

Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia’s Death Penalty Laws and Procedures amidst the Deficiencies of the State’s Mandatory Appellate Review Structure

INTRODUCTION

Beginning with the U.S. Supreme Court decisions in *Furman v. Georgia*¹ and *Gregg v. Georgia*,² challenges to the death penalty laws, policies, and procedures of the state of Georgia have shaped the constitutional jurisprudence applicable to capital punishment cases nationwide. Now, following the Supreme Court’s recent denial of certiorari in *Walker v. Georgia*³—in which Justice Stevens and Justice Thomas expressed sharply divergent interpretations of the Court’s precedent regarding the importance of a thorough proportionality review to Georgia’s capital sentencing scheme,⁴ and in which Justice Stevens emphasized that the Court’s refusal to hear the case was the result of a procedural technicality and not a decision on the merits⁵—the Court once again seems poised to reexamine the constitutional implications of Georgia’s death penalty statute and the manner in which it is implemented. In anticipation of such an analysis, and in order to advocate that the U.S. Supreme Court clarify its position in a way that aligns with its longstanding tradition of requiring prudence and temperance in the infliction of death, this article dissects the grave and constitutionally impermissible flaws inhering in Georgia’s current system of capital punishment, with a particular focus on the failures of the mandatory state Supreme Court proportionality review.

The article thus begins with an assessment of Georgia’s capital sentencing scheme, arguing that the language of the relevant statutes renders the system susceptible to inequities among defendants and abuses of discretion by state officials. Notably, the state Supreme Court’s automatic review of all death sentences, instituted as a means of restraining overbroad judicial, juror, and prosecutorial application of vague statutory text, has failed to provide any meaningful check on the systemic arbitrariness and unfairness of death penalty decisionmaking that manifests at every stage of the criminal process. This point is elaborated in the second section of the article, which focuses on potential Eighth Amendment challenges to the practical application of Georgia’s death penalty laws. This section of the article contends that a meticulous and comprehensive judicial proportionality review is integral to the legitimacy of Georgia’s procedures, and to the extent that the Georgia Court persists in providing only a cursory rendition of its obligation, the entire institution of capital punishment within the state is unconstitutional. Moreover, even assuming the validity of any arguments that the U.S. Supreme Court’s precedent with respect to the significance of the mandatory review is at all ambiguous, the compendium of Eighth Amendment death penalty jurisprudence—with its dual emphasis on the need for both

¹ 408 U.S. 238 (1972).

² 428 U.S. 153 (1976).

³ No. 08-5385, 555 U.S. ____ (2008) (Stevens, Thomas, JJ., concurring).

⁴ Compare *Walker*, No. 08-5385, 555 U.S. ____, 3-4 (2008) (statement of Thomas, J.) (“[U]nder this Court’s precedents, Georgia is not required to provide any proportionality review at all.”), to *Walker*, 555 U.S. at 2 (2008) (statement of Stevens, J.) (“Our decision in [*Gregg*] to uphold the later enacted statute was founded on an understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by impermissible factors such as race.”).

⁵ See *id.* at 1 (statement of Stevens, J.) (“That [procedural] argument provides a legitimate basis for this Court’s decision to deny review. I write separately to emphasize that the Court’s denial has no precedential effect....”).

consistency and restraint in the imposition of death by the state—militates in favor of striking down a statutory scheme that offers only superficial protections to capital defendants and that has repeatedly proven deficient in its ability to limit the death penalty to only the most extreme and atrocious cases.

The third and final segment of the article explores an alternative but related set of challenges to Georgia's death penalty procedures through Fourteenth Amendment equal protection claims. Specifically, this section demonstrates how the U.S. Supreme Court has failed to fully attend to the argument that Georgia's death penalty statute, as applied, has fostered opportunities for impermissible considerations, including race-based biases (implicit or otherwise), to infiltrate the various stages of criminal proceedings, thus exposing capital defendants to a heightened risk that their sentence will be based on reasons irrelevant to their culpability. After showing that sophisticated statistical research supports the assertion that Georgia's procedures are in fact flawed in ways that violate the Equal Protection Clause, the article explains why allowing such evidence to form the basis of a Fourteenth Amendment claim comports with the Supreme Court's prior decisions. In particular, the article notes that, the traditional deference given to the decisions of district attorneys notwithstanding, the gross statistical disparities in the treatment of defendants in white-victim versus black-victim cases surpass even the most latitudinous conception of the appropriate bounds of prosecutorial discretion.

The article thus concludes by positing that the problems underlying these Eighth Amendment and Fourteenth Amendment concerns are in fact intertwined: a statutory scheme that grants district attorneys and sentencing authorities virtually unconstrained discretion to decide whether or not to pursue or impose the death penalty on a particular defendant can be construed as facilitating acts of mercy only if one assumes that all capital defendants were justifiably death-eligible in the first instance. Yet the Georgia statute is constructed such that more than a majority of all persons accused of murder fall within the statutory "guidelines" for capital punishment, and the whims and biases of judge or jury sentencers and the political leanings and ambitions of county DAs will determine with unavoidable inconsistency who is ultimately subjected to death and who is spared. This is a striking contrast from the constitutional mandate that death be applied sparingly but fairly, against only the most dangerous and horrific killers.

Furthermore, the state Supreme Court proportionality review, which was essential to the U.S. Supreme Court's decision to uphold Georgia's revised death penalty statute (enacted after the Court struck down the former version several years prior) and which has since deteriorated into a mere perfunctory exercise, neither shields death row defendants from arbitrary and disproportionate sentencing in violation of the Cruel and Unusual Punishment Clause, nor rectifies the effects of institutionalized racism and individual prosecutorial biases in violation of the Equal Protection Clause, as it was originally intended to do. Accordingly, this article contends that when the U.S. Supreme Court fulfills its responsibility to definitively resolve these issues—and as noted, dicta in recent opinions indicates that such resolution may soon be forthcoming—the only legally and morally justifiable position for the Court to take is to insist that the Georgia Supreme Court fulfill its duty to provide a thorough review of the fairness and proportionality of each capital punishment sentence imposed by the state; and, since the Georgia Court has consistently proven unwilling or incapable of doing so, to strike down the state's death penalty law itself as unconstitutional.

GEORGIA'S CAPITAL SENTENCING SCHEME

Georgia's criminal code is notable in that, unlike the laws of many other jurisdictions, it makes no distinction between degrees of murder. Instead, under Georgia law, "a person commits the offense of murder when he unlawfully and with malice aforethought, *either express or implied*, causes the death of another human being."⁶ In contrast to the laws of other states, which (if they sanction it at all) tend to limit capital punishment to murder in the first degree,⁷ Georgia's statute provides that any person "convicted of murder shall be punished by death or by imprisonment for life."⁸ A Georgia defendant convicted of murder becomes death penalty-eligible upon a finding by the sentencing judge or jury of the existence beyond a reasonable doubt of one or more statutory aggravating circumstances.⁹ Once a single statutory aggravating factor is found, the sentencer may, but need not, recommend death, depending on its consideration of any other existing mitigating or aggravating circumstances.¹⁰

If the judge or jury does find that the State proved at least one of the enumerated aggravating circumstances and decides, in the exercise of complete discretion, that the death penalty should be imposed, Georgia law requires that the trial court transmit the entire record and transcript of the proceedings, along with a special report prepared by the trial judge, to the state Supreme Court in order to facilitate appellate review.¹¹ In the course of this review, the state Supreme Court must determine whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor" and whether it "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."¹² Under the statute, the Georgia Supreme Court is obligated to "include in its decision a reference to those similar cases which it took into consideration" and is authorized to affirm the sentence of

⁶ GA. CODE ANN. § 16-5-1(a) (emphasis added). Express malice is defined as the "deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof." GA. CODE ANN. § 16-5-1(b). Implied malice exists "where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." *Id.*

⁷ See Bureau of Justice Statistics - Capital Punishment Statistical Tables, 2006 - Table 1: Capital Offenses by State, 2006 (Dec. 17, 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st01.htm>. As of 2006, among the 38 states that maintain a capital punishment statute, 21 expressly define "first-degree murder" and limit death penalty eligibility to that offense: Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Louisiana, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, and Wyoming. The vast majority of these states also require a finding of one or more aggravating circumstances before capital punishment is an option.

⁸ GA. CODE ANN. § 16-5-1(d).

⁹ GA. CODE ANN. § 17-10-30(c). Of the eleven circumstances listed in the Georgia code, several are very specific in their terms, limiting the respective class of defendants to which each rightly could be applied. See, e.g., GA. CODE ANN. § 17-10-30(b)(1) (defendant has a prior record of conviction for a capital felony); § 17-10-30(b)(9) (defendant was in or had escaped from the lawful custody of a peace officer or a place of lawful confinement). Others, however, are considerably more vague and susceptible to broad interpretations that could implicate a disturbingly wide range of defendants. See, e.g., GA. CODE ANN. § 17-10-30(b)(3) (defendant "knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person"); GA. CODE ANN. § 17-10-30(b)(4) (defendant murdered for the purposes of receiving money or anything of monetary value); § 17-10-30(b)(7) (the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, *depravity of mind*, or an aggravated battery to the victim) (emphasis added).

¹⁰ GA. CODE ANN. § 17-10-30(b).

¹¹ GA. CODE ANN. § 17-10-35(a).

¹² GA. CODE ANN. § 17-10-35(c).

death or to set it aside and remand the case, depending on its findings.¹³ In practice, however, this mandatory review is consistently performed in a cursory manner, and has been widely criticized for its many accompanying procedural failures and the Georgia Court’s “rubber stamp” approval of every death sentence it purports to examine.¹⁴

The current pro forma nature of this review stands in stark contrast to the way the state of Georgia assured the U.S. Supreme Court that the process would be administered. In response to a certified question from the U.S. Supreme Court, the Georgia state Supreme Court analogized its treatment of aggravating circumstances to a pyramid: all cases of homicide are contained within the pyramid, with the consequences to the perpetrator becoming increasingly severe as the case moves from the pyramid’s base to its apex. The first plane of division distinguishes murder from all other homicides; the second plane separates all murders from those for which the death penalty is a possibility due to the presence of one or more statutorily defined aggravating circumstances; and the third sets apart from all death-eligible murders those for which—pursuant to the discretionary judgment of a jury considering all evidence in extenuation, mitigation, and aggravation of punishment—death actually will be imposed.¹⁵ The Georgia Supreme Court specified that its automatic review of death sentences acted as a final limitation on the imposition of the punishment, examining “whether the penalty of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.”¹⁶ While performance of this function may cause the Georgia court to remove a case from the death penalty category, it can never have the reverse effect of subsuming it.¹⁷

It is critical under Georgia’s laws and procedures that the state Supreme Court review adequately functions to constrain state officials and jurors who favor the death penalty, since district attorneys are granted virtually unbridled discretion in deciding which murder defendants will be exposed to the possibility of capital punishment. By way of example, the petitioner in *McCleskey v. Kemp* submitted a deposition from Lewis R. Slaton, who for eighteen years had served as the district attorney of Fulton County, where the petitioner had been tried and sentenced.¹⁸ The testimony that Slaton provided regarding his duties in office, and his description of a lack of any standard procedures or guidelines to inform or constrain any of the assistant district attorneys in their fulfillment of such responsibilities during any stage of the prosecution of cases, is indicative of a systemic susceptibility to abuse and injustice. Having received only “on-the-job training,” individual prosecutors were granted full discretion to decide when to seek an indictment for murder over a lesser charge; when to plea bargain or to reduce or dismiss charges; and when to seek the death penalty.¹⁹ The ADAs informed Slaton of these decisions “as they saw fit,” and at no point were they required to justify or explain themselves.²⁰ Moreover, beyond Slaton’s periodic pulling of evidentiary files at random in order to check on the status of cases, there were no supervisory efforts to maintain consistency between

¹³ GA. CODE ANN. § 17-10-35(e).

¹⁴ See *infra* Sections (5)(C) and (5)(D) under the Eighth Amendment heading of the article.

¹⁵ See *Zant v. Stephens*, 462 U.S. 862, 870-72 (1983) (quoting *Zant v. Stephens*, 250 Ga. 97, 99-100 (1982)).

¹⁶ *Zant v. Stephens*, 250 Ga. 97, 99-100 (1982) (citing GA. CODE ANN. § 27-2537).

¹⁷ *Zant*, 250 Ga. at 100.

¹⁸ *McCleskey v. Kemp*, 481 U.S. 279, 357 (1987) (Brennan, J., dissenting) (citing Deposition in No. 84-8176 of Lewis R. Slaton, Aug. 4, 1983, p. 5; *McCleskey v. Zant*, 580 F.Supp. 338 (1984); and Tr. 1316).

¹⁹ *McCleskey*, 481 U.S. at 357.

²⁰ *Id.* at 357-58.

prosecutorial decisions or to identify and rectify any potential discriminatory abuses of discretion.²¹

Georgia's capital sentencing procedures thus exhibit severe deficiencies at every stage: a murder statute that fails to discriminate between degrees of murder and that contains a number of vaguely written statutory aggravating factors, providing a basis from which an impermissibly large number of defendants can be considered death-eligible; prosecutors who have neither the guidance nor the incentive to cultivate consistency in their capital punishment and plea bargaining decisions, either within or between districts; and a state Supreme Court review intended to rectify abuses of discretion which may occur in the lower courts as a result of overbroad statutory construction that has degenerated into a perfunctory exercise that does little if anything to ensure that the death penalty is not disproportionate in any given case. Accordingly, and as the following sections will show, the current imposition of the death penalty under Georgia law contradicts the expectations that the U.S. Supreme Court had and the requirements that it promulgated when it originally upheld the applicable criminal and procedural statutes. Moreover, Georgia's death penalty practices violate a number of the provisions and principles of the U.S. Constitution, particularly the Eighth Amendment prohibition against cruel and unusual punishment and the guarantee of equal protection of the laws under the Fourteenth Amendment.

THE EIGHTH AMENDMENT

This second section of the article contends that Georgia's death penalty statutes and procedures violate the Eighth Amendment prohibition against cruel and usual punishment as the concept has been developed through over three decades of Supreme Court jurisprudence. More particularly, this section identifies the increasingly influential judicial recognition of consistency and restraint as dual constitutional mandates with respect to the State-sanctioned extinguishment of a human life, and describes more fully how, as applied, Georgia's capital punishment law stands in contravention of both: it does not constrain application of the death penalty to only the most extreme and atrocious crimes and criminals, nor does it differentiate in any meaningful way between those defendants who are executed and those who are spared.

