 211, 224 (2000).

¹⁴² GELMAN AND HILL, *supra* note 129, at 258.

0.7 is indicative of a very reliable system.¹⁴³ Alternatively, an ICC below 0.4 is indicative a very poor reliability.¹⁴⁴

VI. RESULTS

A. Arbitrariness/Inconsistency.

The first step in understanding the level of arbitrariness in death penalty decision-making is the calculation of a baseline measure of variability death noticing behavior in order to get a sense of how much is attributable to within- and between-circuit dynamics. This baseline measure is obtained by estimating the ICC for an “empty model” that does not include any explanatory variables. The measure is referred to as the *unconditional* ICC and simply describes the degree of dependence of death noticing within judicial circuits. The ICC for the empty model is .14, which indicates low reliability in charging within circuits. The conditional model that includes 35 case-level predictors results an ICC of 0.18, suggesting very low reliability in charging behavior for cases that are factually similar within the same judicial circuit. The ICC increased by a very modest .04 after adding a host of key explanatory variables to the model.¹⁴⁵ This is particularly noteworthy because *Furman* and its progeny emphasized the importance of both consistency and rationality in death penalty decision-making. The very slight improvement in the consistency of death noticing practices within circuits after taking into account these legally relevant case characteristics strongly suggests that the Georgia’s existing capital statute has done very little to constrain prosecutorial discretion.

¹⁴³ Charles E. Lance, Marcus Butts & Lawrence C. Michels, *The Sources of Four Commonly Reported Cutoff Criteria What Did They Really Say?*, 9 ORG. RES. METHODS 202, 205 (2006). Cicchetti suggests the following thresholds for the ICC: less than .40 (poor); between .40 and .59 (fair); between 0.60 and 0.74 (good); above .75 (excellent). Domenic V. Cicchetti, *Guidelines, Criteria, and Rules of Thumb for Evaluating Normed and Standardized Assessment Instruments in Psychology*, 6 PSYCHOL. ASSESSMENT 284 (1994).

¹⁴⁴ Generally speaking, the use of MLM is warranted whenever the ICC of above .05.

¹⁴⁵ See *infra* Table 1 for list of variables included in the case-level regression model.

B. Institutional Performance

The ICC is an extremely useful statistic for understanding inconsistency in capital charging decisions within and across circuits, but it does not provide information on specific circuits. Recall that an important feature of the MLM framework is the ability to assess institutional performance.¹⁴⁶ Specifically, MLM permits the calculation of sensible values for the jurisdiction-specific residual error terms, thereby facilitating a meaningful ranking of the jurisdiction-level effect relative to other jurisdictions. By way of example, in education research, where student performance is often the outcome variable, school-specific effects obtained from MLM are interpreted as the “value added” by the school for the “typical” student in the school district.¹⁴⁷ With respect to the capital punishment process, circuit-specific effects can be defined as the jurisdiction’s degree of punitiveness (or leniency) relative to the other circuits. In other words, circuits engaging in death noticing behavior exhibiting a substantial deviation from the typical circuit, even after taking into account a host of legally relevant explanatory variables established through statutes and legal precedent, are likely to be deemed as unjustifiably idiosyncratic.

The comparative performance of judicial circuits for the typical case in Georgia can be depicted graphically to provide a more intuitive presentation of the results. Figures 1 and 2 reveal that cases that are factually similar along several key dimensions included in the model, including the overall level of aggravation according to Georgia’s capital statute and important mitigating evidence, are processed very differently across Georgia’s judicial circuits.¹⁴⁸ That is, these two figures display inter-circuit differences in the probability that a death-eligible homicide will be charged capitally. Figure 1 depicts the information spatially on a map of Georgia. The legend located to the left of the map displays a color grid (in grayscale) corresponding to the magnitude of the probability of receiving a death notice for each circuit. The black horizontal line in Figure 2 represents the statewide probability of a death-eligible defendant receiving a death notice (.33) and the

¹⁴⁶ See RABE-HESKETH & SKRONDAL, *supra* note 133.

¹⁴⁷ RABE-HESKETH & ANDERS SKRONDAL, *supra* note 133, at 50; accord RAUDENBUSH & BRYK, *supra* note 135.

