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## Can All Murders Be “Aggravated?” A Look at Aggravating Factor Capital-Eligibility Schemes

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## CAN ALL MURDERS BE “AGGRAVATED?” A LOOK AT AGGRAVATING FACTOR CAPITAL-ELIGIBILITY SCHEMES

### I. INTRODUCTION

According to the Supreme Court, a constitutional capital sentencing scheme must provide a way to “genuinely narrow” the class of those eligible for the death penalty and must “reasonably justify” imposing a more severe sentence compared to others found guilty of murder.<sup>1</sup> This stems from the Court’s decision in *Furman v. Georgia* that a death sentence was unconstitutional when it was applied only to “a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>2</sup> Death sentences are to be reserved for the “worst of the worst” offenders (i.e. only those most deserving of execution).<sup>3</sup> States are therefore required to define death-eligible crimes in a way that avoids “standardless [sentencing] discretion.”<sup>4</sup> In order to keep their capital sentencing schemes constitutional, states have adopted systems of “aggravating” and “mitigating” factors which are designed to ensure that death sentences are actually imposed on only the most deserving of offenders.<sup>5</sup> “This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”<sup>6</sup>

While the Supreme Court has previously approved of this framework, systems of aggravating factors have created new problems. Previously, the Supreme Court has held that a sentencing scheme is unconstitutional if an *individual* aggravating factor is overbroad or vague.<sup>7</sup> Overbroad or vague factors are problematic because, due to their vagueness or breadth, it is possible that nearly all murders could fall within their grasp. Therefore, they cannot serve to

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1. *Zant v. Stephens*, 462 U.S. 862, 876–77 (1983).

2. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

3. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (“[W]ithin the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst.’”). *See also* *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia* 536 U.S. 304, 319 (2002) (“Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.”).

4. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

5. *See* *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia* 428 U.S. 153 (1976).

6. *Godfrey*, 446 U.S. at 428.

7. *Id.* (finding that a statutory aggravating factor showing that a murder was “outrageously or wantonly vile, horrible and inhuman” did not restrain arbitrary and capricious imposition of the death penalty).

“genuinely narrow” the class of death-eligible persons to only “the worst of the worst.”

Several state statutory aggravating factor schemes as a whole should also run afoul of *Furman* for the same reasons that individual factors have failed. Because overly-broad aggravator schemes capture nearly all actually-occurring murders, they fail to sufficiently narrow the death eligible class, fail to suitably direct sentence discretion, and fail to justify death sentences as proportionate punishments for the crimes committed (i.e. the aggravators might not reserve death for the “worst of the worst”). For these three reasons, they are unconstitutional in their current state. The remainder of this paper will proceed in two parts. Part II looks at the reason for implementation of state statutory aggravating factor schemes after the Supreme Court handed down *Furman* and will consider the attributes of these statutory schemes that help the statutes address the Court’s concerns in *Furman*. Part III argues that the current state of statutory aggravating factors, and the view of them taken by courts, fails to satisfy the concerns originally raised by *Furman*.

## II. STATUTORY AGGRAVATING FACTOR SCHEMES POST-FURMAN

Statutory aggravator schemes are a means to an end, not an end in themselves. They were brought about by the Supreme Court’s decision in *Furman v. Georgia*, which rendered invalid state capital sentencing schemes in 1972.<sup>8</sup> In *Furman*, each of the nine justices wrote separately, underscoring both the importance and controversial nature of the opinion.<sup>9</sup> While Justices Douglas<sup>10</sup> and Brennan<sup>11</sup> would have invalidated the death penalty entirely, the other three concurring opinions left the door open for a constitutionally permissible implementation. These other three narrower opinions—the ones which struck existing death penalty statutes while allowing for the possibility of a constitutionally permissible death penalty—are typically thought of as the core holding of *Furman*.

In his concurrence, Justice White was more concerned with an empirical stylized fact about the death penalty’s use. He noted that death sentences could be imposed so infrequently that the penalty itself would cease to contribute to any permissible end of the criminal justice system.<sup>12</sup> If a penalty is seldom imposed, it would fail to act as a credible deterrent. Likewise, it is unlikely that society’s retributive needs are satisfied by a punishment which is infrequently implemented. “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing

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8. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

9. *Id.* at 240.