The Eighth Amendment section of this article thus begins with an assessment of how the Court establishes the continually evolving limitations imposed on punishment under the Cruel and Unusual Punishment Clause, noting the importance of both community values and independent judicial construction of what precedent dictates. The following two parts of the section specifically focus on how ambiguous and potentially overbroad statutory aggravating factors and unconstrained prosecutorial discretion have led to an appearance of arbitrariness in sentencing decisions. This, in turn, undermines the legitimacy of the entire Georgia criminal justice system from the perspective of Georgia's citizens.

After considering the role of the jury as arbiter of the "community values" that fix when, if ever, the State is justified in inflicting a death sentence, the article explores the importance of a thorough proportionality review to the constitutionality of Georgia's capital punishment scheme. Specifically, the article argues that the U.S. Supreme Court's approval of Georgia's death penalty statute in *Gregg v. Georgia* was conditional on the state's promise of a mandatory and properly performed proportionality review in every applicable case. This position aligns with the

²¹ *Id.* at 358.

separate statement that Justice Stevens made in the recent denial of certiorari on the issue in *Walker v. Georgia*, but conflicts with Justice Thomas’s interpretation of Court precedent as articulated in an additional separate statement to that same case. The Justices’ conflicting opinions seem to indicate that the Supreme Court will be pressed to clarify its position on Georgia’s laws in the near future.

Notwithstanding the evidence that both the Georgia legislature and the U.S. Supreme Court considered a comprehensive proportionality review to be critical to the fair application of the state’s death penalty statutes and procedures, the article next is able to demonstrate that the Georgia Court has neglected its obligations. By selecting an increasingly abbreviated range of cases, by utilizing improper case comparators, and by incorporating overturned and otherwise inappropriate sentences into its analysis, the state Court’s perfunctory review procedures provide only a pretense of protecting a capital defendant’s rights. The article shows that as a result, Georgia’s death penalty law cannot be said to conform to the requirements of the Eighth Amendment regarding the appropriate purposes for and manners in which the government may punish its citizens.

The final part of this section of the article introduces a hypothetical death row petitioner (an amalgamation of real capital murder defendants) in order to show how the current iteration of Georgia’s proportionality review omits from consideration comparable murder cases that resulted in life sentences—whether due to a plea bargain, a prosecutorial decision not to pursue the death penalty at all, or the mercy of the sentencing authority—which in turn skews the reviewing judges’ perception of whether capital punishment is commensurate with the severity of the crime. This section of the article therefore concludes that the combination of the overbroad construction of the state’s statutory aggravating factors and the consistent failure of the state Supreme Court to adequately undertake its required proportionality review has resulted in an arbitrary and inconsistent capital punishment scheme, which violates the Cruel and Unusual Punishment Clause of the U.S. Constitution and which therefore must be struck down.

(1) Overview of the Eighth Amendment “Cruel and Unusual Punishment” Clause

A. History of the Eighth Amendment

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”²² The meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment has been developed through decades of Supreme Court jurisprudence addressing the constitutionality of the death penalty under various circumstances. The Amendment proscribes “all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.”²³ Underlying this prohibition of excessive punishments is the basic “precept of justice that punishment for [a] crime should be graduated and proportioned to

²² U.S. CONST. amend. VIII.

²³ *Kennedy v. Louisiana*, 554 U.S. ___, 8 (2008) (citing *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002)).

[the] offense.”²⁴ Such proportionality is assessed based on currently prevailing norms²⁵ and the “evolving standards of decency that mark the progress of a maturing society.”²⁶

Such evolving standards of decency “must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”²⁷ This is especially crucial in the context of capital punishment because when the State punishes by death, the law and those who enforce it in pursuit of retributive justice risk “descen[ding] into brutality” and “transgressing the constitutional commitment to decency and restraint.”²⁸ Accordingly, the Eighth Amendment demands that capital punishment “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”²⁹

B. Continually Evolving Meaning of the Eighth Amendment

Since “the cruel and unusual punishment clause [is] not a static concept, but one that must be continually reexamined in the light of contemporary human knowledge,” and “the cruel and unusual language must draw its meaning from the evolving standard of decency that mark the progress of a maturing society,” the fact that capital punishment has been considered permissible throughout the history of the United States does not necessarily mean that it remains permissible today.³⁰ Thus, the Georgia and United States Supreme Courts are obligated to recurrently reassess Georgia’s sentencing procedures and decisions to ensure that they comport with continually evolving societal standards and norms of decency. The citizens of Georgia in particular have displayed a consistently decreasing willingness to send convicted murderers to death row: in the years comprising the mid- to late-1990s, juries issued death sentences anywhere from one-half to two-thirds of the time that they had the option, whereas in the years following 2000, the pattern reversed and juries rejected the death penalty two-thirds of the time.³¹ In the year 2006, for the first time in 30 years, no Georgia jury handed down a death sentence.³²

Even if the U.S. Supreme Court continues to reaffirm its decision in *Gregg v. Georgia*, however, and to hold that Georgia’s capital punishment law is (for the present time) facially constitutional, such a holding would not be binding with respect to the adequacy of Georgia’s procedures as applied:

If the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to

²⁴ *Weems v. United States*, 217 U.S. 349, 367 (1910).

²⁵ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

²⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

²⁷ *Kennedy*, 554 U.S. at 9.

²⁸ *Id.*

²⁹ *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins*, 536 U.S. at 319).

³⁰ *Furman v. Georgia*, 408 U.S. 238, 328-29 (1972) (Marshall, J., concurring) (internal citations and punctuation omitted) (“The fact... that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on [the Court].”).

³¹ Heather Vogell, *A Matter of Life or Death: Is the public less eager to have killers die?*, ATLANTA J.-CONST., Sept. 24, 2006.

³² *Id.* The researchers also noted that the Georgia justice system sent five or more people to death row every year between 1974 and 2000, but has sent fewer than five persons to death row each year since then. *Id.*

establish, *and has not even attempted to establish*, that the Georgia Supreme Court failed properly to perform the task in this case or that it is incapable of performing its task adequately in all cases; *and this Court will not assume that it did not do so.*³³

In other words, since the petitioner in *Gregg* raised only a general challenge to Georgia’s procedures and did not attempt to present evidence as to more specific instances of failure in the appellate review process, the U.S. Supreme Court in the exercise of judicial restraint refrained from speculating on the possible inadequacies of the statute as applied or potential derelictions of duty in any particular case. In contrast, Georgia’s penitentiaries currently are populated by a number of death row inmates who can present evidence that does indeed establish that, regardless of the adequacy or inadequacy in the abstract of the statutory procedures that the Georgia Supreme Court is obligated to undertake, in practice, and particularly as applied to such inmates’ individual cases, they have failed to conform to the effective review process that the U.S. Supreme Court envisioned in *Gregg*—an assumption that comprised part of the foundation for that Court’s decision that Georgia’s death penalty statute was constitutional on its face.³⁴

C. Objective Indicia as Evidence of Cruel or Unusual Punishment

In assessing whether “the death penalty is disproportionate to the crime committed” in violation of the Constitution, the U.S. Supreme Court considers “objective indicia of society’s standards, as expressed in legislative enactments and state practices with respect to executions,” but also relies upon “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”³⁵ In this process of refining and clarifying the continually evolving meaning of the Eighth Amendment, the Supreme Court has demonstrated its willingness to engage in statistical analysis and other methods of quantifying and assessing data—and indeed, has often found such evidence persuasive.³⁶ Such statistical evidence can be informative about relevant social norms and consensus, even if the existence of a legislative enactment alone might seem to suggest that the death penalty is generally favored by the governing body’s constituents.

For example, in *Kennedy v. Louisiana*, the Court noted that although a number of States had passed legislation permitting the imposition of the death sentence in child rape cases, “no

³³ *Gregg v. Georgia*, 428 U.S. 153, 224 (1976) (White, J., concurring) (emphasis added).

³⁴ Although this author has a long-standing academic interest in the modern institution of capital punishment, this particular article was motivated by the author’s personal involvement in a currently pending death penalty appeal in Georgia. Until all avenues for challenging the client’s death sentence have been fully exercised, this author prefers to omit any details of the client’s case from this article, even when the information is otherwise publicly available. However, some of characteristics and circumstances attributed to the hypothetical defendant referred to herein reflect those of such client and other similarly situated death row inmates. The author reminds the reader that the stylistic choice of using a hypothetical rather than an actual defendant’s case should not detract from the fact that real persons are deeply affected by the constitutional problems articulated in this article, which should underscore the urgency of resolving these issues.

³⁵ *Kennedy v. Louisiana*, 554 U.S. ___, 10 (2008) (citing *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); and *Gregg v. Georgia*, 428 U.S. 153 (1976)).

³⁶ See *Kennedy*, 554 U.S. at 11 (“The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here.”).

individual ha[d] been executed for the rape of an adult or child since 1964.”³⁷ In other words, in determining whether the death penalty is a constitutionally permissible, proportionate, and appropriate punishment for a crime, the Court deems relevant not simply whether the legislature has passed a law authorizing capital punishment under the particular circumstances, but also the frequency with which judges and juries actually impose the death sentence when the facts of a case would allow it. Notably, the Supreme Court’s emphasis is not on whether capital punishment is *ever* imposed under certain conditions, but rather the relative *frequency* of its imposition; using the former measurement could result in a high aggregate total if the sentencing criteria are written so broadly as to encompass a large number of murders, even if under the latter methodology the relative imposition of capital punishment (that is, the actual compared to potential number of death sentences) is quite low. Critically, and as will be further elaborated *infra*, the state Supreme Court proportionality and constitutionality review mandated by Georgia’s sentencing procedures overlooks this distinction.

D. Consistency and Restraint in Punishment

Two themes pervade the U.S. Supreme Court precedent regarding the underlying procedures and surrounding circumstances that are necessary for the death penalty to be permissible. First is the idea of consistency: persons convicted of similar crimes should be punished similarly, and there must be a cognizable rationale as to why certain defendants receive a death sentence and others do not.³⁸ Second is the idea of restraint: given that those convicted of similar wrongdoing must receive punishment of approximately the same magnitude, and given the duty of the courts to uphold the respect for human life and dignity mandated by the Constitution, capital punishment must be a relative rarity, imposed only on those guilty beyond a reasonable doubt of the most abhorrent crimes and heinous behavior.³⁹ The Georgia Supreme Court proportionality review is meant to ensure that citizens serving on juries and other state actors in the lower court system do not overreach their authority in contradiction to either of these two principles.

(2) Sentencing Decisions: The “Extreme and Atrocious” Limitation

A. The Relative Rarity of “Extreme and Atrocious” Murders

³⁷ 554 U.S. at 22.

³⁸ *See, e.g., id.* at 25 (stating that in order to promote the constitutionally required principle of human decency, “[o]ne approach has been to insist upon general rules that ensure consistency in determining who receives a death sentence”); *see also* *California v. Brown*, 479 U.S. 538, 541 (1987) (“[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.”).

³⁹ *See, e.g., Kennedy*, 554 U.S. at 26 (the approach of the Court “has been to insist upon confining the instances in which capital punishment may be imposed” (citing *Gregg v. Georgia*, 428 U.S. 153, 187, 184 (joint opinion of Stewart, Powell, and Stevens, JJ.) (because “death as a punishment is unique in its severity and irrevocability,” capital punishment must be reserved for those crimes that are “so grievous an affront to humanity that the only adequate response may be the penalty of death”) (internal citations omitted); and *Roper v. Simmons*, 543 U.S. 551, 569 (the Eighth Amendment requires that “the death penalty is reserved for a narrow category of crimes and offenders”)).

Assuming that there are at least some circumstances under which it is constitutional for the State to inflict the death penalty—an assumption that several Justices have questioned,⁴⁰ but which at present time a majority of Justices hold⁴¹—the gravity and finality of the sentence is such that it will be proportional to the severity of the crime only in the rarest and most extreme cases. The recurrent theme in Supreme Court jurisprudence that “death is different”⁴² and “unique”⁴³ stems from the recognition that death is “an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.”⁴⁴ When the State sanctions the “calculated killing of a human being,” it constitutes “a denial of the executed person’s humanity” and the extinguishment not only of his life but his rights, such that even if “[t]he punishment itself [is] unconstitutionally inflicted, ... the finality of death precludes relief.”⁴⁵

Accordingly, “[t]he outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.”⁴⁶ Death is certainly not the ordinary punishment for several specific subtypes of murder for which a disturbingly high number of Georgia inmates have been placed on death row. Without undermining the serious nature of the offenses with which these individuals are charged, and notwithstanding the actions of certain overzealous prosecutors and judges, juries both within Georgia and throughout the United States typically do not prescribe capital sentences under similar factual circumstances. Thus, for example, for all persons in Georgia convicted of a murder in the course of the armed robbery of a business or in a home invasion between 1995 and 2004, less than 5 percent were sentenced to die.⁴⁷ Even for those categories of crimes with relatively higher rates of death penalty convictions, such as multiple murders, less than 10 percent of all defendants received a death sentence.⁴⁸ Among these defendants, there does not appear to be, in the words of Justice

⁴⁰ See, e.g., *Pulley v. Harris*, 465 U.S. 37, 64-67 (1984) (Brennan, J., dissenting) (arguing that even if proper procedural protections exist and are exercised, the death penalty itself may not be a constitutional exercise of the State’s power, since “the emotions generated by capital crimes” may “invariably affect[] by impermissible considerations” the decisions of juries, trial judges, and appellate courts); see also *Zant v. Stephens*, 462 U.S. 862, 905 (1983) (opinion of Marshall and Brennan, JJ., dissenting) (citing Justice Marshall’s dissent in *Gregg* and concurrence in *Furman*) (arguing that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Constitution).

⁴¹ See, e.g., *Baze v. Rees*, No. 07-5439, ___ U.S. ___, 8 (2008) (opinion of Roberts, C.J., Kennedy, J., Alito, J.) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional....”).

⁴² See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

⁴³ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

⁴⁴ *Id.*

⁴⁵ *Id.* at 290 (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1958)).

⁴⁶ *Furman*, 408 U.S. at 291 (Brennan, J., concurring).

⁴⁷ *Same crime, different outcome*, ATLANTA J.-CONST., Sept. 22, 2007. From 1995 to 2004, murders associated with the armed robbery of a business resulted in 8 death sentences and 168 life sentences, or a death sentence rate of approximately 4.5 percent. In the same time period, Georgia imposed 223 life sentences and only 13 death sentences on convicted murderers whose crime occurred during a home invasion—a mere 3.6 percent of relevant and eligible cases.

