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A PROMISE UNFULFILLED: CHALLENGES TO GEORGIA'S DEATH PENALTY STATUTE POST- *FURMAN*

William Cody Newsome*

INTRODUCTION

William Henry Furman was twenty-nine years old when he was convicted for the murder of William Joseph Micke, Jr., on September 20, 1968.¹ After a trial lasting a single day, the jury returned a guilty verdict along with a death sentence.² The only evidence presented to the jury was a conflicting account of the events,³ and Furman's age and race.⁴ On appeal, Furman's counsel argued Georgia law created an arbitrary death penalty because it failed to distinguish the present crime "from thousands of others for which the death penalty is not inflicted."⁵

In *Furman v. Georgia*,⁶ the U.S. Supreme Court agreed with Furman's counsel.⁷ Three Justices agreed that Georgia law, as applied, was arbitrary and potentially discriminatory.⁸ Moreover, one

*J.D. Candidate, 2017, Georgia State University College of Law. I would like to thank every member of the GSU Law Review for their time and effort spent editing this Note. In life, we are lucky to have one person on which we can truly depend, but God has blessed me with a large and loving family. To my family: I wish I could thank you in the manner you deserve, but I can't. All I can say is that I will be eternally grateful to Him and to you for pushing me to be a better man and giving me a model to live by.

1. Brief for Petitioner at 2-3, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 71-5003).

2. *Id.*

3. *Id.* at 5-6. A detective, who questioned Furman after the arrest, testified that Furman said he fired a shot as he was fleeing the house. *Id.* Furman denied making this statement. *Id.* Instead, Furman claimed the gun accidentally discharged when he tripped as he fled from the house. *Id.*

4. Brief for Petitioner, *supra* note 1, at 12. The jury was not given information on Furman's mental capacity. *Id.* Only weeks after the alleged murder, Furman was institutionalized at the Georgia Central State Hospital in Milledgeville, Georgia. *Id.* at 9. Months before the trial, the Superintendent of the Hospital reported mental deficiency with psychotic episodes that would inhibit his ability to assist his defense counsel at trial. *Id.* Moreover, evidence that Furman had only earned a sixth grade level of education was also not admitted. *Id.* at 10 n. 9.

5. Brief for Petitioner *supra* note 1, at 11-12.

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

7. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

8. *Furman*, 408 U.S. at 255 (Douglas, J., concurring) ("[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied . . ."); *id.* at 309

Justice challenged the value of the death penalty and doubted it served any of the alleged purposes for which it was employed.⁹ The challenges of five Justices in *Furman* opened the floodgates for additional legal challenges to the death penalty.

Since *Furman*, the Court has ruled on various legal procedures involved in the process of execution.¹⁰ Each challenge illustrates the Court's evolving understanding of "cruel and unusual punishment,"¹¹ and what that means for the viability of the death penalty in America. With each new standard the Court imposes, the marginal benefits of imposing the death penalty are diminished.¹² Faced with the challenges of imposing the death penalty, nineteen states and the

(Stewart, J., concurring) ("In the first place, it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." (citations omitted)); *id.* at 313 (White, J., concurring) ("I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion . . . is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

9. *Furman*, 408 U.S. at 342–58 (Marshall, J., concurring); see *infra* note 66 and accompanying text.

10. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding a statute unconstitutional that authorized the death penalty for aggravated rape of a child without a resulting death); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding "a sentencing judge, sitting without a jury," violates the sixth amendment when the judge finds the "aggravating circumstances necessary for imposition of the death penalty"); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (concluding the eighth amendment does not preclude the execution of mentally retarded individuals), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,'" the court held the death penalty is excessive for a mentally retarded offender); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) ("[T]he Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."); *McCleskey v. Kemp*, 481 U.S. 279, 29–93 (1987) (holding that a greater number of executions of black-on-white murderers versus white-on-black murderers does not establish racial discrimination without "discriminatory purpose"); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding the death penalty for rape of an adult woman is "grossly disproportionate and excessive punishment . . . and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment").

11. U.S. CONST. amend. VIII.

12. Ralph Dellapiana, *Should We put the Death Penalty on the Chopping Block?*, 22 UTAH BAR J. 24, 24 (2009); see *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

District of Columbia have simply abolished the punishment altogether.¹³

Although many challenges subsequent to *Furman* have been raised and arguably resolved by the Court, the underlying challenges raised by *Furman* appear to remain prevalent with the Court. Justice Breyer recently echoed the concurring opinions of *Furman* in his dissenting opinion from *Glossip v. Gross*, when he stated: “In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty’s application. We cannot have both.”¹⁴

This Note will explore both sides of Justice Breyer’s contention in *Glossip*. Part I will establish a brief history of the death penalty in the United States and the constitutional limits imposed by the Supreme Court of the United States.¹⁵ Part I will also discuss *Furman v. Georgia* and establish the constitutional principles that result from that decision.

Part II will analyze Justice Breyer’s contention in *Glossip* by first looking to whether contemporary death penalty systems serve a “penological purpose,”¹⁶ and then whether the systems of Connecticut¹⁷ or Maryland fail to achieve “reliability and fairness in [their respective] application.”¹⁸ Part II will conclude with an additional study conducted in Georgia, which reinforces similar findings in Connecticut and Maryland regarding their respective issues with the death penalty.¹⁹ Finally, Part III will examine whether Georgia can improve its death penalty system and what steps it should take to eliminate the issues articulated in *Furman*.²⁰

13. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last modified July 1, 2015).

14. *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting).

15. See discussion *infra* Part I.B–C.

16. *Glossip*, 135 S. Ct. at 2772 (Breyer, J., dissenting); see discussion *infra* Part II.A.

17. See discussion *infra* Part II.B.

18. *Glossip*, 135 S. Ct. at 2772 (Breyer, J., dissenting); see discussion *infra* Part II.C.

19. See discussion *infra* Part II.D.

20. See discussion *infra* Part III.

I. BACKGROUND

The death penalty has developed as a result of general reforms,²¹ but more importantly through federal interpretations of common and constitutional law.²²

A. Federal Interpretations of Common and Constitutional Law

Due to death penalty system reforms, the punishment was in a relative state of flux between 1900 and 1960 in the United States.²³ However, the Supreme Court attempted to combat that flux by shaping the developments of modern death penalty laws through the lens of common law and the Fifth,²⁴ Eighth,²⁵ and Fourteenth Amendments to the Constitution.²⁶

21. Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 586–87 (2008). The reforms included:

“(1) the use of more humane methods of execution, (2) the prohibition of public executions to protect the public from exposure to the death penalty, (3) the development of ‘degrees’ of murder where only the highest degree of murder received the death penalty, and (4) the use of jury discretion to choose the death penalty instead of the mandatory sentence of death.”

Id. These reforms reflected the evolving standards of society, allowing it to remain prevalent in the United States. *Id.* at 586.

22. *See* discussion *infra* Part I.A.

23. Millett, *supra* note 21, at 589. Millett noted:

By 1917, twelve states had abolished the death penalty, though ‘under the nervous tension of World War I, four of those States reinstated’ it. By the end of World War II, ‘[t]he manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public’ and, as a result, nothing much happened until many decades later. Between the years 1900 and 1966, an estimated 7226 judicial executions were carried out in the United States. In addition, by the end of the 1960s, forty-one states, the District of Columbia, and the federal government all allowed the death penalty for at least one crime. As late as the 1960s, crimes punishable by the death penalty in at least two states included the following crimes: murder, treason, kidnapping, rape, statutory rape, robbery, bombing, assault with a deadly weapon by a life term prisoner, train wrecking, burglary, arson, perjury in a capital case, espionage, machine gunning, and other particular forms of assault. Notwithstanding, the number of executions began to decline: twenty-one in 1963, fifteen in 1964, seven in 1965, and only three between 1966 and 1967.

Id. at 589–90.

24. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

25. U.S. CONST. amend. VIII (disallowing the infliction of “cruel and unusual punishment”). The fluctuating understanding of the death penalty may be demonstrated with two cases. In *Wilkerson v. Utah*, the Court upheld public shootings as a permissible form of execution because it was a common

First, in *Weems v. United States*,²⁷ the Court established the constitutional requirement for proportionality between the crime and punishment.²⁸ Second, the Court decided *Louisiana ex rel. Francis v. Resweber*,²⁹ where it held that the Constitution prohibited cruelty in the method of execution, not the suffering as a result of being sentenced to death.³⁰ Third, in *Trop v. Dulles*,³¹ the Court stated that its understanding of cruel and unusual punishment develops along with society.³² *Trop* was pivotal in that it established a standard of “decency . . . of a maturing society,”³³ opening the door for the Court to eventually rule the process unconstitutional altogether. These cases largely guided the Court in death penalty cases like *Furman* and beyond.