¹⁴⁸ See *supra* Part V.A for a discussion of variables included in the model.

black circles denote the probability of a death notice for each judicial circuit.¹⁴⁹ The name of the specific circuit is listed along the horizontal axis. The probability of a death-eligible defendant receiving a death notice ranges from approximately .12 (Atlanta Circuit) to .59 (Ocmulgee Circuit). The mean absolute deviation (MAD)—the average difference of the circuit-level probabilities from the state-wide probability for the model—is 8%.¹⁵⁰ The MAD assesses how different, on average, the circuits are from the statewide average. In other words, the “typical” circuit death-noticing probability differs from the statewide probability by 8 percentage points—the Ocumglee Circuit is 26 percent points above statewide average, whereas the Atlanta Circuit is 21 percent points below the statewide average.¹⁵¹

Perhaps a more useful metric institutional performance are predictions of the expected number of death notices filed across the state if the charging behavior of the entire state resembled the charging behavior of particular circuits. As described, *supra*, prosecutors from some judicial circuits are significantly more likely to seek the death penalty in a typical case than prosecutors from other circuits. These judicial circuits can be ranked and then organized into percentiles. Griffin, Northeastern, and Cobb Circuits represent, respectively, the 95th, 50th, and 5th percentiles of the distribution of circuits (see Table 3). The actual number of death notices filed in Georgia during the time period under investigation was 400.¹⁵² If prosecutors across the entire state were as aggressive in seeking the death penalty as prosecutors in Griffin Circuit (95th percentile), then one would expect 681 death notices during the same time period—an increase of approximately 70%. At the 50th percentile (Northeastern Circuit), the expected number

¹⁴⁹ Because this is the statewide probability of a death notice, based on all of the death-eligible cases in the state during the time period, this is the probability that the “average” case receives a death notice.

¹⁵⁰ The MAD is an estimate of the spread of ratings and is calculated by subtracting the mean of a distribution of ratings from each of the absolute values of the ratings and then taking the mean of the resulting scores. $\sum |\pi_j - \mu|/J$, where π_j is the circuit-level predicted probability of a death notice, μ is the statewide predicted probability, and J is the total number of circuits. DICTIONARY OF STATISTICS & METHODOLOGY: A NONTECHNICAL GUIDE FOR THE SOCIAL SCIENCES 89 (W. Paul Vogt ed., 2005).

¹⁵¹ The median absolute deviation—which is more resistant to extreme circuit values—for models is 7%.

¹⁵² See *supra* Part V.A.

of death notices would be 413—very close to the 400 death notices actually filed during across the state. When statewide charging dynamics mirror Cobb Circuit, which represented the 5th percentile, only 274 death notices are expected to be filed—a decrease of approximately 30%. Again, it must be emphasized that these predictions are based on cases that are factually similar both with respect to defendant and crime characteristics along the variables described in Table 1. These results strongly suggest that some circuits are extremely idiosyncratic in their death noticing behavior and the unreliability/inconsistency in capital charging associated with legally irrelevant geographic differences emphasized by Justice Brennan in *Gregg* and *Pulley* remain significant obstacles to the fair administration of the death penalty in the post-*Furman* era.

VII. CONCLUSION

In the quarter-century since the U.S. Government Accountability Office commissioned a study to evaluate the constitutionality of the operation of post-*Furman* capital punishment regimes, only two studies have failed to uncover evidence of arbitrariness and bias.¹⁵³ These persistent problems in the administration of the death penalty are attributable, in large part, to broadly written capital statutes that fail to sufficiently narrow the class of death eligible defendants and place tremendous power in the hands of prosecutors.¹⁵⁴ Critics of these post-*Furman* statutes were well aware that rigorous judicial review of charging, sentencing, and clemency decisions was absolutely essential to the rational and even-handed functioning of death penalty systems. The majority opinions in *Gregg* and *Pulley* interpreting the requirements established by, respectively, *Furman* and *Gregg*, removed much of the regulatory force of *Furman* and has recently led the American Law Institute—the initial architects of the statute at issue in *Gregg*—to disavow that very framework. Post-*Furman* death penalty systems must take seriously the constitutional mandates established in *Furman*. To date, the Court has all but

¹⁵³ See *supra* Introduction, text accompanying notes 7-10.