⁴⁸ *Id.* Of the 172 multiple murder cases examined from 1995 to 2004, 155 convicted defendants received terms of imprisonment, while only 17 received the death penalty.

Brennan's concurrence in *Furman*, any "rational basis that could differentiate... the few who die from the many who go to prison."⁴⁹

B. The Problem of Overbroad Statutory Aggravating Factors

Justice Brennan, in his *Furman* concurrence, also dispensed with the State's argument that the sporadic imposition of the death penalty was evidence of "informed selectivity" rather than arbitrariness:

Informed selectivity, of course, is a value not to be denigrated... [But] [w]hen the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for the punishment... [A]ll cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner *Furman* or his crime illustrates the "extreme," then nearly all murderers and their murders are also "extreme."⁵⁰

The version of the Georgia death penalty statute with which the *Furman* court was concerned gave juries more unguided discretion in deciding who would receive the death penalty than the current statute, at least on its face. The de facto effect of Georgia's current law and procedures, however, is to bestow a similar amount of discretion on prosecutors and sentencing authorities, thus subjecting defendants to the same risk of capricious punishment which necessitated that the former statute be struck down.

Specifically, as they are applied, the statutory aggravating factors do not "genuinely narrow the class of persons eligible for the death penalty," and fail to "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."⁵¹ This is evidenced by the fact that over half of the murders in Georgia display one or more statutory aggravating factors and are thus death-eligible,⁵² and the fact that among these death-eligible defendants, there is no meaningful and constitutionally valid distinction between the character or crimes of the few who are executed and the rest who are spared, beyond the whims of the district attorney or the sentencing judge or jury for the particular case. Given the Eighth Amendment mandate that death sentences are imposed rarely and only for the most extreme crimes, subjecting these defendants to capital punishment in many cases will be an unconstitutionally disproportionate punishment in violation of the Cruel and Unusual Punishment Clause. Treating it otherwise, moreover, would compel the imposition of the death penalty in countless additional cases, to an extent that itself would violate constitutional law by rendering the restriction to "extreme" cases meaningless.

(3) Sentencing Decisions: Arbitrariness and Prosecutorial Discretion

⁴⁹ 408 U.S. at 294 (Brennan, J., concurring); *see also, e.g., Same crime, different outcome, supra* (describing by way of case histories for five categories of aggravated murder how defendants who committed factually similar crimes receive drastically different punishment).

⁵⁰ 408 U.S. at 293-94 (Brennan, J., concurring).

⁵¹ *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

⁵² Bill Rankin et al., *A Matter of Life or Death: Death Still Arbitrary*, ATLANTA J.-CONST., Sept. 22, 2007 [hereinafter "Rankin et al., *Death Still Arbitrary*"] (finding that 56 percent of all murders studied were eligible for death, including hundreds of only "moderately aggravated" cases).

A. Opportunities for Arbitrariness under Imprecise or Expansive Statutory Criteria

The problem of overbroad statutory aggravating factors discussed in the immediately preceding part of this article exacerbates the additional problem of the appearance of arbitrariness within the penal system. Broadly written and non-uniformly applied statutory aggravating factors increase the total number of defendants eligible for death under Georgia law to an extent that renders the state's sentencing procedures constitutionally suspect. In the past, the U.S. Supreme Court has been wary of statutes that significantly expand the pool of defendants subject to capital punishment at the discretion of the presiding district attorney and will look beyond the language of the statute to examine how it is applied in practice: "Legislative 'policy' is thus necessarily defined not by what is legislatively authorized, but by what juries and judges do in exercising the discretion so regularly conferred upon them."⁵³

In *Kennedy v. Louisiana*, for instance, the U.S. Supreme Court invalidated a Louisiana statute authorizing the imposition of the death penalty for the crime of rape of a child, in part because of the excessive number of executions that would be permitted under the law.⁵⁴ Of equal significance, therefore, should be the similarly and unduly large number of persons who would be eligible for execution if district attorneys and judges across Georgia all engaged in the broadest construction of the current death penalty statute that the face of the text seems to allow. If every jurisdiction in the state were to pursue capital punishment as aggressively and against as extensive a spectrum of defendants as officials in certain Georgia counties have done,⁵⁵ the number of potential executions would rise to a level that the Supreme Court implies should be constitutionally impermissible.⁵⁶

The Supreme Court has already made it clear that, because of the "uniqueness" of the death penalty, it cannot "be imposed under sentencing procedures that create[] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner."⁵⁷ The criticisms levied by the U.S. Supreme Court at Georgia's death penalty statute when striking it down as unconstitutional in *Furman* are equally applicable to the state's current statute: "The death penalty is exacted with great infrequency even for the most atrocious crimes, and... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."⁵⁸ When less than 1 in 10 persons, or even 1 in 20 persons, convicted of a particular subcategory of

⁵³ *Furman*, 408 U.S. at 314 (White, J., concurring).

⁵⁴ 554 U.S. ___, 27-28 (2008).

⁵⁵ The discrepancy in the rate and aggressiveness with which different Georgia counties pursue the death penalty is most apparent between urban and suburban districts: in the metro-Atlanta area, for example, a capital sentence is significantly more probable in the suburban Cobb and Douglas counties than it is in the urban DeKalb and Fulton counties. See Georgia Moratorium Campaign, *Problems with Georgia's Death Penalty*, available at www.georgiamoratorium.org/application.html, last visited Dec. 5, 2008 (citing, *inter alia*, the Georgia Department of Corrections and the Georgia Criminal Justice Coordinating Council). Additional county-to-county comparisons reveal shocking disparities, such as the greater number of death row inmates found in Baldwin County, which averages only 2 murders per year, relative to Fulton County, which averages 230 murders per year. *Id.* (citing Richard Willing, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999).

⁵⁶ See *Kennedy*, 554 U.S. at 28 ("[O]nly 2.2% of convicted first-degree murderers are sentenced to death," and allowing death penalty states to "sentence to death all persons convicted of raping a child... could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.").

⁵⁷ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

⁵⁸ 408 U.S. at 313 (White, J., concurring).

murder under one of Georgia’s statutory aggravating factors is sentenced to death,⁵⁹ the punishment can fairly be said to be

cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [murders], many just as reprehensible as [the defendant’s], [the defendant is] among a capriciously selected random handful upon whom the sentence of death has been imposed.... [T]he 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.⁶⁰

Just as the lack of “suitably directed and limited” discretion inhering in the Georgia statute at issue in *Furman* led to a finding of its unconstitutionality,⁶¹ so too does the arbitrary and disproportionate nature of present-day capital conviction in Georgia necessitate that both the sentences of these defendants and the Georgia death penalty laws and procedures that support them be overturned.

B. Limitations to the Tolerance of Discretionary Action under *Gregg*

There are “opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law.”⁶² For instance, “the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them.”⁶³ In the past, the Supreme Court has not been persuaded by the contention that this or other discretionary opportunities are in themselves sufficient to render the Georgia death penalty statute unconstitutionally vague. As the *Gregg* court construed it, a prosecutor’s decision of whether or not to seek capital punishment was in the context of “*remov[ing]* a defendant from consideration as a candidate for the death penalty,” and noted that a “decision to afford an individual defendant mercy” was not unconstitutional.⁶⁴

This rationale, however, presumes that the defendant justifiably should have been among those considered eligible for a death sentence in the first place. Yet if the judicial and prosecutorial construction given to the statutory aggravating factors is broader than the legislature intended or than the Constitution permits, any concern that some capital defendants are arbitrarily shown mercy is subordinate to the problem that others who never should have been death-eligible to begin with will not receive such mercy. The Court has acknowledged as much when it stated that “[s]ince the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty,” a jury decision to spare a particular defendant from death is not unconstitutional, *provided that* the defendants are “sentenced under a system that does not create a substantial risk of arbitrariness or caprice.”⁶⁵ Under a statute where the majority of all murders meet one or more of the statutory aggravating factors,⁶⁶ and where

⁵⁹ See *supra* notes 47-49 and accompanying text (providing data demonstrating the sporadic imposition of death sentences on various categories of aggravated murder).

⁶⁰ *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

⁶¹ See *Gregg*, 428 U.S. at 189.

⁶² *Id.* at 199.

⁶³ *Id.*

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Id.* at 203.

⁶⁶ See Rankin et al., *Death Still Arbitrary*, *supra* note 52.

prosecutors have unbridled discretion to pursue a death sentence in any, all, or none of these cases, such impermissible arbitrariness is not just a “risk” but an inevitability.

The *Gregg* court’s disposition of the petitioner’s argument that Georgia’s “statutory aggravating circumstances are vague and therefore susceptible of widely differing interpretations, thus creating a substantial risk that the death penalty will be arbitrarily inflicted by Georgia juries,”⁶⁷ was cursory and necessarily incomplete, since the petitioner only brought two of the possible ten statutory aggravating factors into issue. As noted above, a number of the statutory criteria are susceptible to expansive interpretation, but the *Gregg* court was not given reason to expressly consider them. Moreover, the Court’s holding against the petitioner was made “[i]n light of the decisions of the Supreme Court of Georgia,” at that time,⁶⁸ before the Court had sufficient opportunity to discern how the criteria would be applied.

The *Gregg* court also acknowledged that the mere existence of sentencing guidelines may not be sufficient to withstand constitutional scrutiny: “A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.”⁶⁹ Although applicable state court precedent at the time that the *Gregg* opinion was issued may have suggested that the statute would be narrowly construed, more than three decades of Georgia Supreme Court and lower court jurisprudence subsequent to the decision indicate otherwise. As a result, Georgia’s death penalty practices, as they now stand, fail to comply with the U.S. Supreme Court’s condition that sentencing procedures be structured in a way so as to avoid arbitrary or disproportionate results.

C. The Public Perspective: Appearance of Arbitrariness

The Eighth Amendment judgment about whether a punishment is disproportionate to the severity of the crime “should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”⁷⁰ The gross discrepancy between the rate of capital punishment—even in factually similar cases—throughout the various districts of Georgia, however, is evidence that neither district attorneys nor judges (including the state Supreme Court judges in their proportionality review) are making these sentencing decisions based on objective criteria to an extent sufficient to comport with the demands of the Constitution. Even if purportedly guided by statutory criteria, in practice the decisions about who will suffer a death sentence appear wholly arbitrary in a way that undermines the integrity of the judicial system and is manifestly unconstitutional.

The damage that the systemic flaws inhering in Georgia’s death penalty procedures inflict on the legitimacy of the state’s criminal justice system should not be discounted. It is of “vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”⁷¹ The widespread and pointed criticisms of the inequities and injustices under the current law show that Georgia’s capital sentencing structure fails in both respects: the public does not perceive the system to be

⁶⁷ 428 U.S. at 202.

⁶⁸ *Id.*

⁶⁹ *Id.* at 195, n. 46.

⁷⁰ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

⁷¹ *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)) (internal punctuation omitted).

fair, and both qualitative and quantitative data support the accuracy of this perception of unfairness. For instance, of the 1,315 murder cases in the ten-year period from 1995 through 2004 that were death-penalty eligible, prosecutors pursued capital punishment for only one out of four defendants, with only one in twenty-three of these defendants (about 4.3%) ending up on death row.⁷² Moreover, even out of the most severe 10 percent of death-eligible cases (as identified through a statistical analysis incorporating factors such as multiple victims, a rape, or torture), only 22 percent of the convicted killers were placed on death row.⁷³

The sentencing discrepancies between defendants found guilty of killing white victims and those found guilty of killing black victims are particularly detrimental to the legitimacy of the criminal justice system. “Race discrimination is ‘especially pernicious in the administration of justice.’ And public respect for our system of justice is undermined when the system discriminates based on race.”⁷⁴ Even after controlling for differences between cases (such as evidence of rape or torture, or a confession) that could contribute to a district attorney’s motivation to pursue capital punishment, killers of white victims remained twice as likely to be placed on death row.⁷⁵ Notwithstanding the absence of any explicit directive to take divergent approaches to cases depending on the race of the victim, the de facto racial classifications and discriminatory treatment that a standardless system permits severely damages the integrity of the law in the eyes of the public and “undermine[s] [the Court’s] unceasing efforts to eradicate racial prejudice from our criminal justice system.”⁷⁶

(4) Sentencing Decisions: The Jury as Arbiter of “Community Values”

The *Gregg* court stressed that Georgia’s sentencing procedures “require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant.”⁷⁷ The criminal sentencing statute at issue was upheld in part because the Supreme Court envisioned a system whereby death would be imposed only if the members of the jury collectively agreed beyond a reasonable doubt that one or more statutory aggravating factors were present; and because even if such aggravating circumstances were found, the jury would be permitted to make a binding recommendation of mercy irrespective of the existence or nonexistence of any mitigating factors.⁷⁸

Such a sentencing scheme, presented in the abstract, appears to help minimize the risk that the factfinder will hand down an arbitrary or disproportionate sentence. In practice, however, a solitary judge, rather than a fair cross-section of the community as embodied in a jury, may make these critical findings. Moreover, the disparate outcomes in similar cases demonstrate that the purportedly “clear and objective” standards that “control” the factfinder’s

⁷² Rankin et al., *Death Still Arbitrary*, *supra* note 52.

⁷³ *Id.* The study found that although prosecutors sought the death penalty in 103 of the 132 cases statistically determined to be the “worst” ten percent of 1,315 total death-eligible murders, nearly half of the defendants were allowed to plead guilty to avoid the possibility of death and others were sentenced by judge or jury to life imprisonment, so that ultimately only 29 of the 132 most severe cases resulted in the defendant on death row. *Id.*

⁷⁴ *Johnson v. California*, 543 U.S. 499, 511 (2005) (quoting *Rose v. Mitchell*, 433 U.S. 545, 555 (1979)).

⁷⁵ Heather Vogell, *A Matter of Life or Death: Patterns of disparities*, ATLANTA J.-CONST., Sept. 22, 2007 [hereinafter, “Vogell, *Patterns of disparities*”].

⁷⁶ *Johnson*, 543 U.S. at 512 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987)).

⁷⁷ 428 U.S. at 198.

⁷⁸ *See id.* at 196-98.

exercise of discretion have been insufficient in application to protect against arbitrary and disproportionate results. Furthermore, the flexibility of the system, which was intended to facilitate the sentencing authority's ability to show mercy to convicted defendants, in practice only further randomizes who is selected for death, especially given the large pool of defendants who ultimately are death-eligible under Georgia's broadly written statutory provisions.