B. Pre-Furman to Post-Furman

Following *Trop*, six characteristics of the death penalty bearing constitutional significance became evident across numerous death

method used for “soldiers convicted of desertion or other capital military offences . . .” 99 U.S. 130, 135 (1878). “*Wilkerson* seemed to suggest that a severe punishment is not cruel and unusual if it had been commonly performed in the past.” Millett, *supra* note 21, at 591. However, in another late 19th century case, *In Re Kemmler*, the Court approved electrocution as a permissible method of execution even though it was an uncommon practice. 136 U.S. 436, 444 (1890). “*In re Kemmler* seemed to suggest that although an execution method is unusual, or uncommon, it is still constitutional if enacted by the legislature as a more human way to administer the death penalty.” Millett, *supra* note 21, at 591. These two cases demonstrate conflicting rulings in early death penalty analysis.

26. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *see also* Millett, *supra* note 21, at 590–91.

27. *Weems v. United States*, 217 U.S. 349 (1910).

28. *Id.* at 368 (conceding that punishment may be so disproportionate to the offense that such punishment may be cruel and unusual). This case marked an early recognition by the Court that the death penalty should be reserved for the worst offenses in order to maintain proportionality. Proportionality is significant when evaluating the arbitrary imposition of death across cases.

29. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

30. *Id.* at 464 (“Petitioner’s suggestion is that because he once underwent the psychological strain of electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution.”).

31. *Trop v. Dulles*, 356 U.S. 86 (1958).

32. *Id.* at 101.

33. *Id.*

penalty schemes throughout the United States.³⁴ The first characteristic defining the death penalty was the discretion granted to sentencing juries without any standards to ensure consistent results.³⁵ Second, a large number of people became eligible for the death penalty because of the large number of chargeable capital crimes.³⁶ These facts also related to the third characteristic where the number of people sentenced to death and numbers of people actually executed were “remarkably small.”³⁷ The fourth characteristic in many states was the limitation of appellate jurisdiction to “special legal errors,” that did not include the “reasonableness of a death sentence,” in any given case.³⁸ The fifth characteristic commonly prevalent was a “very high proportion of nonwhite defendants sentenced to death.”³⁹ Finally, the sixth characteristic dealt with multiple points of discretion throughout the process of prosecution that lead to the death penalty.⁴⁰ The Supreme Court addressed each of these characteristics in *Furman*.⁴¹

34. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 7–9 (1990).

35. *Id.* at 7–8. The level of discretion granted to juries has been found to be the root of many constitutional issues in contemporary death penalty system face. *See* discussion *infra* Part II.C.2 (discussing jury discretionary issues in Maryland). Moreover, problems in Georgia’s death penalty system have been directly attributed to discretion granted to juries when deciding whether or not to impose death or life in prison. *See* discussion *infra* Part II.D.2.

36. BALDUS, *supra* note 34, at 7.

37. *Id.* at 9.

38. *Id.*

39. *Id.* This disproportionate application of death penalty laws persisted following the *Furman* decision, at least in Maryland and Georgia. *See* discussion *infra* Parts II.C.2, II.D.2.

40. BALDUS, *supra* note 34, at 7. Similar to discretion granted to juries, the process of prosecuting a capital case and the discretion throughout that process is directly attributed to constitutional issues in contemporary death penalty systems. *See* discussion *infra* Parts II.C.2, II.D.2; *see also infra* text accompanying note 174.

41. *See Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 311–12 (White, J., concurring); *id.* at 300 (Brennan, J., concurring); BALDUS, *supra* note 34, at 9, 12. *Furman* was not the Court’s first attempt to address these issues. *See, e.g., McGautha v. California*, 402 U.S. 183, 203–20 (1971). In *McGautha*, California’s death penalty was challenged because it did not provide juries with standards to impose the punishment. *Id.* at 185. Ultimately, the Court held such standards were unnecessary because the states were entitled to assume jurors would responsibly impose the sentence given its’ consequences. *Id.* at 208. The Court’s reasoning was based in “a strong deference to the independent sovereignty of the states and the principles of federalism.” BALDUS, *supra* note 34, at 11. *McGautha* was effectively overruled by *Furman*. *Furman*, 408 U.S. at 400.

1. *Furman v. Georgia*

The Court in *Furman* issued a single paragraph per curiam opinion invalidating the death penalty laws of Georgia and Texas.⁴² Unfortunately, each Justice wrote his own concurring or dissenting opinion, leaving little clear guidance for future courts. Three of the Justices agreed that *as applied*⁴³ the death penalty was unconstitutional in the United States.⁴⁴ However, two Justices challenged the assumption of the death penalty's constitutionality and for the first time ruled that it is unconstitutional as cruel and unusual punishment.⁴⁵ The four dissenting Justices relied on principles of federalism when upholding the laws of Georgia and Texas.⁴⁶

As applied, Justice Douglas found that the death penalty impermissibly targeted poor, black Americans unequally,⁴⁷ and thus, violated the Fourteenth Amendment's equal protection guarantee.⁴⁸ Justice Stewart implicitly rejected the federalism argument, finding jury discretion without standards violated the Eighth Amendment because there was no way to distinguish the "capriciously selected

42. *Furman*, 408 U.S. at 239–40. A per curiam opinion is defined as “[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.” *Per Curiam Opinion*, BLACK’S LAW DICTIONARY (10th ed. 2014). Per curiam opinions are significant because they, “by their very nature, obscure the author of an opinion.” Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1212 (2012). In *Furman v. Georgia*, where there is a five-person majority, it is impossible to know which Justice’s reasoning should apply to future cases without knowing the author of the Court’s opinion. *Id.*

43. As-applied challenges occur when litigants “raise a constitutional objection to a statute . . . assert[ing] that the statute’s application to [their specific] case violates the Constitution.” Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327 (2000) (emphasis omitted). As a result, the Court may “engage in reasoning that marks the statute as unenforceable in its totality.” *Id.* at 1327–28.

44. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

45. *Id.* at 305 (Brennan, J., concurring); *id.* at 359–60 (Marshall, J., concurring).

46. *Id.* at 418 (Burger, C.J., Blackmun, J., Powell, J., Rehnquist, J., dissenting).

47. *See Furman*, 408 U.S. at 255 (Douglas, J., concurring).

In a Nation committed to equal protection of the laws there is no permissible ‘caste’ aspect of law enforcement. Yet we know that the discretion of the judges and juries . . . enables the penalty to be selectively applied, feeding prejudices against the . . . poor and despised, and . . . member[s] of a suspect or unpopular minority

Id.

48. U.S. CONST. amend. XIV, § 1; BALDUS, *supra* note 34, at 12.

random handful,” chosen to die from those that were not.⁴⁹ Justice White viewed the death penalty as constitutional only if it advanced some penological purpose.⁵⁰ However, he found that the death penalty as applied did not serve such a purpose because of three reasons: (1) the extreme infrequency of use, (2) the alternative of lengthy incarceration, and (3) the impossibility of determining why some defendants were sentenced to death while others, convicted of the same crimes, were not.⁵¹

Justice Brennan and Justice Marshall concluded the death penalty was unconstitutional in any circumstance.⁵² Justice Brennan further concluded current laws created the potential for degradation of human dignity,⁵³ relying on four principles to evaluate the level of degradation the punishment created.⁵⁴ Following Justice Brennan’s lead, Justice Marshall echoed the four principles and evaluated six purposes the death penalty allegedly served.⁵⁵ Justice Marshall considered: (1) retribution, (2) deterrence, (3) prevention of recidivism, (4) encouragement of confessions and guilty pleas, (5) eugenics, and (6) economic reasons.⁵⁶ He then rejected each of these purposes as illegitimate to retain the death penalty.⁵⁷

49. See *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring); see also BALDUS, *supra* note 34, at 12.

50. See *Furman*, 408 U.S. at 311–12 (White, J., concurring); see also BALDUS, *supra* note 34, at 12. Such purposes include: “incapacitation, general deterrence, or . . . retribution.” *Id.*

51. See *Furman*, 408 U.S. at 311–12 (White, J., concurring); see also BALDUS, *supra* note 34, at 12. Each of these three problems pointed out by Justice White arguably persist in the contemporary death penalty system operating in Georgia. See discussion *infra* Part II.D.1–2.