10. *Id.* at 370–71 (Marshall, J., concurring).

11. *Id.* at 305 (Brennan, J., concurring).

12. *Id.* at 311 (White, J., concurring).

the few cases in which it is imposed from the many cases in which it is not.”<sup>13</sup> Presumably, a “meaningful basis” must also be a constitutionally permissible one. Although he does not say so in *Furman*, it seems likely that Justice White would have permitted a capital punishment scheme in which a greater proportion of a given death-eligible class actually received the penalty. Indeed, Justice White’s dissent in *Woodson* confirmed this point.<sup>14</sup> Theoretically, the concern that death sentences are too infrequent could be accomplished either by increasing the absolute number of executions or by limiting the class of offenders eligible for death in the first place.

While Justice Stewart accepted that the ability to sentence to at least some criminals to death was necessary for the purpose of retribution,<sup>15</sup> he voted to overturn death sentences which were “cruel” because they went excessively beyond punishments that state legislatures had determined were necessary, and “unusual” because of the rarity of death sentences for both murder (“infrequently imposed”) and rape (“extraordinarily rare”).<sup>16</sup> Justice Stewart also suspected that the race of the defendants played a role in the imposition of the death sentence in *Furman*.<sup>17</sup> Justice Stewart’s concurring opinion thus shows a concern for guiding sentencing discretion, such that the race of the defendant or victim was not determinative of whether a death sentence was imposed.

The Supreme Court’s decisions in other capital cases shed additional light on some of the Court’s overarching concerns. The Court has expressed concern about the “arbitrary and capricious” implementation of the death penalty.<sup>18</sup> The Court has noted that even for those crimes which deserve a sentence of death, the penalty itself is infrequently imposed.<sup>19</sup> Because the Court was primarily concerned about the arbitrary and infrequent imposition of the death penalty, the

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13. *Furman*, 408 U.S. at 239–40 (White, J., concurring).

14. *Woodson v. North Carolina*, 428 U.S. 280, 307 (1976) (White, J., dissenting) (“I reject petitioners’ arguments that the death penalty in any circumstances is a violation of the Eighth Amendment.”).

15. *Furman*, 408 U.S. at 308 (Stewart, J., concurring) (“The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law.”).

16. *Id.* at 309 (Stewart, J., concurring) (“In the first place, it is clear that these sentences are ‘cruel’ in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary.”).

17. *Id.* at 310.

18. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“Because of the uniqueness of the death penalty . . . it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”).

19. *Furman*, 408 U.S. at 313 (White, J., concurring) (“[T]he 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.”).

Court set out requirements that a valid capital sentencing scheme must establish. A valid capital sentencing scheme must provide a way to “genuinely narrow” the class of those eligible for the death penalty and must “reasonably justify” imposing a more severe sentence compared to others found guilty of murder.<sup>20</sup> Death sentences are to be reserved for offenders “most deserving of execution”<sup>21</sup> where the defendant has been found to have committed one or more statutory aggravating factors.<sup>22</sup>

To accomplish this task, states turned to statutory aggravating factor schemes, which were upheld by the Court in *Gregg v. Georgia*.<sup>23</sup> The statutory provision at issue in *Gregg* set out ten aggravating factors, at least one of which must have been found to exist beyond a reasonable doubt by a jury before a sentence of death could be imposed.<sup>24</sup> The Supreme Court approved of Georgia’s updated safeguards, stating:

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as *Furman*’s jury did: reach a finding of the defendant’s guilt and then, without guidance or direction, decide whether he should live or die.<sup>25</sup>

It is clear from *Gregg*’s language that the Court viewed its decision in terms of alleviating the concerns raised by *Furman*.<sup>26</sup>

The Supreme Court’s case law sets out several requirements that a constitutional capital sentencing scheme must meet in determining whether a defendant is eligible for a death sentence. First, the defendant must have committed one or more aggravating factors in addition to the murder.<sup>27</sup> Aggravating factors are statutorily defined, either in the definition of the crime or in a separate sentencing factor.<sup>28</sup> Aggravating factors themselves must meet the separate requirements of applying only to a subclass of defendants, and not being unconstitutionally vague.<sup>29</sup> This means that each factor must apply to less than the entire population of defendants, and also that an individual factor must be specific enough so as to be readily identifiable. As such, the aggravating

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20. *Zant v. Stephens*, 462 U.S. 862, 876–77 (1983).