Death sentences where the decision is made by a judge rather than a jury are especially problematic, since the absence of a collective and reasoned judgment from a pool of the defendant's fellow citizens eliminates the "link between contemporary community values and the penal system."⁷⁹ The Supreme Court has attributed the "reluctance of juries in many cases to impose the [death] sentence" to "the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases."⁸⁰ Research and analysis of the death penalty in Georgia has demonstrated that juries making sentencing decisions in accordance with "contemporary community values" rarely find capital punishment warranted for death-eligible murders in general, with the frequency plummeting to a near nullity for certain subtypes of crimes.⁸¹ These same "community values" are supposed to help to inform the Georgia Supreme Court's determination of whether capital punishment in a given case comports with the demands of the Eighth Amendment. Accordingly, the use of a judge rather than jury sentencer hinders appellate analysis of whether capital punishment in the defendant's particular circumstances is violative of the Eighth Amendment. Whenever the decision is taken out of the hands of jury—which embodies a cross-section of such community values⁸²—and placed into the hands of a single judge, the defendants in such cases are deprived of an additional safeguard against unconstitutional imposition of the death penalty. "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."⁸³

(5) Importance of Proportionality Review to Georgia's Procedures

A. Proportionality Review as Condition Precedent to Approval under *Gregg* in Georgia

The contention that the promise of a thorough state Supreme Court review was integral to the U.S. Supreme Court's decision to uphold the Georgia death penalty statute in *Gregg v. Georgia*⁸⁴ is evidenced by the opinion itself as well as by subsequent cases interpreting the language contained therein. In *Gregg*, the U.S. Supreme Court found that Georgia's death penalty procedures adequately controlled the discretion of the sentencing authority⁸⁵ and ensured that capital punishment would not be imposed so arbitrarily as to be invalid under the authority of *Furman v. Georgia*.⁸⁶ Both the opinion of the Court and the White concurrence in *Gregg* "made much of the statutorily required comparative proportionality review."⁸⁷ Later cases

⁷⁹ *Id.* at 181 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968)).

⁸⁰ *Gregg*, 428 U.S. at 182.

⁸¹ *See supra* note 47, source cited therein, and accompanying text.

⁸² *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁸³ *Gregg*, 428 U.S. at 187 (citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932), and *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harland, J., concurring in result)).

⁸⁴ 428 U.S. 153 (1976).

⁸⁵ *Id.* at 197-98 (opinion of Stewart, Powell, and Stevens, JJ.).

⁸⁶ *Id.* at 222 (opinion of White, J., Burger, C.J., and Rehnquist, J., concurring).

⁸⁷ *Pulley v. Harris*, 465 U.S. at 45 (citing *Gregg*, 428 U.S. at 198, 204-06, 222-23).

confirmed that the *Gregg* court's approval of the Georgia sentencing procedures was dependent on "meaningful appellate review of every death sentence,"⁸⁸ wherein the state Supreme Court would "review[] the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate."⁸⁹ Initially the Supreme Court abided by this directive in a meaningful way, conducting an extensive review of all death sentences that included comparisons to similar cases where a term of imprisonment, rather than capital punishment, was imposed.⁹⁰ As a result, in the relatively short interval between the enactment of the post-*Furman* revised statute through the year 1981, the Georgia court reversed 10 death sentences on proportionality grounds.⁹¹ Since then, and following the Georgia Court's practice to drop life sentences from its analyses, however, no death sentences have been overturned on proportionality grounds.⁹²

The Court's decision in *Pulley v. Harris* generated some ambiguity as to whether and when an appellate proportionality review will be a constitutionally required element of capital sentencing procedures. The *Pulley* court held that although mandatory proportionality review was a component of the judicially approved laws and practices of certain other states, this fact in itself did not render such a review "indispensable" to every statute, including the California statute specifically before the Court.⁹³ The dicta of certain Justices in later opinions reflects an apparent adherence to an overly expansive interpretation of the *Pulley* decision, construing it as completely eliminating the need for a proportionality review under the procedures of any jurisdiction.⁹⁴ The language of *Pulley* itself, however, expressly states that the Supreme Court must "take statutes as we find them."⁹⁵ Moreover, majority opinions issued by the U.S. Supreme Court subsequent to *Pulley* recognize that the compulsory appellate review is an integral part of Georgia's sentencing procedures, regardless of its constitutional necessity in other states. In the *McCleskey* decision, handed down three years after *Pulley*, for example, the U.S. Supreme Court explained that Georgia's mandatory review is "administered pursuant to [the] Court's decisions interpreting the limits of the Eighth Amendment on the imposition of the death penalty," meant to "ensure a degree of care in the imposition of the sentence of death that can be described only as unique."⁹⁶

Georgia's statutory sentencing scheme is distinct from those employed by other states in a number of significant ways, rendering U.S. Supreme Court precedent holding the other states' proportionality reviews noncompulsory under the Constitution inapplicable to the Georgia procedures. Specifically, "[i]n Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard."⁹⁷ These differences leave juries in Georgia less guided by legislative mandate in their decisions, and thus more vulnerable to handing down inconsistent sentences between similarly situated defendants. This, in turn,

⁸⁸ *Zant v. Stephens*, 462 U.S. 862, 875 (1983).

⁸⁹ *Id.* at 876.

⁹⁰ Bill Rankin, *A Matter of Life or Death: Is the review process fixable?*, ATLANTA J.-CONST., Sept. 25, 2007.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 465 U.S. at 44-45.

⁹⁴ *See, e.g., Walker v. Georgia*, No. 08-5385, 555 U.S. ____, 4 (2008) (statement of Thomas, J., concurring).

⁹⁵ 465 U.S. at 45.

⁹⁶ *McCleskey v. Kemp*, 481 U.S. 279, 314, n. 37 (1987).

⁹⁷ *Zant*, 462 U.S. 862, 873-74 (1983).

renders the state Supreme Court review all the more important to ensuring fair, consistent, and proportional outcomes, and explains why such a review would be constitutionally mandated in Georgia even if it were not in other states. “[E]ach distinct system must be examined on an individual basis,”⁹⁸ and language in one case minimizing the importance of a proportionality review for another state’s particular scheme does not necessarily translate to Georgia’s procedures.⁹⁹

B. Clarification and Conflict following Justice Stevens’ Statement in *Walker*

Most recently, in late October 2008, Justice Stevens addressed the importance of a thorough proportionality review under the standards articulated in *Gregg* by providing a separate statement to the Supreme Court’s denial of a petition for writ of certiorari on the issue in *Walker v. Georgia*.¹⁰⁰ The petitioner in the *Walker* case charged the Georgia Supreme Court with failure to conduct a meaningful proportionality review in violation of the Eighth Amendment’s guarantee against arbitrary or discriminatory sentencing.¹⁰¹ Justice Stevens wrote separately to emphasize that the denial of certiorari was due to a procedural technicality rather than the merits of the claim, that such denial would have no precedential effect, and that in fact the Court’s prior opinions support the petitioner’s submission.¹⁰² Justice Stevens’ opinion, particularly when contrasted with Justice Thomas’ statement, suggests that the Supreme Court is poised to definitively resolve lingering concerns about the constitutionality of Georgia’s death penalty laws and procedures.

In his appended statement, Justice Stevens asserted that the decision in *Gregg* to uphold Georgia’s death penalty statute “was founded on an understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by impermissible factors,” and that these procedures would include consideration of similarly situated defendants “who had *not* been put to death because that inquiry is an essential part of any meaningful proportionality review.”¹⁰³ Indeed, the Georgia Supreme Court itself confirmed this assumption in response to a certified question from the U.S. Supreme Court, expressly stating that its proportionality review “uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed.”¹⁰⁴

Justice Stevens persuasively argues that the Court’s decision in *Pulley v. Harris*¹⁰⁵ was not meant to abolish the Eighth Amendment requirement of a proportionality review in all jurisdictions, but rather was a recognition that it will not be constitutionally necessary “where the statutory procedures adequately channel the sentencer’s discretion”¹⁰⁶ under that particular

⁹⁸ *Id.* at 875 (citing *Gregg*, 428 U.S. at 195).

⁹⁹ *Cf. Walker*, 555 U.S. at 6 (statement of Stevens, J.) (stating that the assertion in *Pulley v. Harris*, 465 U.S. 37 (1984), that a comparative proportionality review will not be required for every capital sentence “was intended to convey [the Court’s] recognition of differences among the States’ capital schemes and the fact that we consider statutes as we find them,” and was not meant to undermine Court precedent concluding that “such review is an important component of the Georgia scheme”).

¹⁰⁰ *Walker*, 555 U.S. ____ (statement of Stevens, J.).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1.

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.* at 2-3 (quoting *Zant v. Stephens*, 462 U.S. 862, 880, n. 19 (1983)).

¹⁰⁵ 465 U.S. 37 (1984).

¹⁰⁶ *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

states' capital sentencing scheme.¹⁰⁷ The language of the majority opinion in *Pulley* itself indicates that the Court must “take statutes as we find them” without generalizing about the indispensability of a proportionality review from one sentencing scheme to the next,¹⁰⁸ and holds only that “[a]ssuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort.”¹⁰⁹

Importantly, the *Pulley* decision “was not meant to undermine [the Court’s] conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme.”¹¹⁰ Nevertheless, the Georgia court presently considers a much narrower range of cases than it did when the state’s death penalty statute and procedures were originally approved, now omitting those in which the jury sentenced the defendant to imprisonment—a direct contradiction to the representations it made to the U.S. Supreme Court in *Zant*.¹¹¹ “[T]he likely result of such a truncated review—particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury’s discretion in weighing aggravating and mitigating factors—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.”¹¹²

C. Systemic Failure of the Georgia Supreme Court Proportionality Review

The capital sentencing system upheld by *Gregg* was one in which the appellate proportionality review would “assure” that no defendant who is “sentenced to die by the action of an aberrant jury” will ultimately suffer death if such a penalty is generally not imposed in that particular kind of murder case.¹¹³ The confidence of the U.S. Supreme Court in Georgia’s ability to employ adequate review procedures was bolstered by its assessment of language contained in prior Georgia state decisions: the Georgia Court had promised that “if the death penalty is only rarely imposed for an act, or it is substantially out of line with sentences imposed for other acts, it will be set aside as excessive.”¹¹⁴ Yet in the years following *Gregg*, and as will be demonstrated more particularly below, the Supreme Court review has upheld capital punishment sentences even where the predominant trend throughout the state is to punish similar acts by similar defendants with the lesser penalty of imprisonment.

Justice Stevens’ scathing criticism of the Georgia Supreme Court’s required review procedures, as discussed in the preceding section, also enumerated the many deficiencies materializing in the implementation of the law. First, the written review challenged by the petitioner in *Walker* was short and cursory, consisting of “a single paragraph, only the final sentence of which” addressed the proportionality question, doing so “in the most conclusory terms.”¹¹⁵ Second, an appendix referenced in the review as offering support for the Georgia Court’s conclusions contained only a string citation of other cases in which a jury imposed death; it mentioned neither the facts of these cases nor the aggravating circumstances found by the jury,

¹⁰⁷ *Walker*, 555 U.S. at 6 (statement of Stevens, J.).

¹⁰⁸ *Pulley*, 465 U.S. at 44-45.

¹⁰⁹ *Id.* at 51.

¹¹⁰ *Walker*, 555 U.S. at 6 (statement of Stevens, J.).

¹¹¹ *Id.* at 7.

¹¹² *Id.*

¹¹³ *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

¹¹⁴ *Id.* at 205 (quoting *Coley v. State*, 231 Ga. 829, 834 (1974)).

¹¹⁵ *Walker*, 555 U.S. at 4 (statement of Stevens, J.).

which would at least help to clarify why the Georgia Court found them valid bases for comparison.¹¹⁶ Third, the perfunctory review that the court did undertake was “erroneous because it failed to use reasonable comparators,” such as relying on double-homicide cases 30 percent of the time even though the defendant at issue had been convicted of only a single homicide.¹¹⁷ Finally, by restricting its review to “the limited universe of cases in which the defendant was sentenced to death,” the court neglected the importance of the “numerous cases involving offenses very similar to petitioner’s in which the jury imposed a sentence of life imprisonment.”¹¹⁸ These defects, moreover, were not unique to the particular case under scrutiny in *Walker*, but rather are a systemic problem that occurs with regularity.¹¹⁹

The persistent discrepancies in sentencing outcomes are in part the result of the limited types of cases that the Georgia Supreme Court has been willing to consider in its review. The petitioner in *Gregg* had criticized Georgia’s capital sentencing procedures for the failure of the Georgia Supreme Court to include “nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained” in the group of cases it considers and compares when assessing the appropriateness and consistency of the death penalty for a particular defendant. Since the Georgia Supreme Court has the “authority,” to consider such cases, however, the U.S. Supreme Court found that the petitioner’s criticism did not establish that the procedures were inadequate.¹²⁰ This authority is meaningless, however, if the Georgia Supreme Court never employs it; and the consequences to the fairness and validity of the capital punishment system as a result of Georgia’s dereliction of its responsibilities have become increasingly apparent.

Finally, the conclusions of the *McCleskey* court with respect to the proportionality review are plagued by circular reasoning. The *McCleskey* opinion claimed that “absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, [the defendant] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.”¹²¹ But realistically, the only way to show that the system *is* arbitrary and capricious is to show that only certain similarly situated defendants received the death penalty, while the rest did not. A comparison that examines *only* death-sentenced defendants likely will never show a constitutional violation as long as at some point there was at least one case of a somewhat similarly situated defendant receiving the death penalty. The lack of any indication of the relative frequency with which the penalty is imposed makes virtually impossible any kind of coherent analysis of potential arbitrariness or caprice, whether in a particular case or in the system as a whole. Moreover, at least some of the Justices who originally approved the capital sentencing statute presumed such comprehensive assessments would take place: “That approach seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court.”¹²²

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 5-6, n. 3. Notably, although imposition of the death penalty is sporadic even when the defendant is found guilty of multiple homicides, the rate of capital punishment is relatively high as compared to other aggravating factors (although still quite low when considered independently), making the state Supreme Court’s use of these cases as comparators all the more misleading. See notes 47, 48, *supra*, and accompanying text.

¹¹⁸ *Walker*, 555 U.S. at 4-5.