52. *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 359 (Marshall, J., concurring). See also BALDUS, *supra* note 34, at 12.

53. *Furman*, 408 U.S. at 306 (Brennan, J., concurring); see also Millett, *supra* note 21, at 593.

54. *Furman*, 408 U.S. at 282 (Brennan, J., concurring) (“The test, then, will ordinarily be a cumulative one: if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment . . .”).

55. *Id.* at 342 (Marshall, J., concurring). See also Millett, *supra* note 21, at 593.

56. *Furman*, 408 U.S. at 342 (Marshall, J., concurring). See also Millett, *supra* note 21, at 593–94.

57. *Furman*, 408 U.S. at 342–60 (Marshall, J., concurring). Marshall rejected retribution because scholars had rejected it and “[t]he history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.” *Id.* at 342–45. He further rejected deterrence because numerous studies had been concluded there is no deterring effect and “that capital punishment is not necessary as a deterrent to crime in our society.” *Id.* at 353. Marshall rejected prevention of recidivism because “[f]or the most part, [defendants] are first offenders, and when released from prison they are known to become model citizens.” *Id.* at 355. He rejected the argument for encouragement for guilty

A majority of the Justices did agree, however, “death-sentencing systems operated in an essentially arbitrary and discriminatory fashion.”⁵⁸ As a result of the five concurring opinions issued by the Justices, the Court invalidated forty-two death penalty statutes as unconstitutional,⁵⁹ leaving the states with few options.

2. *Post-Furman*

Following *Furman*, seven states did not try to rewrite their statutes;⁶⁰ ten states rewrote their statutes imposing mandatory sentences for capital crimes;⁶¹ and twenty-five states rewrote their statutes around the issues raised in *Furman*.⁶² The statutes of the ten states that imposed mandatory sentences were almost immediately challenged and ruled unconstitutional in *Woodson v. North Carolina*.⁶³

On the same day of *Woodson*, the Court issued the plurality opinion of *Gregg v. Georgia*,⁶⁴ holding “the punishment of death does not invariably violate the Constitution.”⁶⁵ The Court then reviewed Georgia’s new death penalty statute.⁶⁶ Under the new Georgia law following *Furman*, the death penalty would only be imposed under a bifurcated system.⁶⁷ The case would proceed normally through a trial, and upon conviction, a separate hearing

pleas and confessions as violations of the Sixth Amendment. *Id.* at 356. Marshall rejected eugenics because the “[n]ation has never formally professed eugenic goals, and the history of the world does not look kindly on them.” *Id.* See also Millett, *supra* note 21, at 594–95.

58. BALDUS, *supra* note 34, at 13. See also *Furman*, 408 U.S. at 249–57 (Douglas, J., concurring); *id.* at 293–95 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–66, 368 (Marshall, J., concurring).

59. Millett, *supra* note 21, at 592.

60. *Id.* at 595.

61. *Id.* Imposing mandatory death sentences eliminated part of the discretion opposed by Justice Stewart in *Furman*. See *Furman*, 408 U.S. at 308–09 (Stewart, J., concurring); see also BALDUS, *supra* note 34, at 22.

62. See Millett, *supra* note 21, at 596; see also BALDUS, *supra* note 34, at 32.

63. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (invalidating North Carolina’s mandatory death sentence statute because it did not leave room for courts to consider individual factors).

64. *Gregg v. Georgia*, 428 U.S. 154 (1976) (plurality opinion).

65. *Id.* at 169.

66. *Id.* at 162–68 (reviewing Georgia’s death sentence statute).

67. *Id.*; see also O.C.G.A. § 17-10-31(b) (1973).

dedicated to sentencing would be conducted.⁶⁸ At this point, the prosecution and defense would present new evidence to the jury regarding the case's extenuating, mitigating, and aggravating circumstances.⁶⁹ Should the jury find an aggravating circumstance and then choose to sentence the defendant to death, the law provides "for a special expedited direct review by the Supreme Court of Georgia . . ." ⁷⁰ The Supreme Court of Georgia would not only review the case for misapplications of law, but would also evaluate the proportionality of the sentence to the crime.⁷¹ The Court ultimately upheld Georgia's new death penalty scheme.⁷²

In the cases that followed *Gregg*, the Court upheld similar statutory schemes of imposing the death penalty around the nation.⁷³

68. *Gregg*, 428 U.S. at 163; *see also* O.C.G.A. § 17-10-31(b).

69. *Id.*

70. *Gregg*, 428 U.S. at 165. Under the statute, the jury was required to find at least one aggravating circumstance to impose the death penalty. *Id.* Moreover, even if the jury found an aggravating circumstance, the jury could still use discretion to impose the punishment. *Id.* This raises questions as to whether the Georgia statute really removed the chance for unequal application of the death penalty. *See also* O.C.G.A. § 17-10-35 (1973).

71. *Gregg*, 428 U.S. at 166–67. Generally, "[p]roportionality refers to the relationship of the punishment to the criminal conduct of the offender . . ." William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 87–88 (2011). Proportionality reviews consider "various individual interests," on individualized bases in each case. *Id.* Moreover, proportionality reviews consider not only if a particular crime and death sentence are proportionate, but also whether a particular defendant received the death sentence "under circumstances that usually result in a lesser penalty." BALDUS, *supra* note 34, at 33.

72. *Gregg*, 428 U.S. at 206–07 ("The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court . . . [n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."). *Gregg* was important because it was the first case following *Furman* that approved of a state death penalty system. *See id.* at 169. The U.S. Supreme Court approved of the *Gregg* procedures because it was believed they would eliminate the wanton and freakish death sentences seen in *Furman*. *See id.* at 207. Based on studies conducted in Connecticut, Maryland, and Georgia, the promise of *Furman* and *Gregg* is yet unrealized. *See discussion infra* Part II.B–D.

73. *E.g.*, *Proffitt v. Florida*, 428 U.S. 242 (1976). The Florida statute, like Georgia's, provided statutory aggravating and mitigating circumstances that must be considered and weighed against one another. *Id.* at 250. Florida's statute also provided for direct review by the Supreme Court of Florida; although it did not require that court to consider proportionality. *Id.* at 251–52. Moreover, once the jury considers the mitigating circumstances, it merely provides a recommendation to the judge whether or not to impose the death penalty. *Id.* at 248–49. The judge has the ultimate decision on application of the death penalty based on his or her weight of aggravating and mitigating circumstance. *Id.* at 249. *See also* *Jurek v. Texas*, 428 U.S. 262, 263 (1976). The Texas statute, like Georgia and Florida's, provided for a bifurcated system. Millett, *supra* note 21, at 598. However, Texas did not provide for a list of statutory aggravating circumstances. *Jurek*, 428 U.S. at 270. Instead, Texas narrowed the list of crimes for which death could be imposed. *Id.* Additionally, Texas required the jury to consider a series of question:

(1) whether the conduct of the defendant that caused the death of the deceased

The majority of schemes incorporated three important procedural changes.⁷⁴ First, the unitary system was replaced with a bifurcated system.⁷⁵ Second, juries would be required to consider aggravating and mitigating circumstances in the sentencing stage.⁷⁶ In some cases, state law prescribed only a limited number of aggravating circumstances that a jury could consider.⁷⁷ Third, at least twenty states created a system whereby the death sentence could be immediately appealed to a state appeals court for review.⁷⁸

Each of these reforms was directed at resolving an issue raised by *Furman*, specifically the impermissible arbitrariness and discriminatory nature of death penalty laws.⁷⁹ Although there has been some positive effect, post-*Furman* statutory schemes remain susceptible to arbitrary and discriminatory results.⁸⁰ Moreover, given the competing interests described by Justice Breyer in *Glossip*, the death penalty's value is in greater doubt than before *Furman*.⁸¹

II. ANALYSIS

When devising a death penalty, states must consider constitutional limits imposed by the U.S. Supreme Court. Additionally, the Court has required the punishment to serve some legitimate purpose. This Part will first turn to the deterring effect of the death penalty,⁸² and

was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, in any, by the deceased.

Id. at 269. In order to impose the death penalty, the jury must answer each question affirmatively, otherwise a sentence of life imprisonment results. *Id.*

74. BALDUS ET AL., *supra* note 34, at 22–24.

75. *Id.* at 23.

76. *Id.* at 23–24.

77. *Id.* at 23.

78. *Id.* at 24.

79. *Id.* at 1–2.