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

22. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

23. *Gregg*, 428 U.S. at 206–07 (“No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.”).

24. *Id.* at 196–97.

25. *Id.* at 197.

26. *See id.* at 206–07 (contrasting the newly-upheld Georgia sentencing procedures against those overturned in *Furman*).

27. *Tuilaepa*, 512 U.S. at 972.

28. *Id.*

29. *Id.*

factors are designed to limit the death-eligible class of offenders to only those most deserving of the punishment. Second, statutory aggravating factor schemes must suitably limit the sentencer’s discretion, in order to “distinguish [a particular] case, in which the death penalty was imposed, from the many cases in which it was not.”<sup>30</sup> Third, the defendant must have been convicted of a crime for which the punishment of death is proportionate.<sup>31</sup> In summary, statutory aggravating factor schemes are designed to do three things: genuinely narrow the death-eligible class of offenders; suitably direct the fact finder’s discretion; and justify the proportionality of the punishment.

A. *Valid Capital Sentencing Schemes Must Perform a Limiting Function*

A common metaphor to help visualize the role that the aggravating factor system is supposed to play is to imagine a pyramid. The pyramid is divided into several layers, and a capital case can be imagined to proceed upward through the layers. At the base layer is the population of cases for which the defendant was found guilty of murder. The next layer is the “eligibility phase” in which a statutory aggravator must be found by the jury. If at least one aggravator is found, the case moves upward to the next level, the “sentencing phase” where a jury may consider mitigating evidence in addition to the aggravators and must ultimately decide whether to impose a death sentence against the capital defendant. At the pinnacle is the so-called “worst of the worst” who have been sentenced to death and are executed.

The point of thinking about the system this way is that every level contains less area than the one immediately below it. The system is imagined this way to drive home the point that each “level” in the process is doing some narrowing work towards the ultimate goal of identifying the worst offenders who are most deserving of death. Juries need not consider weighing capital aggravators and mitigators if the defendant is not even death-eligible. Courts need not worry if a defendant is death-eligible if he has not committed a crime for which death is even an available punishment. By narrowing out defendants at each level, the system should function to ensure that only the most deserving of death, i.e. those who pass through each level of the pyramid up to the top, receive death sentences. To the extent that an actual system resembles a pyramid, narrowing work is being done at each level. If, for example, one level contains exactly as many murders as the level below it, it is not doing any work to narrow the class of death-eligible offenders and must be looked upon with suspicion. There is no point in having a filter which does no filtering.

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30. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (“[I]t ‘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.’” (quoting *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977))).

31. *Tuilaepa*, 512 U.S. at 971.

In order to be constitutionally permissible, “a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty.’”<sup>32</sup> Despite the requirement that the death-eligible class is “genuinely narrow[ed]” by the entire capital sentencing scheme,<sup>33</sup> cases that focus on this requirement have only applied the analysis to individual aggravators, not systems of aggravators.<sup>34</sup> This is an important distinction, as courts have utilized it to reject challenges based on the idea that aggravating factor schemes do no narrowing.<sup>35</sup>

Taken to its logical conclusion, this sort of analysis suggests that a state is free to adopt a seemingly limitless number of individual aggravators that would capture substantially all murders as death-eligible murders, provided that each individual aggravating factor applies to only a subclass of defendants and is not itself unconstitutionally vague. In this instance, the scope of each individual aggravator matters while the overall scope of the aggravating factor scheme does not. This is an absurd result which frustrates the purpose of having a death-eligible step in the analysis at all. To limit scrutiny to only overly-broad individual aggravators while ignoring patchwork collections of aggravators which lead to the exact same result is to ignore the Supreme Court’s original concerns in *Furman*. It is equivalent to establishing a legally significant distinction between a blanket and a quilt based solely on the arbitrary fact that a quilt is made up of many different pieces of cloth stitched together while a blanket is not. However trivial this example might seem, for the capital defendant, the formalistic and capricious distinction between “blanket” and “quilt” in this instance is the very real difference between life and death.