¹¹⁹ *See id.* at 6.

¹²⁰ *Gregg v. Georgia*, 428 U.S. 153, 404 n. 56 (1976).

¹²¹ *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987).

¹²² *Walker*, 555 U.S. at 3 (statement of Stevens, J.).

D. Statistical Evidence of a Perfunctory Review Process

When the Court in *Gregg* upheld Georgia's capital sentencing procedures, it emphasized that the Georgia Supreme Court was expected to "compare[] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate."¹²³ It was on the assumption that this appellate review would be effective to ensure a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not"¹²⁴ that the *Gregg* court was able to conclude that Georgia's procedures conformed to the mandates of the Constitution. In practice, however, the Georgia Supreme Court review is perfunctory, failing to fulfill the duty to adequately assess, *inter alia*, "whether the sentence is disproportionate compared to those sentences imposed in similar cases."¹²⁵ This failure is shown through qualitative as well as quantitative and statistical data which evidence systematic discrepancies in the way the death penalty in Georgia is apportioned and enforced, and which the appellate review process is not properly rectifying.¹²⁶

It is self-evident that a fair proportionality review must be based on appropriate comparators. Researchers have demonstrated, however, that the use of overturned and inappropriate cases to justify state Supreme Court decisions to uphold capital sentences is not just an occasional error, but rather occurs with a disturbing regularity. Both the number of appellate reviews affected and the extent to which these reviews contain inaccurate and outdated information evince a system that has deteriorated from its original protective function into a perfunctorily executed farce. An extensive study undertaken by the Atlanta Journal-Constitution in cooperation with University of Maryland criminologist Ray Paternoster, for instance, examined state Supreme Court death penalty reviews dating back to 1982 and found that, of all the cases cited to justify the imposition of a death sentence, 19 percent already had been overturned on appeal at the time of the citation and an additional 17 percent were later reversed after the review had been completed.¹²⁷ The study also revealed that 80 percent of these rulings contained at least one overturned case, while another 10 percent contained citations that were reversed afterward, so that less than 10 percent of all cases in the preceding 25 years of state Supreme Court reviews ultimately cited no overturned cases.¹²⁸ In more than a third of the review decisions, 25 percent or more of the citations were no longer good law.¹²⁹

Despite the pervasiveness of this problem, the Georgia Supreme Court will not reconsider the conclusions of its proportionality review, even if some of the death sentences used to uphold capital punishment in a given defendant's case have been or are later overturned.¹³⁰ As long as

¹²³ 428 U.S. at 198.

¹²⁴ *Id.* (internal punctuation and citations omitted).

¹²⁵ *Id.*

¹²⁶ See *Walker*, 555 U.S. at 4 (statement of Stevens, J.) (rebuking the Georgia court for carrying out "an utterly perfunctory review," which was "stated... in the most conclusory terms" and which included only a string citation of cases that made no reference to the underlying facts or aggravating circumstances connected with each).

¹²⁷ Rankin et al., *A Matter of Life or Death: High court botched death reviews*, ATLANTA J.-CONST., Sept. 25, 2007 [hereinafter, "Rankin et al., *Botched death reviews*"]. The Georgia Supreme Court had itself overturned or had noted another court's decision to overturn 23 cases that it later used to support upholding the death penalty. A *Matter of Life or Death: Faulty Reviews by the Numbers*, ATLANTA J.-CONST., Sept. 25, 2007.

¹²⁸ Rankin et al., *Botched death reviews*, *supra* note 127.

¹²⁹ *Id.*

¹³⁰ *Davis v. Turpin*, 273 Ga. 244, 245 (2000).

the Georgia Supreme Court remains convinced that “the sentences in the cases used for comparison were already at the time, or later are, reversed for reasons unrelated to the juries’ reactions to the evidence,” reevaluation of its proportionality review is unnecessary.¹³¹ Yet the evidence demonstrates that the Georgia Court has failed to abide by even this lenient restriction. In its investigation into the practices of the judicial system in death penalty cases, for example, the Atlanta Journal-Constitution revealed that nearly 50 cases cited by the state Supreme Court in its proportionality reviews had been overturned for serious reasons that likely would have affected jury deliberations and sentencing decisions: inadequate representation by defense counsel, prosecutorial misconduct, demonstrable failure of the district attorney to prove any aggravating circumstances, evidentiary issues, confusing or inadequate jury instructions by the judge, and racially skewed jury pools were among such problems noted by the study.¹³²

(6) Proportionality: Purposes of Punishment

A capital sentence is unconstitutionally excessive (1) if it is grossly disproportionate to the severity of the crime, or (2) if it “makes no measurable contribution to the acceptable goals of punishment”—namely, retribution and deterrence of capital crimes.¹³³ Capital punishment may be deemed unconstitutional on either grounds.¹³⁴ In many capital defendant’s cases, the death penalty will fail both tests. Frequently, the lack of proportionality between the severity of a defendant’s crime or his dangerousness as a criminal and the sentence that he receives can be established both by his trial record and character evidence weighed independently, and by a properly performed assessment of this data relative to the full range of comparable cases; and this excessiveness is only underscored by the failure of such a defendant’s execution to contribute to any constitutionally valid social or criminological purpose.

With respect to specific deterrence—the need to inflict death to stop the convicted individual from committing further harms—the circumstances of the crimes for which a substantial number of capital defendants are accused and sentenced hardly suggest the type of hardened, calculating, repeat killers whose continuing existence arguably could pose a permanent threat to society. Rather, the evidence often bespeaks a tragic but isolated incident, inflamed by drug use, desperation, or escalating conflict with the eventual victim. While these additional factors in no way excuse such a defendant’s actions, they do indicate that the defendant’s impulse and motivation to kill typically could be constrained without the State resorting to the death penalty.

Moreover, to the extent that such a person is susceptible to committing further crimes, this persisting danger can be controlled by “effective administration of the State’s pardon and parole laws,” in conjunction with, if necessary, “techniques of isolation... while he remains confined.”¹³⁵ A defendant may be condemned to die without an unequivocal showing that he is the rare type of criminal who poses such an extreme, incorrigible, and imminent threat to society that ending his life is the only way to prevent the perpetration of future crimes. Under this

¹³¹ *Id.* at 245-46.

¹³² Rankin et al., *Botched death reviews*, *supra* note 127.

¹³³ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Kennedy v. Louisiana*, 554 U.S. ____, 30 (2008) (citing *Gregg*, 428 U.S. at 173, 183, 187 (joint opinion of Stewart, Powell, and Stevens, JJ.)).

¹³⁴ *Coker*, 433 U.S. at 592.

¹³⁵ *Furman v. Georgia*, 408 U.S. 238, 300-01 (1972) (Brennan, J., concurring).

scenario, the history of cases tried throughout the state of Georgia will show that “for so many in like circumstances, life imprisonment or shorter prison terms are judged sufficient,” and so it cannot “be said with confidence that society’s need for specific deterrence justifies death for so few” within a group of similarly situated defendants.¹³⁶

Similarly, the argument in favor of using capital punishment to promote general deterrence has been criticized for the limited and unrealistic circumstances in which it would be applicable even hypothetically. Specifically, the theory of general deterrence is relevant only to “a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death.”¹³⁷ Given the infrequency and arbitrariness with which the death penalty is enforced in Georgia, moreover, this fictional rational criminal also would have to factor in the probability that he would be caught, convicted, and then sentenced by one of the increasingly few juries or judges willing to impose such a punishment. “[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct, and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.”¹³⁸

Thus, while this hypothetical potential criminal might have an awareness that if he were to be tried in, for example, Douglas or Cobb County, as opposed to in another Georgia county where pursuit of the death penalty is more restrained,¹³⁹ the probability of a capital sentence would be significantly increased, it is manifestly unreasonable to expect that any potential criminal would go through this type of cost/benefit mathematical analysis. The solution is not to impose the death penalty on a more frequent basis, since the Constitution mandates that capital punishment is an option reserved, if at all, for only the most extreme and heinous criminals and crimes. Rather, in order to comply with the dual constitutional requirements that death be imposed under rare but consistent circumstances, the authority of a district attorney to pursue a death sentence and the discretion of a judge or jury to impose it must be guided and restrained in a way that is absent from an unacceptably large number of Georgia jurisdictions.

Accordingly, even in areas where the possibility of punishment by death can reasonably be called a “credible threat” due to its overbroad application by prosecutors, the significant degree of randomness that persists with respect to who is subjected to the punishment and who is granted the opportunity to enter a plea bargain (among other prosecutorial decisions) renders any resulting deterrent effect unconstitutional. In a system where all these hypothetical calculations undertaken by the theoretical potential criminal are confounded by a “remote and improbable” risk of death, and where even if death were “invariably and swiftly imposed” the deterrent value of capital punishment would remain merely speculative, arguments supporting the efficacy of general deterrence are specious.¹⁴⁰

It seems, therefore, that in order to countenance the death penalty at all, Georgia’s prosecutors and courts are forced to place undue reliance on the retributive justification for capital punishment. However, the U.S. Supreme Court has made clear that the government must proceed with extraordinary caution when pursuing or upholding capital punishment under this

¹³⁶ *See id.* at 311-12 (White, J., concurring).

¹³⁷ *Id.* at 301 (Brennan, J., concurring).

¹³⁸ *Id.* at 312 (White, J., concurring).

¹³⁹ *See supra* note 55.

¹⁴⁰ *Furman*, 408 U.S. at 302 (Brennan, J., concurring).

rationale, since “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”¹⁴¹ Furthermore, the inconsistency with which the death penalty is applied only undermines the community values that retributive justice allegedly seeks to vindicate.¹⁴² Even if the retributive justification is accepted, “[a]n expression of community outrage carries the legitimacy of law only if it rests on fair and careful consideration, as free as possible from passion or prejudice.”¹⁴³ Since pure vengeance as a constitutionally valid aim of the State is dubious at best,¹⁴⁴ Georgia’s practical application of the death penalty will rarely if ever effectively contribute to any legitimate penal purpose, and is therefore unconstitutionally excessive under the Eighth Amendment.

(7) The Proportionality Review As Applied to Specific Defendants

A. Procedural Components of the Appellate Review Owed to a Capital Convict

Noting that “[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century,”¹⁴⁵ the Supreme Court has outlined the “objective criteria,” shaped by the Court’s own precedent, that should guide a reviewing court’s proportionality analysis under the Eighth Amendment, “including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”¹⁴⁶ For instance, with respect to the second criterion, the court in *Solem v. Helm* observed that in previous cases, it had been “helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.”¹⁴⁷

Thus, it ought to be relevant to the Georgia Supreme Court, as it undertakes its mandatory proportionality analysis for a particular capital convict, if other individuals found guilty of similar crimes within the state of Georgia have received sentences of imprisonment rather than death. Moreover, the Georgia Court should be obligated to account for other cases in which a defendant was found guilty of a crime objectively worse than that of the particular defendant whose sentence is being reviewed (for example, by killing a greater number of people, killing in a particularly brutal manner, or killing under more disturbing circumstances), who was never threatened with capital punishment at all. The Georgia Supreme Court’s failure to

¹⁴¹ *Kennedy v. Louisiana*, 554 U.S. ___, 9 (2008) (noting that, of the principle rationales under which punishment is justified, retribution is the one that “most often can contradict the law’s own ends”).

¹⁴² *See Furman*, 408 U.S. at 303 (Brennan, J., concurring) (“[I]f the deliberate extinguishment of human life has any effect at all [on the ‘community’s moral code’], it more likely tends to lower our respect for life and brutalize our values.”).

¹⁴³ *Harris v. Alabama*, 513 U.S. 504, 518 (1995).

¹⁴⁴ *See, e.g., Furman*, 408 U.S. at 305 (Brennan, J., concurring) (“As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.”); *but see Harris*, 513 U.S. at 517-18 (1995) (Since “rehabilitation plays no role[,] incapacitation is largely irrelevant... when the alternative of life imprisonment without the possibility of parole is available, and the assumption that death provides a greater deterrent than other penalties is unsupported by persuasive evidence... the principal justification for the death penalty is retribution.”).

¹⁴⁵ *Solem v. Helm*, 463 U.S. 277, 286 (1983).

¹⁴⁶ *Id.* at 292.

¹⁴⁷ *Id.* at 291.

properly undertake the comparative analysis described by the *Helm* court, and the resultant acquiescence in the inconsistent application of the death penalty against criminal defendants within the state, is one of many indications that the state's capital sentencing procedures are unconstitutional and should be struck down.

By using the AJC/Rankin database¹⁴⁸ to analyze cases between 1995 and 2004, it becomes apparent that a significant number of defendants who were convicted of a subset of crimes similar in nature to that for which a very small minority face death either (a) never confronted the threat of capital punishment because the prosecuting attorney did not seek it, or (b) avoided a death sentence notwithstanding the district attorney's decision to pursue it. In some of the latter cases, the defendant never went to trial because he entered into a plea bargain with the prosecution, while in other cases a jury determined that imprisonment was the more appropriate punishment for the crime.

Regardless of how such defendants managed to evade death, however, the Georgia Supreme Court would not consider any of their cases when deciding whether a death row inmate's sentence was proportionate to his crime and was imposed upon him in a non-arbitrary fashion, even if the facts supporting the conviction were nearly identical. An examination of the details of such cases leaves one struggling to ascertain how and why one defendant's crime could be considered so manifestly more extreme, atrocious, and vile that he should be subjected to death while the others are spared. Of course, the grave and ultimately insurmountable problem with the state of Georgia's Supreme Court review process as it now stands is that the Court has no method to account for the many times in which judges, juries, and prosecutors show mercy, instead focusing its study only on the times (however few in proportion to the total) when the death penalty was assessed.

B. Specific Murder Cases as Comparators: A Hypothetical Example

As noted above,¹⁴⁹ this article will refrain from specifying the details of any death penalty cases for which avenues of appeal still remain. Nonetheless, the heretofore abstract discussion of the mandatory review process would benefit from the inclusion of a more concrete example of how the review procedure was intended to and ought to be carried out, as compared to how it actually materializes in practice. Accordingly, the article here proffers a hypothetical death row inmate, "J. Doe," whose fictional crime and personal characteristics are loosely based on the actions and traits (as determined by the respective factfinders) of real defendants who have been convicted of capital murder and who face execution as a result.

Mr. Doe, in this example, will be a white male in his mid-twenties, who grew up in an impoverished and broken home in Imaginary County, Georgia—a jurisdiction in which the district attorney seeks the death penalty at virtually every possible opportunity, and where Mr.