80. BALDUS ET AL., *supra* note 34, at 2.

81. See discussion *infra* Part II.C.

82. See discussion *infra* Part II.A. For the purposes of this Note, considerations of the “penological purposes” the death penalty serves are focused solely on deterrence. The focus is on deterrence because history has shown deterrence to be “the top argument in favor of executions.” Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99

will then consider the Constitutional concerns of arbitrariness and discrimination.⁸³

A. Is Deterrence a Legitimate “Penological Purpose”?

The first half of Justice Breyer’s contention in *Glossip* questions whether the death penalty provides some “penological purpose[.]”⁸⁴ As Justice Marshall noted in *Furman*, the death penalty allegedly serves several purposes.⁸⁵ He further rejected each of these purposes,⁸⁶ and each has been rejected since *Furman*.⁸⁷ However, when Nebraska recently abolished the death penalty, much debate centered on the issue of whether or not the death penalty furthered the goal of deterrence.⁸⁸ Instead of conducting an individualized study on deterrence in Nebraska, critics and proponents relied on national studies related to this issue.⁸⁹

CRIM. L. & CRIMINOLOGY 489, 492 (2009).

83. See discussion *infra* Part II.B–C.

84. *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting).

85. See *supra* text accompanying note 56.

86. See *Gregg v. Georgia*, 428 U.S. 153, 234–41 (1976) (Marshall, J., dissenting).

87. John L. Mackie, *Retribution: A Test Case for Ethical Objectivity*, in CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 98, 98 (Sanford H. Kadish et al. eds, 9th ed. 2012) (“Punitive retribution is the repaying of harm with harm How does the criminal’s suffering or deprivation pay anything to society? No doubt repaying a debt often hurts the person who pays it, but it does not follow that anything that hurts someone amounts to his repaying a debt So this account is simply incoherent”); Radelet & Lacock, *supra* note 82, at 489–90 (“The findings demonstrate an overwhelming consensus . . . that the empirical research conducted on the deterrence question strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment.”); Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 139 (2010) (“Although there is considerable variation today in the conduct of capital trials, it is beyond doubt that such trials are more extensive and expensive along virtually every dimension.”). Georgia is particularly concerned with the cost of its’ criminal justice system. GA. COUNCIL ON CRIMINAL JUSTICE REFORM, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 7 (2014) (discussing the results of the bipartisan, inter-branch Special Council on Criminal Justice Reform “to improve public safety, hold offenders accountable, and stabilize . . . spending”).

88. *Compare* 104 NEB. LEGIS. REC. 1, at 29 (“Most commentators who oppose capital punishment assert that an execution has no deterrent effect Recent evidence, however, suggests . . . an enormous deterrent effect on the number of murders.”), *with id.* at 37–38 (“[T]he death penalty doesn’t work, it’s not a deterrent”).

89. *Id.* The scope of this Note—which is primarily concerned with issues announced in *Furman*—does not require an individualized analysis of the deterrent effect of Georgia’s death penalty system. A general discussion of deterrence will suffice to demonstrate the conflicting evidence of such an effect on criminals.

In 2005, Professor John J. Donohue and Assistant Professor Justin Wolfers compiled the results of some of the most extensive studies on death penalty deterrence.⁹⁰ After evaluating the methods of each study, Donohue and Wolfers found it difficult to correlate lower homicide rates with greater use of the death penalty.⁹¹ They found the true effect of the death penalty as deterrence “reasonably close to zero.”⁹² The lack of clarity in empirical studies leaves room for both sides of the debate to cite relevant statistics.

Although there is some debate, a survey conducted in 2009 by the world’s leading criminologists found there is “an *overwhelming consensus* . . . that the death penalty *does not* add deterrent effects to those already achieved by long imprisonment.”⁹³ When asked whether or not the death penalty acts as a general deterrent, 88.2% of respondents said no.⁹⁴ Moreover, when asked if empirical evidence supported deterrent effects of the death penalty, 94.7% of respondents responded the evidence showed either weak or no support at all of deterring effects.⁹⁵ Given the conflicting empirical evidence available, it is hard to understand how some individuals cite deterrence as a legitimate purpose to retain the death penalty.⁹⁶ It appears the argument that capital punishment deters crime is

90. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 804–18 (2005). The compilation included a study by Lawrence Katz, Steven D. Levitt and Ellen Shustorovich assessing executions between 1950 and 1990. Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003). A second study, conducted by Hashem Dezhbakhsh and Joanna M. Shepherd, assessed executions between 1960 and 2000. Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence From a “Judicial Experiment”*, <http://law.bepress.com/cgi/viewcontent.cgi?article=1017&context=alea> (last visited Nov. 8, 2015). The final major study included by Donohue and Wolfers was conducted by H. Naci Mocan and R. Kaj Gittings, assessing executions between 1984 and 1997. H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003).

91. Donohue & Wolfers, *supra* note 90, at 836.

92. *Id.* (The zero deterrent effect means “one cannot confidently conclude that the evidence points to either deterrent or antideterrent effects”).

93. Radelet & Lacoock, *supra* note 82, at 489–90.

94. *Id.* at 501 (emphasis added).

95. *Id.* at app. A.

96. The survey asked several questions aimed at answering this question. The survey asked whether the following statement was accurate or inaccurate: “Politicians support the death penalty as a symbolic way to show they are tough on crime.” Radelet & Lacoock, *supra* note 82, at app. A (emphasis added). 90.9% of respondents found this statement largely or totally accurate. *Id.*

inconclusive at best.⁹⁷ Just as likely, the deterring argument in support of the death penalty is flat out wrong.⁹⁸ If Georgia retains the death penalty to serve some legitimate purpose, it appears that purpose cannot be based in the deterrence argument.

B. Does Arbitrariness Persist? Consider Connecticut.

Connecticut abolished its death penalty in 2012.⁹⁹ Instead of looking at the deterrence factor like Nebraska, Connecticut's legislature chose to evaluate its death penalty by assessing levels of arbitrariness—the second half of Justice Breyer's contention in *Glossip*.¹⁰⁰

1. Post-Furman Death Penalty Laws

In 1973, Connecticut replaced its pre-*Furman* death penalty statute with Conn. Gen. Stat. § 53a-46b, listing specific categories of death-eligible crimes.¹⁰¹ Upon conviction of a crime falling into one of those categories, a separate penalty phase was conducted.¹⁰² During that phase, the trier-of-fact would decide between a sentence of death or one of life in prison without parole.¹⁰³ The statute also required the finding of one statutory aggravating factor,¹⁰⁴ but the defense was

97. Donohue & Wolfers, *supra* note 90, at 836.

98. See Radelet & Lacock, *supra* note 82, at 489–90.

99. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last modified July 1, 2015).

100. *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting) (questioning whether or not the system “seeks reliability and fairness,” given claims of arbitrariness in the death penalty system).

101. John J. Donohue III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION 67 (2013). Death eligible offenses included: (1) the murder of a police officer, judicial marshal, firefighter, corrections officer, or other law enforcement officer in the performance of his or her duties; (2) murder for pecuniary gain, whether defendant committed the murder or hired someone; (3) murder by defendant with a prior conviction for either intentional or felony murder; (4) murder by defendant under sentence of life imprisonment at time; (5) murder by kidnapper of kidnapped person in course of kidnapping; (6) murder committed in course of sexual assault (added 1980); (7) murder of two or more persons at the same time or in course of single transaction (added 1980); or murder of person under sixteen years of age (added 1995). *Id.*

102. See also Donohue, *supra* note 101, at 66. The bifurcation of the death penalty was on-trend following *Gregg v. Georgia*. HUGO ADAM BEDAU, THE CASE AGAINST THE DEATH PENALTY 2 (1992), <http://users.rcn.com/mwood/deathpen.html>.

103. Donohue, *supra* note 101, at 66.

104. See *id.*, at 67. The statutory aggravating factors included: (1) murder during felony by one

allowed to present mitigating evidence.¹⁰⁵ After trial, the Connecticut statute provided for automatic appellate review to the Supreme Court of Connecticut.¹⁰⁶ Although the statute originally required the Supreme Court to consider whether the “sentence [was] excessive or disproportionate to the penalty imposed in similar cases,”¹⁰⁷ that provision was repealed in 1998.¹⁰⁸ Compared to Georgia’s death penalty laws, upheld post-*Furman* in *Gregg v. Georgia*,¹⁰⁹ the death penalty laws in Connecticut were remarkably similar.