The narrowing requirement is rooted in the idea that an aggravating factor scheme should do some actual lifting in determining which offenders should at least be eligible for a death sentence and which should not. Some commentators have suggested that what is actually required is conceptual narrowing rather than

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32. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

33. *Id.*

34. *See, e.g., Tuilaepa*, 512 U.S. at 967 (“First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.”); *Godfrey*, 446 U.S. at 420; *Arave v. Creech*, 507 U.S. 463, 474 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.”); *State v. Hidalgo*, 390 P.3d 783, 790–91 (Ariz. 2017), *cert. denied*, 138 S.Ct. 1054 (2018). (“Discussions of ‘narrowing’ challenges to death penalty statutes may involve two different questions: (1) whether a particular aggravator applies to fewer than all murders; and (2) whether the scheme overall ‘is neutral and principled so as to guard against bias or caprice[.]’”) (quoting *Tuilaepa*, 512 U.S. at 972–73).

35. *Hidalgo*, 390 P.3d at 790 (holding that petitioner’s argument that Arizona’s aggravating factor scheme is unconstitutional fails because the Supreme Court’s case law suggests that only the individual factors must apply to subclasses of defendants, not the scheme as a whole).

empirical narrowing.<sup>36</sup> However, this line of reasoning has been described by other commentators as “willfully blind to empiricism,”<sup>37</sup> and there are many instances of courts making empirical examinations within the capital sentencing context.<sup>38</sup> Here, conceptual narrowing means that an aggravating factor scheme is only unconstitutional if it is a *logical impossibility* that any first-degree murder could not also be a capital murder.<sup>39</sup> This could be accomplished in a system with as few as two aggravating factors: “X,” and “not X.” Under such a system, every murder necessarily meets one of these circumstances. Either “X” was satisfied, or if it was not, “not X” was satisfied. In either case, and in all possible cases, the offender is death-eligible. Such a scheme, the argument goes, does not “genuinely narrow” the death-eligible class because of the analytical relationship between the two aggravators (i.e. that they are mutually exclusive). This is in contrast to an “empirical narrowing” idea, which would require that the *actual number* of death-eligible offenders is less than the number of first-degree murder offenders.<sup>40</sup>

However, “[t]he life of the law has not been logic; it has been experience.”<sup>41</sup> The “conceptual narrowing” approach described above is especially strange given that the Supreme Court has used empirical data in evaluating death penalty challenges ever since *Furman*.<sup>42</sup> The various opinions in *Furman* together suggest that, at the time Georgia’s death penalty scheme was found to be unconstitutional, only fifteen to twenty percent of capital-eligible defendants were sentenced to death.<sup>43</sup> Further, *Gregg* considered that if a jury was willing

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36. See Chad Flanders, *Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the Hidalgo Cert. Petition*, 51 U. C. DAVIS L. REV. ONLINE 49, 56–58 (October 2017). Professor Flanders has recently endeavored to differentiate “intrinsic” arbitrariness having to do with the category of crime or criminal (*e.g.*, giving the death penalty to someone who is less deserving of it while sparing someone more deserving of it) and “extrinsic” arbitrariness (getting the death penalty based on “where you commit the crime, what the prosecutor decides, what your race is, or who your lawyer is.”). Chad Flanders, *What Makes the Death Penalty Arbitrary? (And Does It Matter If It Is?)*, 2019 WISC. L.R. 55, 59–60.

37. John Mills, *How to Assess the Real World Application of a Capital Sentencing Statute: A Response to Professor Flanders’s Comment*, 51 U.C. DAVIS L. REV. ONLINE 77, 79 (October 2017).

38. *Id.* at 87–88.

39. *See id.*

40. *See id.*

41. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

42. *Furman v. Georgia*, 408 U.S. 238, 386 (1972) (Burger, C.J., dissenting) (discussing petitioners’ version of empirical evidence as a “different body of empirical evidence”); *id.* at 364, (Marshall, J., concurring) (“A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.”). *See also* Mills, *supra* note 37 at 87.

43. *Furman*, 408 U.S. at 386 n.11 (C.J. Burger, dissenting); Mills, *supra* note 37 at 83.



to issue death sentences in a greater proportion of cases, this would be constitutionally permissible:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.<sup>44</sup>

The chief concern in *Furman* was that the death penalty was too infrequently used to be justified (i.e. the fraction of death sentences over total death-eligible defendants was too small). A possible solution to this problem comes in one of two flavors: Either increase the numerator (more death sentences) or reduce the denominator (decrease the death-eligible class). The second way necessarily requires a way to empirically limit the number of death eligible offenders rather than a hollow, conceptual form of narrowing. At bottom, this is an empirical, rather than a conceptual, argument.