¹⁵⁴ See, e.g., Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 25 (2006).

abdicated its responsibility for ensuring that the death penalty “be imposed fairly, and with reasonable consistency, or not at all.”¹⁵⁵

¹⁵⁵ *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1981); *accord Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

Table 1: Summary Statistics

Variables	Mean/ Proportion	Std. Dev.	Min	Max
DP Notice	0.322	0.468	0	1
Total Aggs	2.276	1.091	1	7
1993	0.091	0.288	0	1
1994	0.127	0.334	0	1
1995	0.159	0.366	0	1
1996	0.133	0.340	0	1
1997	0.144	0.351	0	1
1998	0.110	0.313	0	1
1999	0.104	0.305	0	1
2000	0.132	0.339	0	1
# of Defs	1.793	1.109	1	7
Def White	0.248	0.432	0	1
Def Black	0.728	0.445	0	1
Def Latino	0.018	0.136	0	1
Def Male	0.946	0.226	0	1
Def Age	27.15	9.935	17	69
Def Contemp Fels	1.724	1.602	0	9
Def Prior Fels	0.514	1.332	0	10
Def # of Children	0.583	0.493	0	1
Def Employed	0.562	0.496	0	1
Def Married	0.179	0.383	0	1
Def HS Grad	0.262	0.440	0	1
Def Fam History ¹⁵⁶	1.451	1.254	0	5
Def WRAT ¹⁵⁷	7.619	2.801	1	13
Def IQ	100.341	14.798	50	151
Def Psych Status ¹⁵⁸	1.198	0.478	1	4
Firearm Homicide	0.649	0.477	0	1
# of Vics	1.185	0.504	1	6
Vic White	0.442	0.497	0	1
Vic Black	0.504	0.500	0	1
Vic Latino	0.032	0.178	0	1
Vic Female	0.360	0.480	0	1
Vic Age	36.72	18.20	0	99
Vic Stranger	0.350	0.477	0	1
Interracial Crime	0.283	0.451	0	1
Total Cases	1,238			

¹⁵⁶ This is a summary measure of how many risk factors for criminality were present in the defendant's family environment during childhood (alcohol/drug abuse, emotional/psychological abuse, physical abuse, family criminality, "broken home").

¹⁵⁷ Wide Range Achievement Test (reading, math, and spelling).

¹⁵⁸ Defendant's psychiatric status (no impairment, minimal, serious, severe).

Table 2: Death Notices by Judicial Circuit (1993-2000)

Judicial Circuit	Death Notices	Percent of Total Death Notices
Alapaha	3	0.8
Alcovy	6	1.5
Appalachian	1	0.3
Atlanta	21	5.3
Atlantic	11	2.8
Augusta	29	7.2
Blue Ridge	3	0.8
Brunswick	16	4.0
Chattahoochee	16	4.0
Cherokee	9	2.3
Clayton	19	4.8
Cobb	11	2.8
Conasauga	1	0.3
Cordele	3	0.8
Coweta	6	1.5
Dougherty	7	1.8
Douglas	3	0.8
Dublin	1	0.3
Eastern	10	2.5
Flint	9	2.3
Griffin	17	4.3
Gwinnett	13	3.3
Houston	2	0.5
Lookout Mountain	3	0.8
Macon	8	2.0
Middle	8	2.0
Mountain	2	0.5
Northeastern	11	2.8
Northern	9	2.3
Ocmulgee	26	6.5
Oconee	2	0.5
Ogeechee	10	2.5
Pataula	3	0.8
Paulding	5	1.3
Rockdale	4	1.0
Rome	5	1.3
South Georgia	2	0.5
Southern	12	3.0
Southwestern	4	1.0
Stone Mountain	25	6.3
Tallapoosa	6	1.5
Tifton	8	2.0
Waycross	12	3.0
Western	18	4.5
<i>Total Death Notices: 400</i>		
<i>Percent of all judicial circuits filing a death notice: 96%</i>		