¹⁴⁸ Through the use of court and prison records to identify convictions, and trial transcripts, police reports, newspaper articles and variety of other documents and resources to catalog the details of each crime, several investigative reporters, researchers, and database specialists affiliated with the Atlanta-Journal Constitution compiled a database assembling the facts of 2,328 murder convictions in the decade spanning 1995 to 2004. The research team analyzed the data through multiple regression analyses and presented their findings in a four-day series of articles featured in the newspaper. The underlying database itself consists of coded and mathematically manipulable information related to an array of relevant factors—including the racial profiles of victim and defendant, the county in which the crime was tried, and the existence of specific aggravating circumstances—which can be utilized for additional research and analysis.

¹⁴⁹ See *supra* note 34.

Doe was tried, convicted, and sentenced to death by a jury after a half-day of deliberation. The district attorney of Imaginary County sporadically offers plea bargains, but does so without following any official or unofficial policy; Mr. Doe was never given the opportunity to submit to a plea. The facts as established by the trial record and taken as true are as follows:

(1) Mr. Doe was a petty drug dealer and regular drug user, with a long record of criminal mischief dating back to his youth. Aside from a minor drunken altercation outside of a bar four years before he was arrested for murder, however, he had no history of violence.

(2) At the victims' invitation, Mr. Doe entered the apartment of "Al Victim" and "Bob Victim," brothers who, like Mr. Doe, were white men and in their mid-twenties. Al Victim was considered one of the major drug dealers in the neighborhood and had twice been convicted of domestic abuse for hitting his girlfriends, but had managed to avoid any trouble with the police over the year-long interval immediately preceding his death. Bob Victim did not have a criminal record; his main character flaw appeared to be an inability to hold down a job for any extended period of time.

(3) Mr. Doe was found guilty of shooting Al Victim twice (once in the shoulder and once in the head) and Bob Victim once in chest. Following the clear and competent testimony of the prosecution's expert witnesses, the defense called into question the integrity of the forensic evidence that had been introduced—specifically, that the brothers' two dogs had mutilated their owners' bodies. The crime scene also had been corrupted by the neighbor who found the victims two days later, and possibly by one or more unidentified individuals who an eyewitness believed had entered the apartment to steal cash and other valuables before the police were called.

(4) Mr. Doe testified that the brothers, mostly upon the instigation of Al Victim, attacked him, and that he therefore shot both men in self-defense. From the time that he was taken into police custody, Mr. Doe consistently claimed that Al Victim had accused Mr. Doe of interfering with Al's drug trade and that Al had pinned Mr. Doe to the ground while brandishing a gun. Mr. Doe stated that he was able to recover the gun in the ensuing struggle and use it as the murder weapon. Mr. Doe was less clear about the imminence of the threat that Bob Victim had posed. All three men were under the influence of illegal drugs at the time of the incident.

(5) Mr. Doe had his step-sister pick him up and drive him out-of-state, initially without any explanation as to why. His step-sister was a drug addict, and he convinced her to comply by promising her drugs or money in compensation (although he told her that he was not carrying either at the time) if she did not ask questions. He disposed of the murder weapon on the Georgia side of the Alabama-Georgia border.

(6) The aggravating circumstances for which the jury could have justified the imposition of a death sentence were (a) that Mr. Doe killed two victims and the homicide was not justifiable or excusable in either case,¹⁵⁰ and/or (b) that Mr. Doe committed the homicides to gain something of value, such as drugs or the money alleged to be missing from the brothers' apartment.¹⁵¹

After a number of evidentiary challenges and challenges to the behavior of the prosecutor's office before and during the trial, Mr. Doe's attorneys believe that their client's best hope for commutation of his death sentence is judicial recognition that capital punishment is out of proportion to the sentences typically received by other individuals convicted of drug-related double murders in Georgia. The defense team is extremely concerned, however, that the Georgia Supreme Court will neglect to incorporate a significant number of relevant cases—a subset in

¹⁵⁰ GA. CODE ANN. § 17-10-30(b)(2).

¹⁵¹ GA. CODE ANN. § 17-10-30(b)(4).

which the defendant was convicted of killing multiple persons and where illicit substances appear to have been a factor—into its proportionality review, since the defendants in those cases managed to avoid a capital sentence. As a result, the Georgia Supreme Court will have no conception of the *relative* frequency with which death is imposed under such conditions, and thus no way to accurately gauge the proportionality of Mr. Doe’s punishment to his crime pursuant to prevailing societal standards and norms. Examples of such pertinent but neglected comparators, which justify the defense team’s concern, immediately follow.

(1) Plea Bargain, No Trial – Octavious Steady: One example of a case that would be relevant to accurately assessing the proportionality of Mr. Doe’s sentence, but which would not be considered under current Georgia Supreme Court practices, is that of Octavious Steady, a black male who committed his crime at age 18 and who never went to trial.¹⁵² Steady entered into a plea bargain whereby he will serve, back to back, two life sentences plus 10 years in prison. Steady pled guilty to killing a 26-year-old male who had asked Steady to help him purchase a small amount of drugs, after the two men got into an argument over the transaction. He also pled guilty to killing the man’s 19-year-old girlfriend, who was in the truck with them at the time. Steady may have killed an unarmed security guard who tried to detain him as well, although he testified at his co-perpetrator’s trial that his co-perpetrator was the one who killed the guard. Steady also stole and later wrecked his victims’ truck.

The parallels to Mr. Doe’s case are numerous; if anything, Steady’s crime could be considered more serious because of the greater number of people killed and the clearer evidence of his malicious motivations in perpetrating the crime. Yet the Georgia Supreme Court would never incorporate Steady’s case into its proportionality analysis for the simple reason that it did not go to trial. The fact that the presiding district attorney believed that this crime was not one in which death would be the only suitable punishment, and instead preferred to plea bargain with the defendant, is indicative of the fact that prevailing “community values” do not deem murders of this nature to be the utmost in atrociousness. It also makes the fact that Mr. Doe was never offered a chance to plea to the charges in order to avoid death in his case all the more problematic.

(2) Death Penalty Never Pursued – Ambrocio Valdivia: Similarly, the case of Ambrocio Valdivia,¹⁵³ would not be considered by the Georgia Supreme Court in its proportionality review for Mr. Doe or any other defendant, notwithstanding its obvious usefulness for comparative purposes. A jury found Valdivia guilty of shooting and killing two men and wounding a third, after the victims had knocked on Valdivia’s apartment door during a party at his apartment complex under the mistaken belief that he would sell them beer. The district attorney in this case never pursued the death penalty, and Valdivia was sentenced to two life terms for the murders and to a consecutive 20 years of imprisonment for the aggravated assault against the third victim. This case, when compared to Mr. Doe’s, exemplifies the discrepancies in sentencing that can arise and remain uncorrected, since the Georgia Supreme Court has no mechanism for accounting for even drastic differences in prosecutorial decisions of whether or when to pursue a death sentence.

(3) Mercy of the Sentencer – Rudolph Ottis: Finally, even if the State does seek capital punishment, a jury may decide that life without parole or another prison term is a more appropriate sentence. Although such flexibility allows a jury to show mercy to a defendant, the ultimate effect is that the administration of the death penalty becomes more a matter of chance—

¹⁵² See Beth Warren, *Atlanta teen sentenced to life for 2002 murder*, ATLANTA J.-CONST., Dec. 16, 2004.

¹⁵³ Valdivia v. State, ___ S.E.2d ___, 2008 WL 350943 (Ga. 2008).

dependent on the disposition of a given jury pool or sentencing judge—and less about ensuring that each defendant receives a sentence proportionate to the severity of his crime and to the sentences of others who have committed similar crimes. The state Supreme Court also fails to consider such cases—where the district attorney makes death an option, but the sentencer chooses imprisonment instead—in its proportionality review, which serves to further distort the Court’s perception of community values and its assessment of whether the punishment is commensurate with the crime.

In *Ottis v. State*,¹⁵⁴ for example, Rudolph Ottis received life with parole for the murder of two half-sisters, a 15-year-old and a 7-year-old, both black. The girls were bound with duct tape and stabbed and slashed to death after Ottis and three co-conspirators illegally entered the girls’ mother’s apartment as part of a drug deal. It was later determined that the motive for the murders was to prevent the girls from later identifying one of the participants in the robbery/drug deal. Given the young age of the victims, their status as witnesses and innocent bystanders, and the fact that their murders were carried out methodically and gruesomely, it becomes difficult to fathom how defendant Ottis could be considered less culpable or less deserving of the death penalty than Mr. Doe. Yet the Georgia Supreme Court proportionality review currently avoids these comparisons, which, if properly undertaken, would surely at least give rise to concerns that Mr. Doe’s sentence does not accord with the sentences given to similarly situated defendants.

FOURTEENTH AMENDMENT

This third section of the article focuses on a challenge to Georgia’s death penalty procedures that is distinct from but related to the previously discussed Eighth Amendment option for redressing the system’s discriminatory practices: namely, the potential for an equal protection claim under the Fourteenth Amendment. To evidence the viability of such an argument, this section proceeds in four distinct parts. It begins by summarizing the elements of a cognizable equal protection claim, and contests purported policy concerns about permitting equal protection challenges to capital punishment. The article then demonstrates that despite substantial judicial precedent favoring “as applied” equal protection claims, the Supreme Court has failed to fully address them in the context of Georgia’s capital punishment law. Next, the article considers the proper balance between the discretionary judgments of state actors and the equal protection rights of defendants thereby affected, and explores Supreme Court jurisprudence on the proper use of statistical evidence to show if and when this balance has become misaligned. The final part of this section of the article focuses specifically on the role of district attorneys during death penalty proceedings, examining constitutional constraints on their ability to select for whom they will seek capital sentencing and describing the appropriate use of statistical evidence to prove discriminatory abuses of such prosecutorial discretion.

(1) Overview of Strict Scrutiny in the Criminal Justice System

A. Equal Protection Jurisprudence and Strict Scrutiny

Over the years, and in all areas of public life, the Supreme Court “has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a

¹⁵⁴ 271 Ga. 200 (1999).

free people whose institutions are founded upon the doctrine of equality.”¹⁵⁵ The Court’s abhorrence of racially discriminatory practices in the public sector has led to the development of its “strict scrutiny” jurisprudence, under which all governmental racial classifications—even those implemented for benign purposes or which burden or benefit both races equally—must be analyzed.¹⁵⁶ Under strict scrutiny, the government is charged with proving that racial classifications are “narrowly tailored measures that further compelling governmental interests.”¹⁵⁷ Strict scrutiny is necessary to guard against racial classifications that are “motivated by illegitimate notions of racial inferiority or simple racial politics.”¹⁵⁸

In the most straightforward cases, the invidious and impermissible racial discrimination will be written on the face of the statute. However, a law can be “impartial in appearance,” and yet “applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances....”¹⁵⁹ This too is a “denial of equal justice... within the prohibition of the [C]onstitution.”¹⁶⁰ The opportunity for such discriminatory implementation of a facially neutral statute may be more likely to occur and more difficult to detect when the statute’s enforcement is committed to the “unrestrained will of a single public officer” who is not inhibited by any “rules by which [the law’s] impartial execution can be secured, or partiality and oppression prevented.”¹⁶¹ The party challenging the statute may provide facts regarding “the ordinances in actual operation” that

establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities... with a mind so unequal and oppressive as to amount to a practical denial by the state of [the] equal protection of the laws....¹⁶²

When no reason for gross racial discrepancies is shown, the Court has held that “the conclusion cannot be resisted that no reason for it exists except hostility to the race” to whose disadvantage the statute is applied.¹⁶³ Notably, however, the Court also has maintained that, depending on the surrounding circumstances and the magnitude of the disparity, the party challenging the governmental statute or action often will need to provide additional evidence of a discriminatory intent in enacting or effecting the statute beyond that which can be inferred from the disparate

¹⁵⁵ *Loving v. Virginia*, 338 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

¹⁵⁶ *Johnson v. California*, 543 U.S. 499, 504 (2005) (citing, *inter alia*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); and *Shaw v. Reno*, 509 U.S. 630, 651 (1993)). In *Johnson*, the Court held that strict scrutiny was the proper standard of review for a correction facility’s unwritten policy of segregating inmates based on their respective racial identity upon their entrance into the prison. The Court refused to entertain a more deferential standard of review, notwithstanding the asserted connection between the questioned practice and the legitimate purported penological objective of preventing violence caused by racial gangs.

¹⁵⁷ *Adarand*, 515 U.S. at 227.

¹⁵⁸ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

¹⁵⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

¹⁶⁰ *Id.* at 374.

¹⁶¹ *Id.* at 372-73 (quoting with approval *City of Baltimore v. Radecke*, 49 Md. 217).

¹⁶² *Id.* at 373.

¹⁶³ *Id.* at 374 (finding a Fourteenth Amendment violation under a facially neutral state statute when approximately 200 Chinese citizens were denied a certain permit, while 80 other non-Chinese persons were allowed to carry on the same business under similar conditions).

impact alone.¹⁶⁴ Since discriminatory intentions often manifest covertly or even unconsciously, the requirement of proving this element through hard evidence that goes beyond statistical disparities can impose a substantially higher burden on the challenger.

B. Equal Protection in the Judicial System

The U.S. Supreme Court has an extensive history of mandating procedural safeguards and restraints when unconstitutional considerations of race have the potential to infiltrate the judicial process. The Court “has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race.”¹⁶⁵ In addition to this general proposition, the Court has issued specific holdings regarding the impermissibility of race-based judgments in the context of peremptory challenges¹⁶⁶ and race-based statements during prosecutorial arguments,¹⁶⁷ and will require a change of venue when a community is afflicted with widespread racial biases.¹⁶⁸

Decisions containing language that appears to mitigate the importance of the Fourteenth Amendment to the judiciary in any respect, no matter how limited the precedential effect of such holdings and dicta ultimately are construed to be, have been criticized as being a result of the Court “ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race,” and thereby “fail[ing] to do justice to a claim in which both those elements are intertwined—an occasion calling for the most sensitive inquiry a court can conduct.”¹⁶⁹ Most certainly, “[t]he protections afforded by the Fourteenth Amendment are not left at the courtroom door.”¹⁷⁰ The Court must be constantly vigilant, since “racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.”¹⁷¹

As a result, the exacting standards of strict scrutiny continue to be applicable to all elements of the criminal justice system, including the district attorney’s selection of which cases to pursue for capital punishment. In this respect, harsher treatment of black as compared to white defendants is not the only racial prejudice that can give rise to constitutional concerns; a “diminished willingness to render [a death] sentence when blacks are victims[] reflects a devaluation of the lives of black persons” as well.¹⁷² Implicit racial biases and unchecked prejudices giving rise to discriminatory decisions by public officials contradict the principle of equal protection of the laws, regardless of whether the party discriminated against is the defendant or the victim. Georgia’s current capital punishment scheme provides undue leeway for racial politics to interfere with fair and consistent decisionmaking, such that prosecutors and

¹⁶⁴ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

¹⁶⁵ *McCleskey v. Kemp*, 481 U.S. 279, 309, n.30 (1987) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Batchelder*, 442 U.S. 114 (1979); and *Oyler v. Boles*, 368 U.S. 448 (1962)).