Within the body of the Supreme Court's death penalty jurisprudence, the Court has not hesitated to reason empirically when considering questions regarding the Eighth Amendment's prohibition against cruel and usual punishment. The court has relied on "indicia of consensus" as to the permissibility of making a crime punishable by death. Such indicia include taking surveys of the numbers of states which have acted to invalidate the death penalty in certain instances<sup>45</sup> and gauging the trend of legislatures in moving away from applying death to minors<sup>46</sup> and defendants with intellectual disabilities.<sup>47</sup> The court has also relied on numerous studies, reports, and manuals identifying reasons for the lessened culpability of minors,<sup>48</sup> and fine-tuning thresholds for intelligence tests used in identifying intellectually disabled defendants<sup>49</sup> in which the empirical findings were key to the Court's ultimate decision.

If the Court were concerned only with *conceptual* narrowing, there would be no need to refer to the proportion of death sentences actually carried out, nor the number of states which employ certain aspects of capital punishment, nor to

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44. *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring).

45. *Kennedy v. Louisiana*, 554 U.S. 407, 422–24 (2008) (invalidating death sentence for rape of a child based in part on a survey of current state practices).

46. *Roper v. Simmons*, 543 U.S. 551, 565–66 (2005).

47. *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002).

48. *Roper*, 543 U.S. at 569 (pointing out various scientific and sociological studies proffered by defendant and amici).

49. *Moore v. Texas*, 137 S.Ct. 1039, 1049 (2017); *Hall v. Florida*, 134 S.Ct. 1986, 1993 (2014).

the physiological or intellectual metrics used in determining why youth or the intellectually disabled are less culpable than other defendants. By focusing on empirical metrics, the Court implicitly reasons in an empirical, not strictly conceptual, manner.

*B. Valid Capital Sentencing Schemes Must Direct Sentencing Discretion*

If the aggravating factors are not doing any real work to limit the death-eligible class, this limiting work must be done by either juries or prosecutors. Failing to suitably direct juries’ discretion is a specific concern. Less attention has been paid to the ability or willingness of prosecutors to bring capital charges, but this is obviously an important consideration as well. The specific concerns in each case differ, but the overarching concern is that too much discretion afforded to juries or prosecutors will lead to miscarriages of justice. In a situation where the defendant is potentially subjected to the ultimate punishment, the risk of jurors or prosecutors exercising uncontrolled discretion is unacceptable.

Because the death-eligible class is not sufficiently limited, it is less likely that the discretion of juries is meaningfully directed in any way. Juries’ exercise of discretion is a recurring theme in the Supreme Court’s death penalty jurisprudence.<sup>50</sup> The harsher punishment of death is not justified by a system which both fails to appropriately limit the death eligible class and fails to appropriately direct the sentencer’s discretion. One comprehensive study of 240 juror interviews across fifty-eight cases suggests that topics focused on by jurors at the sentencing phase revolve primarily around questions of guilt.<sup>51</sup> “The jurors do not appear to have grappled with the notion that, despite the defendant’s clear guilt of an aggravated murder, they could decide that he deserved a sentence other than death.”<sup>52</sup> The same study also notes that a substantial proportion of jurors who voted for death sentences believed that under the law a death sentence was *required*, as opposed to merely available.<sup>53</sup> Jurors also seem to ignore potential mitigating evidence; mitigating evidence was infrequently discussed and some jurors viewed the imposition of a life-without-parole sentence as opposed to a death sentence as “excusing” the defendant for the crime.<sup>54</sup>

Prosecutors also play a role in exercising their discretion when the statutory scheme does not sufficiently limit the death-eligible class. Of course, prosecutorial discretion will always have some role in our criminal justice

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50. See *Tuilaepa v. California*, 512 U.S. 967, 991–92 (1994); *Graham v. Collins*, 506 U.S. 461, 483–484 (1993) (Thomas, J., concurring); *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Gregg v. Georgia* 428 U.S. 153, 198 (1976).