2. Arbitrariness in Connecticut

Five of the Justices in *Furman* posited that the death penalty was unconstitutionally arbitrary in its application.¹¹⁰ When used to challenge the death penalty in an individual case, the term arbitrary means the case “cannot be distinguished in a ‘meaningful’ or ‘principled’ way from other cases that generally result in life sentences or less.”¹¹¹ When the Connecticut legislature considered

previously convicted of same felony; (2) murder after two felony convictions of inflicting serious bodily harm; (3) murder while knowingly creating a grave risk of death to others; (4) heinous, cruel, or depraved murder; (5) murder for hire; (6) murder for pecuniary gain; (7) murder using an assault weapon; or (8) murder of public safety official. *Id.*

105. *Id.* at 69. Statutory mitigating factors included: (1) under age of eighteen; (2) mental capacity was impaired; (3) under unusual and substantial duress; or (4) could not reasonably have foreseen that his conduct in the course of commission would cause, or would create a grave risk of causing, death to another person. *Id.*

106. S.B. 855, 1995 Reg. Sess. (Conn. 1995).

107. *Id.*

108. See Donohue, *supra* note 101, at 69.

109. See discussion *supra* Part I.B.2.

110. See *Furman v. Georgia*, 408 U.S. 238, 249–57 (1972) (Douglas, J., concurring); *id.* at 293–95 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–66, 368 (Marshall, J., concurring). See also BALDUS, *supra* note 34, at 13.

111. BALDUS, *supra* note 34, at 14. See also *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (plurality opinion) (finding “no principled way to distinguish” the case before the Court from the many who received lesser sentences); *Gregg v. Georgia*, 428 U.S. 154, 206 (1976) (plurality opinion) (“If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.”); *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) (“For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”) (footnotes omitted); *id.* at 313 (White, J., concurring) (“[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”).

and ultimately repealed its death penalty, much of the debate centered on the issue of arbitrariness.¹¹²

Before abolition, Professor John J. Donohue conducted a systemic evaluation of Connecticut's death penalty laws.¹¹³ Specifically, Donohue looked to see if the "system in its entirety or in particular aspects was operating in an arbitrary and capricious manner."¹¹⁴ Based on his research, Donohue reached three main findings regarding arbitrariness in Connecticut's death penalty statute.¹¹⁵

First, executions were "freakishly rare" in Connecticut.¹¹⁶ According to the Court in *Furman*, evidence that a penalty is imposed infrequently suggests its imposition is arbitrary and therefore unconstitutional.¹¹⁷ Moreover, the Court rejected Georgia's statute that resulted in executions fifteen percent of the time in death-eligible cases.¹¹⁸ Based on Donohue's study, Connecticut imposed the death penalty only 4.4% of time,¹¹⁹ far lower than the statutes at issue in *Furman*.

Second, cases where the prosecutor sought death bore no meaningful difference from cases without capital charges.¹²⁰ In *Roper v. Simmons*, the U.S. Supreme Court held "[c]apital punishment must be limited to those offenders who commit 'a narrow

112. *An Act Revising the Penalty for Capital Felonies: Hearing on SB-280 Before the Judiciary Committee*, 2012 Leg., 413th Sess. 1 (Conn. 2012) The committee reports the following as the reasons for the bill: "Statistics show the death penalty historically is not applied in a fair and impartial manner If even one person is sentenced to death erroneously through such an arbitrary . . . manner open to human error, this ultimate penalty must be abolished." *Id.*

113. Donohue, *supra* note 101, at 32.

114. *Id.*

115. *Id.* at 1.

116. *Id.* at 4. This rate was among the lowest in the nation. *Id.* Only nine out of 205 death eligible cases evaluated in Donohue's study actually received the death penalty. *Id.*

117. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

118. BALDUS, *supra* note 34, at 80.

In *Furman v. Georgia*, the infrequency with which juries actually imposed death sentences in death-eligible cases concerned each of the concurring justices. The *Furman* opinions suggest that the justices estimated that the national death-sentencing rate among convicted murderers was less than 0.20. Our pre-*Furman* data from Georgia indicated an unadjusted death-sentencing rate of 0.15 (44/294)

Id. (endnotes omitted). See also *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting).

119. Donohue, *supra* note 101, at 4.

120. *Id.* at 5.

category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"¹²¹ Donohue assessed 205 capital-eligible murders using two different egregiousness measures and found no significant difference between criminals that received the death penalty and those who did not.¹²²

Third, Connecticut did not leave the death penalty for the worst cases as commanded by *Roper*.¹²³ Donohue found that for some cases where death was imposed, sixty or more cases were *more* egregious yet did not receive the death penalty.¹²⁴ Given the remarkable similarities between Georgia's current death penalty statutes and Connecticut's abolished version, similar challenges made in Connecticut may reasonably be attributed to Georgia as well.

C. Does Discrimination Persist? Consider Maryland.

Five of the Justices in *Furman* were also concerned with potentially inherent discrimination.¹²⁵ Justice Douglas noted that the discretionary death penalty statutes, a source of arbitrariness,¹²⁶ were also "pregnant with discrimination."¹²⁷ After Maryland conducted several studies, discrimination—particularly on the basis of race as a result of discretion in the system—was of particular concern.¹²⁸

121. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319) (holding the death penalty cannot be imposed upon juvenile offenders).

122. Donohue, *supra* note 101, at 5.

123. *Id.*; see also *Roper*, 543 U.S. at 568.

124. Donohue, *supra* note 101, at 5.

125. *Furman v. Georgia*, 408 U.S. 238, 242 (Douglas, J., concurring) ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a *procedure* that gives room for the play of such prejudices.") (emphasis added); *id.* at 364 (Marshall, J., concurring) ("[A] look at the bare statistics regarding executions is enough to betray much of the discrimination It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.").

126. See *Furman*, 408 U.S. at 248–49 (Douglas, J., concurring). The Court previously noted the jury may have "untrammelled discretion to let an accused live or insist that he die." *Id.* at 248. But the Court also recognized that equal protection disallowed punishment imposed through arbitrary or discriminatory processes. *Id.* at 249.

127. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

128. RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 4 (2002). The study was particularly focused on the discretion at four critical points in Maryland's capital

Where Connecticut focused on arbitrariness, Maryland focused on discrimination.¹²⁹

1. Post-Furman Death Penalty Laws in Maryland

Following *Furman*, the Supreme Court of Maryland invalidated its own death penalty laws.¹³⁰ In 1975, the Maryland legislature rewrote the statute and created eight categories of death-eligible crimes that would result in a mandatory death sentence upon conviction.¹³¹ However, the U.S. Supreme Court's decision in *Woodson v. North Carolina* later invalidated all statutes imposing mandatory death sentences.¹³² Maryland once again faced rewriting its death penalty statute.¹³³

During 1977 and 1978, Maryland crafted a third death penalty statute.¹³⁴ Under the new statute, the defendant must be convicted of first-degree murder.¹³⁵ After the conviction, the trial must move to a penalty phase where the trier-of-fact will consider several statutory aggravating and mitigating factors.¹³⁶ The fact-finder must then find beyond a reasonable doubt at least one aggravating circumstance

punishment system: (1) the decision of the state's attorney to seek the death penalty, (2) the decision of the state's attorney not to withdraw from seeking the death penalty, (3) the decision of the state's attorney to take death-eligible cases to a penalty phase upon conviction, and (4) the decision of the trier-of-fact to give a sentence of death. *Id.* at 4–5.

129. *Id.* at 1; Donohue, *supra* note 101, at 1.

130. See *Bartholomey v. State*, 297 A.2d 696, 701 (Md. 1972) (“We entertain not the slightest doubt that the imposition of the death penalty under any of the presently existing discretionary statutes of Maryland which authorize, but do not require, that penalty is unconstitutional under *Furman* as violative of the Eighth and Fourteenth Amendments to the federal constitution. In other words, we think the net result of the holding in *Furman* is that the death penalty is unconstitutional when its imposition is not mandatory.” (footnote omitted)).

131. MD. CODE ANN., Murder § 27-413 (West 1978) (repealed in 2002); see also PATERNOSTER & BRAME, *supra* note 128, at 7.

132. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); see also PATERNOSTER & BRAME, *supra* note 128, at 7.

133. *Blackwell v. State*, 365 A.2d 545, 549 (Md. 1976) (“The [Maryland death penalty] statute does not provide any other standards whereby the sentencing authority can consider the individual circumstances or characteristics of either the offense or the offender; indeed, all those convicted under the statute are treated alike In view of these deficiencies, the Attorney General reasons that the death penalty provisions . . . are unconstitutional, and we fully agree.”); see also PATERNOSTER & BRAME, *supra* note 128, at 7.