¹⁶⁶ See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁶⁷ See *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

¹⁶⁸ See *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁶⁹ *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting).

¹⁷⁰ *Id.* at 346 (citing *Hill v. Texas*, 316 U.S. 400, 406 (1942)).

¹⁷¹ *Rose v. Mitchell*, 442 U.S. 545, 558-59 (1979).

¹⁷² *McCleskey*, 481 U.S. at 336 (Brennan, J., dissenting).

other state actors are able to treat the assailants of white victims significantly more harshly than those of black victims.¹⁷³

C. Policy Concerns about Equal Protection Challenges to Capital Punishment

The *McCleskey* court invoked certain policy concerns with respect to the prudence of hearing claims of impermissible racial (or sexual) biases in the capital punishment system, arguing that similar claims “based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim” would thereafter be inevitable.¹⁷⁴ The Court’s attempt to juxtapose charges of systemic discrimination made by or to the detriment of non-white persons to similar such charges made by arbitrarily formulated groups, and to claim that full consideration of the former would result in an unmanageable profusion of the latter, is neither plausible nor compelling: no theoretical capriciously assembled group will have faced the extensive and sordid history of discrimination that is attached to the experience of racial minorities in this country; there is no judicially recognized precedent or constitutional foundation establishing the need for special care to eliminate prejudice against these hypothetical random groups from the criminal justice system; and the few empirical studies that the Court cites as potential evidence for claims of bias by non-racial groups are nowhere near as numerous and sophisticated as those that specifically focus on race disparities.¹⁷⁵

The dissenting opinions in *McCleskey* also explain why, regardless of the validity of an equal protection claim under the Fourteenth Amendment, the existence of simply a discriminatory *effect* necessitates invalidation of the offending statute under the Constitution, even if discriminatory *intent* cannot be demonstrated.

Once we can identify a pattern of arbitrary sentencing outcomes, we can say that a defendant runs a risk of being sentenced arbitrarily. It is thus immaterial whether the operation of an impermissible influence such as race is intentional. While the Equal Protection Clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own distinct focus: whether punishment comports with social standards of rationality and decency. It may be, as in this case [i.e., racial discrimination], that on occasion an influence that makes punishment arbitrary is also proscribed under another constitutional provision. That does not

¹⁷³ Cf. Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 106-07 (1984) (“Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides.”).

¹⁷⁴ 481 U.S. at 317.

¹⁷⁵ See also *id.* 481 at 328-335 (Brennan, J., dissenting). Justice Brennan outlines “Georgia’s legacy of a race-conscious criminal justice system” and the U.S. Supreme Court’s “own recognition of the persistent danger that racial attitudes may affect criminal proceedings....” *Id.* at 328-29. Justice Brennan emphasizes how the state of Georgia in particular “operated openly and formally precisely the type of dual system the evidence shows is still effectively in place,” wherein the law “expressly differentiated between crimes committed by and against blacks and whites.” *Id.* at 329. The fact that the Court continues to engage in “unceasing efforts to eradicate racial prejudice from our criminal justice system” signifies “not the elimination of the problem but its persistence.” *Id.* at 333 (internal citations omitted).

mean, however, that the standard for determining an Eighth Amendment violation is superseded by the standard for determining a violation under this other provision.¹⁷⁶

Under this rationale, the majority's concern about a proliferation of accusations of unfair systemic biases made by disparate groups representing various unprotected classes becomes inconsequential: if "striking evidence" indicated that if members of some other group, categorized by a characteristic irrelevant to their culpability, were disproportionately and unjustifiably targeted for death, this too would be "repugnant to deeply rooted conceptions of fairness."¹⁷⁷ Although our nation's history suggests that racial prejudices are more likely than other types of discrimination to undermine the legitimacy of the criminal justice system, the demonstrable existence of more widespread problems would demand rectification as well.

It bears emphasis, however, that the prospect of capital sentencing decisions being influenced by race is especially invidious. To an unparalleled extent, the laws and Constitution of the country—as embodied in "[t]hree constitutional amendments[] and numerous statutes"—reflect a fundamental moral commitment to eradicating the pernicious effects of racism.¹⁷⁸ The judicial and constitutional traditions of exposing and dismantling racial bigotry and inequity in the public sector, combined with a growing body of research demonstrating that no other traits unrelated to the legal elements of the crime (with the exception, perhaps, of the particular Georgia county in which the charges are brought) are as strongly correlated to a death penalty outcome as the racial backgrounds of the defendant and victim,¹⁷⁹ make clear that race considerations are a unique concern in equal protection jurisprudence, rendering "slippery slide" arguments unavailing.

(2) De Facto Statutory Factors Render Statute Unconstitutional As Applied

A. Recognition of the Viability of "As Applied" Equal Protection Claims

The Supreme Court has expressly proscribed the use of aggravating factors that are "constitutionally impermissible or totally irrelevant to the sentencing process" and has specified racial considerations in particular as prohibited.¹⁸⁰ "What we have held to be unconstitutional if included in the language of the statute surely cannot be constitutional because it is a *de facto* characteristic of the system."¹⁸¹ Similarly, Justice Douglas, in his concurrence in the *Furman* decision that invalidated a former version of Georgia's death penalty statute, acknowledged the applicability of this equal protection argument: "Any law which is nondiscriminatory on its face

¹⁷⁶ *Id.* at 323, n. 1 (Brennan, J., dissenting).

¹⁷⁷ *Id.* at 339 (Brennan, J., dissenting).

¹⁷⁸ *Id.* at 341 (Brennan, J., dissenting).

¹⁷⁹ Across the state, Georgia prosecutors were more than twice as likely to pursue capital punishment when the victim was white. Rankin et al., *Death Still Arbitrary*, *supra* note 52. Statistical differentials between counties obviously depend on the jurisdictions being compared, but can be even more substantial; a murder defendant in Clayton County was 13 times more likely to face the death penalty than a similarly charged defendant in nearby Fulton County. *Id.* Of course, the fact that inter-county discrepancies are in some cases of a greater magnitude than racial disparities does not render the latter any less objectionable. *See also supra* note 55 and sources cited therein.

¹⁸⁰ *See Zant v. Stephens*, 462 U.S. 862, 885 (1983).

¹⁸¹ *McCleskey*, 481 U.S. at 355-56 (Brennan, J., dissenting).

may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.”¹⁸²

It has been demonstrated that the institution of capital punishment in Georgia as it currently stands is indeed racially discriminatory, in that it “provides heightened protection against murder ‘for whites only,’” except for a certain category of murders so severe and brutal that juries consistently impose the death penalty without regard to the race of either the victim or the offender.¹⁸³ Even if “the law is theoretically impartial,” and “[j]uries do not intentionally favour” certain kinds of defendants over others, a system of punishment fraught “with so many inherent defects” that render unequal application an inevitably raises serious and possibly insurmountable constitutional concerns.¹⁸⁴ Therefore, in addition to the Eighth Amendment challenges described in the previous section of the article, Fourteenth Amendment equal protection claims remain a viable safeguard against this overwhelming and unacceptable potential for discriminatory application of Georgia’s capital punishment statute.

B. Extant Failure to Fully Consider “As Applied” Challenges

The Supreme Court has broached the issue of “as applied” equal protection challenges to Georgia’s death penalty statute, but has so far failed to give the matter a comprehensive hearing that considers all the potential opportunities for discriminatory implementation inhering in the full range of pertinent state actors. For instance, in *McCleskey*, the Supreme Court dismissed the defendant’s claim that by allowing the capital punishment statute to remain in force despite its allegedly discriminatory application, the State of Georgia was in violation of the Equal Protection Clause.¹⁸⁵ The Court noted that under its equal protection jurisprudence

“discriminatory purpose” implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of,” and not merely “in spite of,” its adverse effects upon an identifiable group.¹⁸⁶

The Court refused to infer a discriminatory purpose in this case, since there were legitimate reasons for the Georgia legislature to adopt a capital punishment statute.¹⁸⁷ Yet even if this position is countenanced, it allows the statute to survive only a facial challenge; it does not preclude the possibility that the state actors who are charged with implementing statutory mandates are performing their duties in an impermissibly discriminatory manner.

Indeed, the *McCleskey* court notes that, when examining the constitutionality of death penalty procedures, the judiciary “ha[s] not stopped at the face of a statute, but ha[s] probed the application of statutes to particular cases.”¹⁸⁸ In other words, the Supreme Court recognizes its

¹⁸² *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).

¹⁸³ *McCleskey*, 481 U.S. at 367 (Brennan, J., dissenting); see also Vogell, *Patterns of disparities*, supra note 75 (quoting criminologist and death penalty researcher Ray Paternoster: “Black victims have to be really, really brutalized before they’re treated the same as a white-victim case.”).

¹⁸⁴ *Furman*, 408 U.S. at 251 (Douglas, J., concurring).

¹⁸⁵ *McCleskey*, 481 U.S. at 297-99.

¹⁸⁶ *Id.* at 298 (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (footnote and citation omitted) (internal punctuation omitted)).

¹⁸⁷ *Id.* at 298-99.

¹⁸⁸ *Id.* at 304-05.

obligation to look beyond the plain text of a statute to assess how it is actually applied. Thus, even if some restrained construction of a statute would be constitutional, a broad interpretation given to it by district attorneys and judges will necessitate careful appellate review in order to ensure both that sentencers are not handing down disproportionately severe penalties under the guise of legislative consent and approval, and that none of the parties to the process (district attorneys, judges, and jurors) are exploiting overbroad statutory language and appellate court deference to allow discriminatory practices to infect the system.¹⁸⁹

C. Overbroad Statutory Terms and Impermissible Considerations

A statute cannot survive judicial scrutiny if it is written in terms that are sufficiently vague or overbroad so as to allow impermissible factors to infiltrate the decisionmaking processes of state actors. Thus, even if the Georgia death penalty statute is constitutional on its face, the law as it has been applied to many capital defendants renders it unconstitutional.

What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions. 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.¹⁹⁰

The discrepancies between the personal characteristics of those who are sentenced to death and those who are spared under Georgia law—in particular, the racial profile of the defendant’s victim and the county in which the defendant’s case is tried—indicate that the procedures instituted by the Georgia legislature to foster consistency and fairness in the application of capital punishment actually have “give[n] room for the play of such prejudices.”

“[A] law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed” would “plainly fall.”¹⁹¹ Thus, “[a] law which, in the overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same.”¹⁹² Likewise, then, if the terms of the Georgia capital punishment statute expressly imposed a death sentence on those found guilty of murder in certain counties or for killing white victims, while sparing those who committed similar crimes in other Georgia counties or against black victims, the Georgia and U.S. Supreme Courts would not hesitate to strike down such a law. The courts should be equally zealous in invalidating legislation that has the same practical effect.

(3) Use of Statistical Evidence for Equal Protection Claims in Death Penalty Cases

¹⁸⁹ *Cf. Godfrey v. Georgia*, 446 U.S. 420 (1980) (invalidating a Georgia Supreme Court interpretation of a particular statutory aggravating circumstance, since notwithstanding an adequate limiting definition of the phrase, its interpretation in the case at hand was too broad to adequately guide the sentencing jury’s discretion).

¹⁹⁰ *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

¹⁹¹ *Id.* at 256 (Douglas, J., concurring).

¹⁹² *Id.*

A. The Balance between Discretionary Judgments and Fourteenth Amendment Rights

The Supreme Court has attempted to distinguish equal protection claims in the context of capital punishment by arguing that, in areas where statistics are considered an acceptable form of proof of discriminatory intent, the party against whom such statistics are presented has the opportunity to explain the disparity.¹⁹³ In *McCleskey*, for example, the Court rightly noted that jurors cannot and should not be forced “to testify to the motives and influences that led to their verdict.”¹⁹⁴ However, the Court then went on to claim that “the policy considerations behind a prosecutor’s traditionally ‘wide discretion’ suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties....”¹⁹⁵ The Court makes no mention of the fact that allowing such “wide discretion” to remain unchallenged provides an opportunity for implicit biases to permeate the decisionmaking process. Thus, if the Court maintains the dubious position that “public policy concerns” render prosecutorial and sentencing decisions unreviewable directly, a thorough rendition of the statutory proportionality review becomes all the more imperative in order to guard against the influence of any improper motivations for which neither the prosecutor nor the jury otherwise would be held accountable. It is critical to remember that sentencing discretion “is a means, not an end,” and that procedures that are complicit with abuses of this discretion, which allow the race of the defendant or the victim to supersede evaluation of each crime and each individual as a whole, are “antithetical to the very rationale for granting” such discretion in the first place.¹⁹⁶

B. Supreme Court Precedent regarding Statistical Evidence in Equal Protection Cases

*McCleskey v. Kemp*¹⁹⁷ specifically addressed the question of “whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations” can prove that a defendant’s “capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.”¹⁹⁸ Although the holding of the *McCleskey* court—that the “Baldus study”¹⁹⁹ failed to prove that the defendant’s constitutional rights had been violated—is inherently limited to the particular circumstances of the case, the decision is nevertheless indicative of how the Court may approach future claims regarding the constitutionality of Georgia’s death penalty procedures that are bolstered by similar statistical evidence. Importantly, the Court emphasized the essentiality of discretionary judgments to the criminal justice process and indicated that it “would demand exceptionally clear proof before [it] would infer that the discretion has been abused.”²⁰⁰ However, this language in itself does not preclude future use of the Baldus study (which was praised for its thoroughness and accuracy by several of the *McCleskey* opinion’s dissenting Justices²⁰¹), particularly in conjunction with the additional

¹⁹³ *McCleskey*, 481 U.S. at 296.