51. Ursula Bentele and William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK L. REV. 1011, 1029–30 (2001).

52. *Id.* at 1031.

53. *Id.* at 1041.

54. *Id.* at 1052–53.

system; it would be impossible and misguided to completely eliminate the discretion of those persons actually trying criminal cases in court. However, the ability and willingness of prosecutors to seek death sentences is a particularly powerful use of that discretion and must be vigilantly monitored. This is especially true where statutory aggravator schemes do not sufficiently limit the class of defendants against whom prosecutors can bring capital charges.

One symptom of insufficiently-guided prosecutorial discretion are the county-level discrepancies with respect to death sentences. In his dissent in *Glossip v. Gross*, Justice Breyer called for a renewed examination of the constitutionality of the death penalty by pointing to several studies which show that geography is a factor which can explain death sentences.<sup>55</sup> One of the cited studies shows that only ten percent of all counties in the United States accounted for all death sentences imposed from 2004 to 2009.<sup>56</sup> Additionally, one percent of counties accounted for nearly forty-four percent of all death sentences from 2004 to 2009.<sup>57</sup> Several possible reasons have been suggested for this disparity, including overzealous prosecuting<sup>58</sup> and the cost of mounting a capital case.<sup>59</sup> Whatever the reasons, the fact that a small subset of counties brings substantially all death penalty cases is indicative of a broken system. The imposition of death based on the defendant's geography is wanton and freakish.

Further, the factors which best explain whether a defendant will face a death sentence are themselves arbitrary, capricious, and unjust. The various opinions in *Furman* contained some bare-bones statistics on execution rates, but nothing more substantial. Since *Furman*, however, the number of statistical studies has exploded, and their conclusions are alarming.<sup>60</sup>

One of the most notable uses of statistical data in a death penalty case came in *McCleskey*.<sup>61</sup> In *McCleskey*, the petitioner's death sentence was upheld despite a comprehensive statistical study (the Baldus study) indicating the presence of racial bias in Georgia's death penalty machinery.<sup>62</sup> A four-justice

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55. *Glossip v. Gross*, 135 S.Ct. 2726, 2761–62 (Breyer, J., dissenting).

56. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 233 (2012).

57. *Id.*

58. *Too Broken to Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties*, Report, Fair Punishment Project, <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-Too-Broken.pdf> [<https://perma.cc/E2S9-H28F>] (last visited January 22, 2019).

59. Maurice Chammah, *Six Reasons the Death Penalty is Becoming More Expensive*, Report, The Marshall Project (2014), <https://www.themarshallproject.org/2014/12/17/six-reasons-the-death-penalty-is-becoming-more-expensive> [<https://perma.cc/H32C-R49R>] (last visited January 22, 2019).

60. See generally Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227 (2013).

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

62. *Id.* at 292.

dissent noted that few facts were more relevant to McCleskey’s ultimate sentence than that his victim was white: defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than those whose victims were black.<sup>63</sup>

However, the majority opinion maintained that the showing of a correlation between race and the death penalty was “at most . . . a discrepancy that appear[ed] to correlate with race”<sup>64</sup> and that “[a]pparent discrepancies in sentencing are . . . inevitable.”<sup>65</sup> This decision was derided by commentators as akin to *Dred Scott v. Sanford*, *Plessy v. Ferguson*, and *Korematsu v. United States*.<sup>66</sup> Nevertheless, the majority refused to descend what they saw as a slippery slope:

Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.<sup>67</sup>

Since *McCleskey*, a number of other studies have shown similar results to the Baldus study.<sup>68</sup> After reviewing a number of different studies, composed of various methodologies, time periods, and locations, the data reveal that while there is little to no racial disparity based on race of the defendant alone, there are statistically significant disparities based on race of the victim alone, and the disparity is even greater when based on the combination of race of defendant

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63. *Id.* at 321 (Brennan, J., dissenting) (“At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey’s, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.”). (citations omitted).

64. *Id.* at 312.

65. *Id.*

66. Shatz & Dalton, *supra* note 60 at 1240.

67. *McCleskey*, 481 U.S. at 315–17.