134. PATERNOSTER & BRAME, *supra* note 128, at 7.

135. MD. CODE ANN., Murder § 27-413 (West 1978) (repealed in 2002).

136. *Id.*

before death may be imposed.¹³⁷ If death is imposed, the case is subject to automatic appellate review by the Maryland Court of Appeals.¹³⁸ Maryland's death penalty was remarkably similar to the system enacted in Georgia post-*Furman*.

2. *Discrimination in Maryland*

Since 1978, several studies have been conducted in Maryland to investigate racial discrimination.¹³⁹ Professors Raymond Paternoster and Robert Brame conducted the most recent study, in which the pair focused on filling the gaps of previous studies with additional information.¹⁴⁰ Additionally, Paternoster and Brame evaluated the discretionary stages of a capital case in Maryland in hopes of finding the source of potential racial discrimination.¹⁴¹

After examining approximately 6,000 murder cases,¹⁴² Paternoster and Brame concluded that race did in fact affect the outcome of death penalty cases in Maryland.¹⁴³ Unlike previous reports, this case study accounted for 123 explanatory factors or case characteristics in order to accurately determine whether race and discretion affected capital cases.¹⁴⁴ After accounting for these variables, the study concluded that *race of the victim* significantly affected whether courts imposed the death penalty.¹⁴⁵ Paternoster and Brame found that prosecutors sought the death penalty 1.6 times more often in cases where the

137. *Id.*

138. *Id.*; see also PATERNOSTER & BRAME, *supra* note 128, at 11.

139. PATERNOSTER & BRAME, *supra* note 128, at 1.

140. See *id.* at 3. In a previous study, the authors of that study pointed out two central limitations on their study: "(1) their sample did not include all possible death eligible cases, and (2) they had limited information on the non-statutory aggravating and mitigating factors in the case and other case characteristics." *Id.* at 3-4.

141. *Id.* at 4-5. See note 128 and accompanying text.

142. *Id.* at 12. The report was based upon an examination of approximately 6,000 first and second degree murders that were committed in the state of Maryland from August of 1978 until September of 1999. *Id.* The study started in 1978 because that was the year the new death penalty law took effect. PATERNOSTER & BRAME, *supra* note 128, at 12.

143. *Id.* at 32-37.

144. *Id.* at 19. The final report of the study included Table 9, which listed all case characteristics the study considered. *Id.* at tbl. 9. Some examples of case characteristics include whether the defendant had prior convictions, it was a multiple victim case, the defendant had history of abuse, the victim was mutilated, the victim was killed execution style, the victim was pregnant, etc. *Id.*

145. *Id.* at 33.

victim was white than when the victim was black.¹⁴⁶ Moreover, the probability of actually receiving a death sentence is *two* times higher in a white-victim case than in a non-white-victim case.¹⁴⁷

The study was equally disparaging when considering racial makeup in the combination of offender and victim. When Paternoster and Brame considered the racial makeup of the offender and victim in tandem, they concluded that “black offenders who slay white victims are more likely to be sentenced to death than other racial combinations”¹⁴⁸ In fact, prosecutors are *twice* as likely to seek the death penalty in black-on-white cases than black-on-black cases,¹⁴⁹ and 1.7 times more likely than in white-on-white cases.¹⁵⁰ The study suggests that even when considering 123 additional factors, these racial disparities “cannot be explained”¹⁵¹ Paternoster and Brame note that these disparities develop at the early stages of a capital case where prosecutors possess the most discretion,¹⁵² which may in itself suggest a causal source.

D. Georgia’s Death Penalty

Deterrence is universally a suspect excuse to retain the death penalty.¹⁵³ Moreover, arbitrariness and discrimination existed in death penalty systems remarkably similar to Georgia’s current capital punishment law.¹⁵⁴ This suggests that Georgia’s system may also be arbitrarily and discriminatorily defective. An extensive study examined whether Georgia’s system does in fact exhibit those unconstitutional qualities.

146. PATERNOSTER & BRAME, *supra* note 128, at 34.

147. *Id.*

148. *Id.* at 35–36.

149. *Id.* at 36.

150. *Id.*

151. *Id.* at 32.

152. PATERNOSTER & BRAME, *supra* note 128, at 41.

153. *See* discussion *supra* Part II.A.

154. *See* discussion *supra* Part II.B–C.

I. Arbitrariness in Georgia

David C. Baldus organized a study (Baldus study) in which he gathered statistics and used them to try to determine whether courts arbitrarily imposed the death penalty on murder convicts.¹⁵⁵ The authors reached four conclusions. First, the post-*Furman* reforms to Georgia's death penalty statute did in fact result in increased consistency among murder cases that received the death sentence.¹⁵⁶ Excessive sentences dropped from 43% pre-*Furman* to 13% post-*Furman*.¹⁵⁷ This meant that the death penalty was applied more selectively.¹⁵⁸ However, this change was the extent of positive improvement following *Furman*.

The second finding showed the number of death sentences imposed was substantially lower than that authorized by Georgia law.¹⁵⁹ This poses a problem because the Justices in *Furman* suggested that infrequency of death sentences tended to prove the penalty was arbitrary.¹⁶⁰ Third, Georgia's statutory requirement of an aggravating circumstance to impose the death penalty did "not serve

155. BALDUS, *supra* note 34, at 98.

156. *Id.* at 97. This study was conducted with an eye toward comparing pre-*Furman* and post-*Furman* changes in arbitrariness and discrimination in Georgia, and is thus more illustrative of the thesis of this Note: the promise of *Furman* remains unfulfilled. *Id.* at 98. However, recent studies reached similar conclusions as the Baldus study. See Raymond Paternoster et al., *Race and Death Sentencing in Georgia, 1989-1998*, in AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT app., at S-T (2006) (reaching similar findings "consistent with many other post-*Furman* studies," regarding the death penalty in Georgia).

157. BALDUS, *supra* note 34, at 92. The authors state that excessiveness is the "central defect of arbitrary death sentences." *Id.* at 14. The death sentence, according to the authors, is excessive "if it is so infrequently imposed among a group of similarly situated capital defendants that it offends basic notions of evenhandedness and comparative justice." *Id.*

158. BALDUS, *supra* note 34, at 92.

159. *Id.* at 97.

160. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 311, 313 (White, J., concurring) ("I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment But however that may be, I cannot avoid the conclusion that as the statutes before us now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."); see also BALDUS, *supra* note 34, at 80 ("In *Furman v. Georgia*, the infrequency with which juries actually imposed death sentences in death-eligible cases concerned each of the concurring justices.").

in practice to distinguish murder cases in which death sentences are routinely imposed from those that normally result in a life sentence.”¹⁶¹ Both findings posed a problem because they are both directly contrary to the Supreme Court’s expectations expressed in *Gregg*.¹⁶²

Finally, the study found that prosecutors and juries did not reserve the death penalty for the most severe cases.¹⁶³ In fact, 15%–30% of death sentences appeared to be excessive as defined by the study.¹⁶⁴ Moreover, nearly one-half of Georgia’s death sentences post-*Furman* showed some evidence of excessiveness.¹⁶⁵ This information provides strong evidence that Georgia’s death penalty statute still produces arbitrary results contrary to *Furman*.

2. Discrimination in Georgia

The Baldus study also questioned whether race determined if a defendant received the death penalty.¹⁶⁶ Much like the results of the Maryland study,¹⁶⁷ the Baldus study found that the *defendant’s* race did not have much impact on whether the death penalty was imposed.¹⁶⁸ However, when the study examined effects with varying races of the *victim*, the results showed a victim’s race remained

161. BALDUS, *supra* note 34, at 97.

162. *Gregg v. Georgia*, 428 U.S. 154, 154 (1976) (plurality opinion). “The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court . . . [n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.” *Id.* at 206–07; *see also* BALDUS, *supra* note 34, at 97.

163. BALDUS, *supra* note 34, at 97–98.

164. *Id.* at 98. *See* note 157 and accompany text for definition of “excessive.”

165. BALDUS, *supra* note 34, at 98.

166. *See id.* at 32.

167. *See* discussion *supra* Part II.C.