¹⁹⁴ *Id.* at 296 (quoting *Chicago, B. & Q.R. Co. v. Babcock*, 204 U.S. 585, 593 (1907)).

¹⁹⁵ *McCleskey*, 481 U.S. at 296-97.

¹⁹⁶ *See id.* at 336 (Brennan, J., dissenting).

¹⁹⁷ 481 U.S. 279 (1987).

¹⁹⁸ *Id.* at 282-83.

¹⁹⁹ D. Baldus, G. Woodworth, & C. Pulaski, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & C. 661 (1983).

²⁰⁰ *McCleskey*, 481 U.S. at 297.

²⁰¹ *See id.* at 325-28 (Brennan, J., dissenting) (the “statistics have particular force because most of them are the product of sophisticated multiple-regression analysis... [which] is particularly well suited to identify the influence of

evidence of procedural shortcomings and racial biases that has since been collected and that has been considered compelling by currently seated Justices.²⁰² These findings considered collectively may rise to the persuasive value that the *McCleskey* opinion deemed necessary and that the Baldus study considered in isolation was unable to achieve. At minimum, the Court’s rejection of the use of statistics in one case does not foreclose the possibility that a similarly structured but more thorough presentation of data could be utilized in the future.

The *McCleskey* court also outlined its traditional approach to assessing alleged equal protection violations and indicated how statistical evidence might factor into the analysis. Specifically, the party asserting an equal protection violation has the burden of proving both the existence of “purposeful discrimination” and of a “discriminatory effect” in the party’s particular case.²⁰³ The Court allows statistical evidence of racially disparate treatment to be used as proof of an intent to discriminate in a number of circumstances; and although the disparities demonstrated by the data typically must present a “stark” pattern to be accepted as the sole proof of discrimination, in certain contexts, such as in the selection of a jury venire, the Court will find violations “even when the statistical pattern does not approach [such] extremes.”²⁰⁴

(4) Limitations to Prosecutorial Discretion and Demonstrating Equal Protection Violations

A. Common Law and Constitutional Restraints on Unbridled Prosecutorial Discretion

It is difficult to imagine for what reason a district attorney would choose to more vigorously prosecute and punish cases in which the victim is white rather than black, beyond blatant racism, appeasing white constituents, or some similarly invidious or inappropriate motivation. Of course, a response that relative to the victim’s race, the defendant’s race is, on average, considerably less influential on prosecutorial decisions—and indeed, white defendants are actually more likely to end up on death row because they more frequently kill white victims—is also a nonstarter; any differential treatment based on racial classifications, regardless of the group (victims or defendants) in which the discrepancy occurs, violates the constitutional right to equal protection of the laws for the victim, the victim’s family and loved ones, and the defendant alike.

Nor should district attorneys be granted an exemption from the demands of strict scrutiny under the guise of prosecutorial discretion when their actions effectuate an impermissible form of racial discrimination. The U.S. Supreme Court in the past has “refused to defer to state officials’ judgments on race in other areas where those officials traditionally exercise substantial discretion,” such as where prosecutors have abused their ability to make peremptory challenges

impermissible considerations in sentencing”); *id.* at 354, n. 7 (Blackman, J., dissenting) (contrasting the Baldus study to previously rejected statistical evidence that was “incomplete, not directly relevant to [the] original claim, and statistically insufficient,” and finding that the Baldus study was “of such a different level of sophistication and detail that it simply cannot be rejected on those grounds”).

²⁰² See, e.g., *Walker v. Georgia*, No. 08-5385, 555 U.S. ___, 7 (2008) (statement of Stevens, J.) (citing a law review note that analyzed and critiqued the Georgia Supreme Court’s death penalty review procedures).

²⁰³ *McCleskey*, 481 U.S. at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967), and *Wayte v. United States*, 470 U.S. 598, 608 (1985)); see *supra* Sections (1)(A) and (1)(B) under the Fourteenth Amendment heading for a more detailed account of the elements of an equal protection claim.

²⁰⁴ *McCleskey*, 481 U.S. at 293-94 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 266, n. 13 (1977)).

to strike jurors, doing so on the impermissible basis of race.²⁰⁵ Likewise, then, since the unfettered prosecutorial decisions of district attorneys in Georgia have resulted in drastically different outcomes between races so as to give rise to an inference of systemic racial biases in violation of the Equal Protection Clause, strict scrutiny is constitutionally necessitated.²⁰⁶

Georgia's state Supreme Court appears convinced that the state's district attorneys do not have unfettered discretion to seek the death penalty, but they pronounce this proposition in conclusory terms and fail to provide any evidentiary support for such a position.²⁰⁷ The lone explanation that the state Court gives for its confidence in the forbearance of its district attorneys and the soundness of the criminal justice system is that the DAs' decisions are based on "the exercise of professional judgment as to whether an aggravating circumstance exists," while the actual decision to impose death is entirely the province of the jury.²⁰⁸ Georgia deems the fact that different prosecutors within the state may vary markedly in their decisions to be of no constitutional significance.²⁰⁹ Since the state courts have acquiesced in the exploitation of these unguided discretionary judgments, without substantiating the rationale for their tolerance in light of evidence of gross racial disparities, the U.S. Supreme Court is obligated by its own precedent and by the mandates of the Constitution to intervene.

B. The Use of Statistical Techniques to Analyze Prosecutorial Behavior after *McCleskey*

The *McCleskey* court attempted to distinguish equal protection claims in the context of jury venire selection and employment decisions (where statistical evidence is admissible to prove statutory violations) from similar challenges to capital sentencing procedures by arguing that, in capital punishment cases, the "decision to impose the death penalty is made by a petit jury selected from a properly constituted venire," each one distinct in its composition from the next, which then must consider "innumerable factors" relating to the particular defendant and the facts of his case.²¹⁰ In contrast, according to the Court, "the decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate the consistent policy of the decisionmaker."²¹¹ This distinction between the categories of cases is specious, however, given that the original determination of whether to pursue the death penalty is the district attorney's, and the Court explicitly acknowledges that statistics are persuasive evidence for decisions made by individuals in such positions of stable and identifiable authority.

The Supreme Court necessarily must concede that, as with jury commissions and employers, statistics demonstrating discriminatory patterns in prosecutorial decisionmaking can

²⁰⁵ See *Johnson v. California*, 543 U.S. 499, 512 (2005) (citing *Bastou v. Kentucky*, 476 U.S. 79, 89-96 (1986)).

²⁰⁶ See *infra* Sections (4)(B) and (4)(C) under the Fourteenth Amendment heading for a more thorough discussion of the limits of prosecutorial discretion and the various statistical and evidentiary techniques that may be utilized to prove abuses of this discretion; cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a facially neutral statute was applied in a discriminatory fashion by state officials against persons of Chinese heritage, rendering it unconstitutional).

²⁰⁷ See, e.g., *Terrell v. State*, 276 Ga. 34, 44 (2002).

²⁰⁸ *Crowe v. State*, 265 Ga. 582, 595 (1995).

²⁰⁹ *Id.*; see also *Rower v. State*, 264 Ga. 323, 323-24 (1994) ("Testimony from other district attorneys regarding the manner in which the death penalty is sought in their circuits, or the manner in which plea bargains are reached, would be insufficient to show that the [District Attorney for the county in which petitioner was tried] acted in an unconstitutional manner in [the petitioner's] case.").

²¹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 294 (1987).

²¹¹ *Id.* at 295, n. 15.

evidence the racial biases of *individual* district attorneys. The *McCleskey* court unpersuasively attempted to dismiss this point by grouping district attorneys as a statewide whole, and then labeling the potential value of studying their collective decisionmaking patterns as “questionable.” The Court claimed that since their decisions to charge are made independently, “coordination among district attorney offices across a State would be relatively meaningless” and “any inference from statewide statistics to a prosecutorial ‘policy’ [would be] of doubtful relevance.”²¹² Even assuming the adequacy of the Court’s argument against examining statewide prosecutorial patterns in order to identify any widespread discriminatory tendencies, however, the point regarding the potential discriminatory tendencies of individual district attorneys would remain unaddressed.

Furthermore, the logic of the *McCleskey* court’s argument against using statistical data derived from decisions statewide is also fatally flawed. In addition to the aforementioned use of prevaricating language in the portion of the opinion discussing district attorneys, the Court strangely references in *support* of its position the fact that under the Georgia Constitution, the office of District Attorney is elected by the voters of a particular county.²¹³ Yet it seems that electing district attorneys by local popular vote would render incumbent officials more susceptible to racial politics and to pressures to uphold countywide prejudices in order to safeguard their own reelection. Moreover, the Court’s brief mention of the possibility or importance of inter-jurisdictional coordination in prosecutorial decisionmaking is misguided and misleading. The equal protection arguments and statistics in support thereof are not concerned with proving some nefarious and conscious statewide policy in favor of pursuing the death penalty only in white victim cases, but rather speak to the aggregate effect of racial politics and latent prejudice as manifested through the separate actions of the different district attorneys across the state. Such institutionalized racism would also explain the discrepancies between jurisdictions, because the local politics of some areas will be more resistant to these biases than others.

C. Evidentiary Procedures for Demonstrating Abuses of Discretion

Since the majority opinion in *McCleskey* contributed only a footnote to addressing the potential of Fourteenth Amendment violations by prosecutors as state actors in criminal proceedings, the question would appear to remain open for further judicial scrutiny. The dissenting opinion, recognizing the importance of this topic and the inadequacy of the majority opinion’s treatment thereof, laid out the appropriate framework for this analysis. Specifically, a defendant challenging prosecutorial actions must prove the existence of purposeful discrimination, but may do so by establishing a *prima facie* case wherein “the totality of the relevant facts gives rise to an inference of discriminatory purpose.”²¹⁴ Such an inference may be derived from a “disparity [that] is sufficiently large, [such that] it is unlikely that it is due solely to chance or accident.”²¹⁵ The burden then shifts to the State to rebut the inference, which it cannot do by “mere general assertions that its officials did not discriminate or that they properly performed their official duties,” but which rather requires a demonstration that the discriminatory

²¹² *Id.*

²¹³ *Id.* (citing GA. CONST., art. XI, § 8, ¶ 1).

²¹⁴ *McCleskey*, 481 U.S. at 351-52 (Brennan, J., dissenting) (quoting *Batson v. Kentucky*, 476 U.S. 79, 94).

²¹⁵ *McCleskey*, 481 U.S. at 352, n. 6 (quoting *Castaneda v. Partida*, 430 U.S. 482, 494 (1997)).

effect was due to “permissible racially neutral selection criteria.”²¹⁶ The party making the equal protection challenge also must show that he is a member of the group that is a “recognizable, distinct class,” singled out for differential treatment.²¹⁷

Within Georgia’s death penalty practices, the most problematic classification is not based on the race of the defendant, but rather is based on the race of the victim: the class of persons accused of or found guilty of killing a white person, and who thus suffer disproportionately harsh prosecutorial treatment and sentencing. The *McCleskey* dissent forcefully argued that the Baldus study alone should have been considered sufficient to establish a prima facie showing of purposeful discrimination, but the majority remained unconvinced at the time. Since the decision in *McCleskey* was handed down in 1987, however, additional research has confirmed the original conclusions of the Baldus study: namely, that racial factors, particularly the race of the victim, have an independent effect on prosecutorial decisionmaking and the ultimate outcome of homicide cases in Georgia.²¹⁸ Moreover, as noted above, the majority opinion glossed over the issue of prosecutorial decisionmaking and declined to remark on the body of evidence showing that the victim’s race is “an especially significant factor” prior to the penalty phase of the trial, when the prosecutor must choose whether to create the possibility of a death sentence or to accept a maximum sentence of a term of life imprisonment.²¹⁹ These omissions in judicial doctrine are ripe for consideration by the Supreme Court, either as an alternative to or in conjunction with the Eighth Amendment challenges described in the previous section of this article that also demand attention.

CONCLUSION

In light of the U.S. Supreme Court’s recent denial of certiorari in *Walker v. Georgia*—in which Justices Stevens and Thomas each felt compelled to append additional statements setting forth their respective (and conflicting) views on the constitutionality of Georgia’s death penalty procedures and the importance of the mandatory appellate proportionality review thereto—the Court once again appears poised to analyze the institution of capital punishment within the state of Georgia, with potentially myriad repercussions for the legal and procedural statutes governing death sentences nationwide. This article has provided a framework for understanding and advancing the two most promising avenues for such a challenge: a claim of cruel and unusual punishment under the Eighth Amendment, and an equal protection claim under the Fourteenth

²¹⁶ *McCleskey*, 481 U.S. at 352 (citing *Batson v. Kentucky*, 476 U.S. at 94 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972))).

²¹⁷ *McCleskey*, 481 U.S. at 352 (quoting *Castaneda v. Partida*, 430 U.S. at 494).

²¹⁸ The Baldus study demonstrated that, in explaining capital sentencing outcomes, the race of the victim was approximately equivalent to variables such as whether the defendant was the prime mover in the homicide and whether the defendant had a prior record of a conviction for a capital crime. *McCleskey*, 481 U.S. at 355, 355 n. 9, 10 (defendant’s chance of death increases by a factor of 4.3 if the victim is white, compared to a factor of 2.3 if defendant was the prime mover and of 4.9 if the defendant had a prior capital conviction).

²¹⁹ The Baldus study employed multiple regression analysis to isolate the possible effects of racial factors, ultimately demonstrating their readily identifiable impact at a statistically significant level. Specifically, the study determined that across the state, prosecutors elected to pursue capital punishment in black defendant/white victim cases at nearly five times the rate of black defendant/black victim cases (70 percent of the time, compared to 15 percent of the time), and over three times the rate of white defendant/black victim cases (70 percent compared to 19 percent). *McCleskey*, 481 U.S. at 356. The statistics for Fulton County were consistent with the statewide findings, but necessarily involved fewer cases. *Id.*

Amendment. In support of these arguments, this article has demonstrated that a combination of the ambiguous language and overbroad construction of Georgia's death penalty statute and the abuses of discretion among the state's district attorneys have expanded the application of the death penalty beyond the constitutionally required narrow range of especially extreme and heinous murders. The article also has shown that the state Supreme Court's duty to provide a proportionality review of death sentences is consistently discharged in a perfunctory manner, such that the reviews completely fail in the protective function that the U.S. Supreme Court envisioned when it originally upheld Georgia's laws. As a result, this article has established that, irrespective of the facial validity of Georgia's capital punishment scheme, the entire system is unconstitutional as applied and therefore must be struck down.