Table 3: Regional (In)Consistency: Model-Based Predictions

Predicted number of death notices filed against defendants if the statewide charging practices were similar to:
• Cobb Circuit (5 th percentile): 274
• Northeastern Circuit (50 th percentile): 413
• Griffin Circuit (95 th percentile): 681

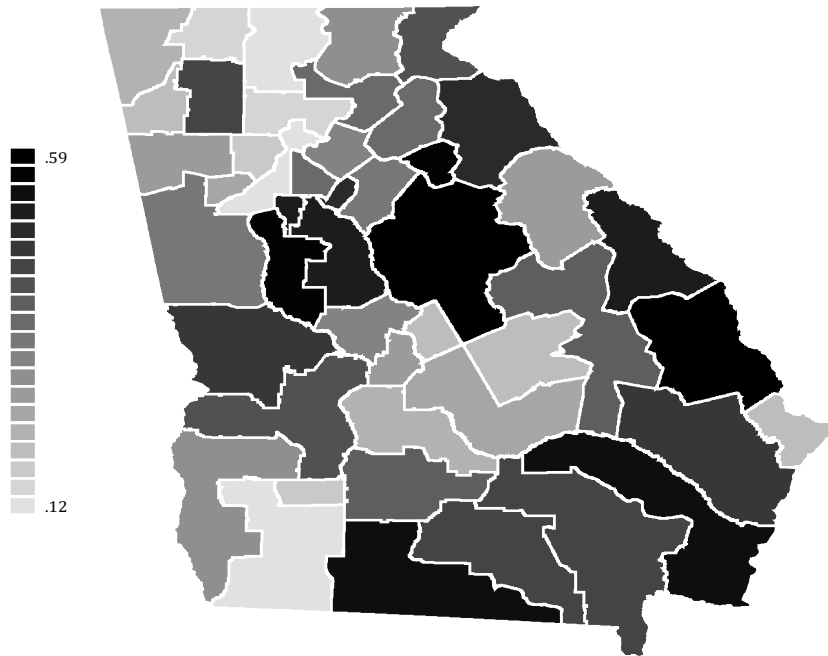


Figure 1: Probability of a Factually Similar Case Receiving a Death Notice Across Georgia's Judicial Circuits

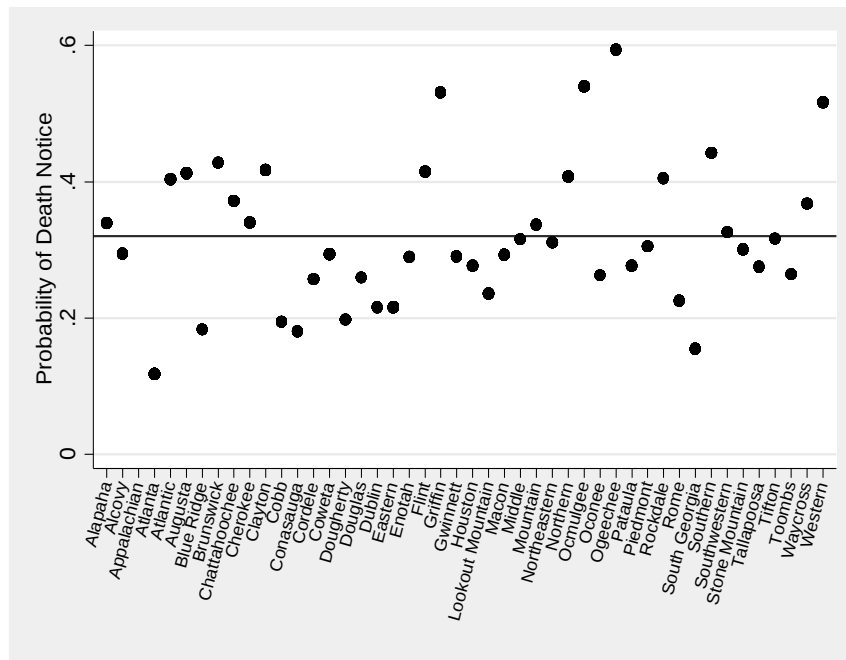


Figure 2: Probability of a Factually Similar Case Receiving a Death Notice Across Georgia's Judicial Circuits