168. BALDUS, *supra* note 34, at 149.

[A]t each point . . . the predicted likelihood of a death sentence is lower for black-defendant/white-victim cases than it is for the white-defendant/white-victim cases. However . . . a race-of-defendant effect reemerges when one examines separately the cases from urban rural areas. The rural cases suggest black defendants were still at a slight disadvantage, although the effect is not statistically significant. In urban Georgia, we find a statistically significant race-of-defendant effect that disadvantaged white defendants.

Id. at 150 (endnote omitted).

significant.¹⁶⁹ In fact, in all cases where the victim was white the study found a 27% likelihood the death sentence would be imposed,¹⁷⁰ compared to only a 7% chance when the victim was black.¹⁷¹ This meant the death penalty was sought 3.9 times more often in white-victim cases than in black-victim cases.¹⁷²

The Baldus study concluded that these clearly discriminatory results originated at two points of discretion: the prosecutor's decision to seek or waive the death penalty following trial and the jury's decision to impose a life sentence or death.¹⁷³ At each stage, the study found that race was a factor for both the prosecutor and jury.¹⁷⁴ Significantly, in all cases where the victim was white, the prosecutor and jury were more likely to seek and impose the death penalty when the defendant was black instead of white.¹⁷⁵ In addition to the arbitrary results previously discussed,¹⁷⁶ the statistics provided in the Baldus study tend to prove a clear racial bias in Georgia when the death penalty is sought and imposed.

III. PROPOSAL

In *Glossip*, Justice Breyer reiterated Supreme Court precedent, which found “the finality of death creates a ‘qualitative difference’ between the death penalty and other punishments.”¹⁷⁷ Therefore, there is “a corresponding difference in the need for *reliability* in the determination that death is the appropriate punishment in a specific case.”¹⁷⁸ However, the corresponding procedural safeguards necessary to ensure reliability “lead to a . . . constitutional problem:

169. *Id.*

170. *Id.* at tbl. 32.

171. *Id.*

172. *Id.*

173. BALDUS, *supra* note 34, at 161.

174. *See id.* When the data is not adjusted for case culpability, the data show effects of race in prosecutorial and jury discretion. *Id.* However, the adjusted data show race remains significant. *Id.* at tbls. 38–41.

175. *See id.* at tbls. 38–39.

176. *See discussion supra* Part II.D.1.

177. *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

178. *Woodson*, 428 U.S. at 305 (emphasis added).

excessively long periods of time that individuals typically spend on death row, alive but under sentence of death.”¹⁷⁹

Traditionally, the death penalty allegedly served three purposes: deterrence, retribution, or incapacitation.¹⁸⁰ Justice Breyer finds the argument in favor of deterrence unpersuasive, relying on studies that provide conflicting results regarding the general deterrent effect of the death penalty.¹⁸¹ Similarly, Justice Breyer questions the retribution value of a significantly delayed execution.¹⁸² He finds the relevant question is whether retribution is really served when finality only comes decades later, if ever.¹⁸³ Just as he finds life in prison without parole a suitable substitute to achieve incapacitation, that punishment is also sufficient to serve the purpose of retribution.¹⁸⁴ Justice Breyer concludes that a procedurally fair and reliable death penalty undermines the purpose for using the punishment at all,¹⁸⁵ but if the death penalty was structured to minimize delay the courts could not ensure it was imposed reliably.¹⁸⁶

The task of creating a death penalty system that provides both a “penological purpose” *and* simultaneously seeks “reliability and fairness” in its application is a daunting, if not an impossible task.¹⁸⁷ It is clear contemporary death penalty systems raise severe

179. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting). Finding the length of delay to have increased significantly over the years, Justice Breyer concluded such delay caused serious constitutional concerns. *Id.* Significantly, “delays undermine the death penalty’s penological rationale,” which traditionally “rests upon society’s need to secure deterrence, incapacitation, [or] retribution” *Id.* at 2767. Incapacitation is served just as well by sentencing a defendant to life in prison without parole. *Id.* Justice Breyer notes that rehabilitation is also a classical rationale for punishment, but capital punishment by definition does not rehabilitate. *Id.*

180. *Id.*

181. *Glossip*, 135 S. Ct. at 2767–68; see also discussion *supra* Part II.A.

182. *Glossip*, 135 S. Ct. at 2769.

183. *Id.* (citing *Valle v. Florida*, 132 S. Ct. 1, 2 (2011) (Breyer, J., dissenting)).

184. *Id.* The value of retribution is based on an individual’s personal opinion. *Id.* Even still, there is debate as to whether retribution is a valid reason to punish. See *supra* note 87 and accompanying text. Unlike retribution, deterrence is not a policy question that is debatable; either a deterrent effect exists or it does not. Millett, *supra* note 21, at 597.

185. *Glossip*, 135 S. Ct. at 2772. “[D]elay is in part a problem that the Constitution’s own demands create.” *Id.* at 2764.

186. *Id.* “A death penalty system that is unreliable or procedurally unfair would violate the Eight Amendment. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose.” *Id.* at 2772.

187. *Id.* at 2772 (Breyer, J., dissenting).

constitutional concerns regarding arbitrariness and discrimination.¹⁸⁸ Thus, it is imperative that Georgia takes some action to guarantee justice for criminal defendants and provide value in the application of criminal punishment. There are two potential avenues for Georgia to pursue: abolition or reform.

A. Abolition

Abolition of the death penalty remains a clear and simple solution to all the problems posed by retention and implementation of the punishment. The death penalty provides no real penological purpose.¹⁸⁹ Instead, the system provides only arbitrary and discriminatory results.¹⁹⁰ Moreover, the difficulty of resolving those flaws while balancing the need to retain a legitimate purpose, as previously noted, is near impossible.¹⁹¹ Additionally, retention of the death penalty in itself—setting aside the need for essential reforms—is more costly than abolition.¹⁹²

Although the problems of retention and benefits of abolition are readily apparent, the political realities in the United States and Georgia make abolition an unlikely solution to the problems posed by the current death penalty scheme.¹⁹³ In a recent poll conducted by Gallup, 61% of Americans favor the death penalty for a person convicted of murder while only 37% disfavor it.¹⁹⁴ Although this is the highest level of disapproval since March of 1972,¹⁹⁵ a strong majority clearly supports the death penalty nationally. Given this political reality, Georgia legislators will most likely forgo this option

188. See discussion *supra* Parts II.B–D; *Glossip*, 135 S. Ct. at 2776 (Breyer, J., dissenting).

189. See *supra* Parts II.A, III.

190. See *supra* Part II.B–D.

191. See *supra* Parts III.A.1–2.

192. Steiker, *supra* note 87, at 139 (“Although there is considerable variation today in the conduct of capital trials, it is beyond doubt that such trials are more extensive and expensive along virtually every dimension.”).

193. Russell D. Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 GA. ST. U. L. REV. 1085, 1121–22 (2012) (“The largest obstacle to abolition of the death penalty . . . is its continuing political popularity, no doubt fueled in large part by the widely shared belief that murderers deserve ‘death,’ not ‘life.’”).

194. *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Dec. 16, 2015).

195. *Id.*

to eliminate the threats posed by the current death penalty scheme. Therefore, legislators may only work to diminish the ill effects in the system through reform by fighting the competing interests cited by Justice Breyer in *Glossip*.

B. Reform the Current System

Issues related to the death penalty are attributed to the great discretion granted to prosecutors and juries.¹⁹⁶ Therefore, reforms should be aimed at meaningful limitations of discretion without conflicting with Supreme Court precedent.

1. Limiting Jury Discretion

Georgia's contemporary death penalty statute was largely upheld because the Supreme Court found sufficient procedural safeguards—relying primarily on statutorily defined aggravating factors—to eliminate the arbitrary or discriminatory imposition of the death penalty by the jury.¹⁹⁷ Based on the Baldus study, however, it is clear that the statutory aggravating factors have not carried the weight envisioned by the *Gregg* court.¹⁹⁸

First, it may be “impossible to construct a verbal formula that would permit different juries to make reasonably consistent comparative judgments about the relative blameworthiness of different defendants, much less to decide in any consistent fashion which of those defendants should live and which of them should die.”¹⁹⁹ Meaningful reform aimed at eliminating arbitrary or

196. PATERNOSTER & BRAME, *supra* note 128, at 4–5.

197. *Gregg v. Georgia*, 428 U.S. 154, 206–07 (plurality opinion) (“The new Georgia sentencing procedures . . . focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury’s discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.”). Specifically, the addition of statutory aggravating factors would give greater guidance to prosecutors and juries. See BALDUS, *supra* note 34, at 409.

198. BALDUS, *supra* note 34, at 410 (“[T]he statutory aggravating factors do not appear to ‘guide’ in any meaningful way either the exercise of prosecutorial discretion in deciding when to seek a death sentence or the exercise of jury sentencing discretion.”).

199. *Id.*

discriminatory results, by minimizing jury discretion, runs the risk of running afoul the Supreme Court's prohibition against mandatory death sentences in *Woodson v. North Carolina*.²⁰⁰

Second, if it is possible to create a formula for the jury to follow, the current laws fail to achieve any real limits on discretion. Although Georgia law provides a list of statutory aggravating factors, it also allows the jury to consider "any . . . circumstances otherwise authorized by law . . ." ²⁰¹ As a result, statutory aggravating factors are unable to "impose any degree of regularity upon sentencing decisions . . ." ²⁰² The results of the Baldus study bear out these results, finding statutory aggravating factors only "exert . . . a modest influence on the actual sentencing results." ²⁰³

2. Limiting Prosecutorial Discretion

Similar to juries, statutorily defined aggravating factors have failed to limit cases in which prosecutors choose to pursue the death penalty.²⁰⁴ Recently, the American Bar Association's Death Penalty Moratorium Implementation Project (the Project) conducted an assessment of Georgia's death penalty system.²⁰⁵ At the outset, the Project acknowledged that "[t]he character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers."²⁰⁶ Although the Project makes several recommendations to improve the quality of prosecutions, there were no recommendations designed to *directly* limit prosecutorial discretion.²⁰⁷ Reforms should make an

200. *Woodson v. North Carolina*, 428 U.S. 280, 305 (plurality opinion) (invalidating mandatory death sentence statute because it did not leave room for courts to consider individual factors). "[U]nless we return to the mandatory death penalty struck down in *Woodson*, the constitutionality of capital punishment rests on its limited application to the worst of the worst. And this extensive body of evidence suggests that is not so limited." *Glossip v. Gross*, 135 S. Ct. 2726, 2762 (Breyer, J., dissenting) (citation omitted).

201. O.C.G.A. § 17-10-30(b) (2015).

202. BALDUS, *supra* note 34, at 410.

203. *Id.* at 411.

204. *See supra* text accompanying note 198.

205. AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT i (2006).

206. *Id.* at 109.

207. *Id.* at 122–30. The Project recommended that Georgia: (1) establish written policies and

attempt to directly address the broad discretion granted to prosecutors.

3. *Solution*

The Supreme Court requires current schemes to strike a balance between granting prosecutors and juries discretion and enough guidance to reach consistent and proportionate results between cases. Attempts to even curtail, but not entirely remove, their discretion have been struck down.²⁰⁸ I suggest two reforms to the system.

For the first reform, give the trial judge the authority to impose the death penalty and take the question away from the jury entirely. Importantly, the jury would still be required to explicitly find aggravating and mitigating factors, but the judge would be the sole arbiter of those facts. This will allow the judge to decide, as a matter of law and on balance of all relevant circumstances, whether a defendant should be sentenced to death. Judges are better situated to review the case and decide whether the punishment is proportionate to sentences imposed for similarly situated defendants and crimes. Allowing the trial judge to perform a proportionality review, rather than waiting for the Supreme Court of Georgia to do so when the convicted defendant inevitably appeals, will help eliminate both arbitrary and discriminatory applications of the death penalty at an earlier stage. Additionally, allowing the judge to decide may expedite the process. Juries perform well when asked to determine issues of fact in a single case. However, they are totally incapable of comparing results in their own case to the results of another. The Supreme Court upheld a similar reform in *Proffitt v. Florida*.²⁰⁹

guidelines for imposing the death penalty; (2) establish policies in state laboratories for the handling of evidence; and (3) provide funding for training and continuing education of all state prosecutors. *Id.* The State of Georgia is in compliance with some of these recommendations, but the Project could not make an accurate determination in some cases because Georgia's records are not complete. *Id.*

208. *Woodson v. North Carolina*, 428 U.S. 280, 305 (plurality opinion). The U.S. Supreme Court invalidated North Carolina's death penalty statute because it did not give juries the opportunity to consider all aggravating and mitigating circumstances when determining whether or not to impose the death penalty. *Millett*, *supra* note 21, at 596.

209. *Proffitt v. Florida*, 428 U.S. 242, 260. The Florida statute, like Georgia's, provides statutory aggravating and mitigating circumstances that must be considered and weighed against one another by the jury. *Id.* at 250. However, the judge has the ultimate decision on application of the death penalty

An alternative would allow juries to make a *recommendation* to the trial judge, but only after the jury has been presented with additional evidence. Presenting the jury with evidence from the sentencing stages of other cases similar to the present case allows the jury to review their own decision for proportionality. This would give the jury more information to make a recommendation, with proportionality as a factor, and would work to help resolve some of the problems.²¹⁰ This alternative, however, would almost certainly lengthen the trial process and would not help promote a purpose of the death penalty due to the extra delay. Therefore, this alternative should only be considered if the legislators are concerned the first option would be challenged in the courts and ultimately ruled unconstitutional.

For the second reform, the trial judge should have the opportunity to review the case for aggravating and mitigating circumstances in a pretrial hearing. For the purposes of the hearing, the judge will ask: if the defendant is found guilty and a jury finds the necessary facts, would I impose the death penalty? This second reform will provide a much needed check on prosecutorial discretion because the judge will be able to decide at the outset whether he or she will allow the

based on his or her weight of aggravating and mitigating circumstance and is free to take or decline the jury recommendation. *Id.* at 249. Florida's statute was recently ruled unconstitutional. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). However, the U.S. Supreme Court's ruling was based on the fact that juries in Florida would provide recommendations on unspecified factual findings. *Id.* at 622. As a result, the judge was sentencing defendants to death on the judge's own findings and the jury's role was superfluous. *Id.* To respond to this challenge, Georgia legislators could reform the system to prohibit the jury from providing a recommendation at all, and instead require very detailed factual findings on aggravating and mitigating circumstances from the jury. *See Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring) ("Those States that leave the ultimate life-or-death decision to the judge may . . . do so—by requiring a prior jury finding of aggravating factor in the sentence phase . . ."). The trial judge would then only be allowed to sentence the defendant based on those explicit factual findings by the jury. This reform would still allow for the benefit of limiting jury discretion while remaining within Constitutional bounds.

210. BALDUS, *supra* note 34, at 8–9 (discussing issues related to jury discretion). The death penalty is a punishment that requires both subjective and objective application. Subjectively, the jury must ask: on all the facts of this case, does this person deserve to be executed? But that decision must be objectively appropriate when compared to all the other capital crimes where the death penalty is both imposed and not imposed. Juries are limited to evidence of the present trial in order to determine guilt or innocence and life or death, and are therefore unable to adequately judge the objective application of death in any particular case. Short of taking the question from the jury entirely, the next best option is to give the necessary information to the jury in order for it to make a constitutionally sound decision.

death penalty to be imposed. Once again, the judge will be allowed to conduct a proportionality review and will be able to decide as a matter of law if the circumstances warrant the death penalty, but will be able to do so at the outset of trial. Moreover, this reform will potentially help reduce time and costs of trying a capital crime where the death penalty would not otherwise be imposed. Although trial judges in practice may give deference to the prosecutor, the reform will at least provide judges a tool to check the prosecutor's broad discretion. Together, these reforms strike a balance of improving the current system on efficiency while ensuring that criminal defendants are protected from arbitrary and discriminatory results.

CONCLUSION

In the past three years, Nebraska, Connecticut, and Maryland have abolished the death penalty. Although they did so for different reasons, each state ultimately decided the total cost—both procedurally and financially—was greater than the value the death penalty provides. The problems these states exhibit clearly demonstrate the tension recognized by Justice Breyer in *Glossip*. The need to have a fair and reliable death penalty invariably conflicts with the state's ability to craft a system that simultaneously serves some legitimate purpose.

Since *Furman*, several states have attempted to craft such a system, but it is evident based on recent studies that the promise of *Furman* has not been achieved. Respectively, Nebraska, Connecticut, and Maryland chose to abolish the death penalty because it does not deter capital crime, is arbitrary in application, and is demonstrably discriminatory. The flaws of these systems, which are based on Georgia's death penalty approved in *Gregg*, are directly attributable to Georgia as well. Abolition is the best option for Georgia legislators, but is highly unlikely given the political pressure to retain the death penalty. In lieu of abolition, meaningful reform may be possible to achieve while also protecting purpose and reliability.