68. Shatz & Dalton, *supra* note 60 at 1244–56.

and race of victim.<sup>69</sup> Further, gender disparities exist as well. Estimates suggest that a defendant who murders a female victim is approximately twice as likely to receive the death penalty than a defendant whose victim is male.<sup>70</sup>

Even though the majority opinion in *McCleskey* rejected petitioner's argument after assuming, *arguendo*, that the data from the Baldus study was true, this does not serve as a bar to the use of studies in death penalty cases. While the Court rejected *McCleskey*'s argument on the ground that he did not prove that he was purposefully discriminated against, this barrier may be weakened by a shift towards more recognized "disparate impact" theories of civil rights violations. Also, statutes passed since *McCleskey* give more force toward finding racial disparities in punishment as unconstitutional.<sup>71</sup>

When aggravating factors schemes do not genuinely narrow the number of defendants in a way that identifies the most culpable, the task is left to juries and prosecutors. Without suitable direction, it appears that the decisions of jurors and prosecutors are affected by capricious factors such as race and geography.

### C. *Valid Capital Sentencing Schemes Must Justify the Heightened Punishment*

States which retain the death penalty set out various aggravating factors, at least one of which must generally be proved beyond a reasonable doubt in order for the defendant to be eligible for the death sentence. Aggravating factors are designed to help the trier of fact determine which defendants have committed a crime for which a proportionate sentence is death. In essence, aggravators are designed to filter out all but the "worst of the worst" offenders, who even then may still prevent mitigating evidence and ultimately may be excused from death at the mercy of the jury. Aggravating factors vary from state to state, but in general they be arranged under some standard categories.

The first category concerns the manner in which the murder is committed. Examples of aggravators under this category typically come with descriptions such as "especially heinous, atrocious, or cruel"<sup>72</sup> or "committed in a cold, calculated manner."<sup>73</sup> Aggravators in this category can be susceptible to the prohibition against overly-vague aggravators in *Godfrey* unless they are given some limiting construction. This category also includes more specific aggravators such as "creat[ing] a grave risk of death"<sup>74</sup> or if the murder occurred as a result of "the hijacking of an airplane, train, ship, bus, or other public

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69. *Id.* at 1250.

70. *Id.* at 1251–52.

71. See 42 U.S.C. § 1981(a) (enacted by Pub.L. 102-116, Title I, §101, Nov. 21, 1991, 105 Stat. 1071).

72. FLA. STAT. ANN. § 921.141(6)(h) (2018).

73. ARIZ. REV. STAT. ANN. § 13-751(f)(13) (2012).

74. ARIZ. REV. STAT. ANN. § 13-751(f)(3) (2012).

conveyance”<sup>75</sup> or “knowingly creat[ing] a risk of death or great bodily harm to more than one person.”<sup>76</sup> The emphasis here is on making these murderers death-eligible due to the particular violence against one person or potential for mass-murder.

The second category of aggravators make capital-eligible murders which are reprehensible because of some attribute of the victim which makes the victim particularly vulnerable and unable to put up any resistance against the murderer. Aggravators in this category include the murder of “an unborn child in the womb,”<sup>77</sup> someone “seventy years of age or older,”<sup>78</sup> or someone “less than 14 years of age.”<sup>79</sup>

The third category of aggravators concern specific situations where incentives are important, such as the improper interference with the criminal justice system<sup>80</sup> or murder-for-hire plots.<sup>81</sup> Aggravators in this category are aimed toward increasing punishment for the murder of a person who could potentially play a role in a trial or who performs duties within the criminal justice system, while also providing counterbalancing disincentives for a uniquely incentivized version of murder that was done for pecuniary gain.

The fourth category of aggravators deal with what can be thought of as “tack-ons” to the murder—namely instances of felony murder<sup>82</sup> and instances where the defendant is a past-offender.<sup>83</sup> While murders in this category are still reprehensible, and past offenders may be arguably more culpable, it can also be argued that it is unfair to extract additional punishment from a defendant for an offense for which he has already been sentenced, rehabilitated, and released. This does not allow the defendant a clean slate after he is released from his sentence. Further, allowing a statutory aggravator to be met based on actions allows for a punishment (death) greater than what the total punishment would be for each crime considered separately. However, these considerations must be weighed against a societal interest in curbing recidivism, especially of violent offenses.

Disturbingly, some aggravators may not function to capture the murders whose perpetrators are more deserving of the heightened punishment of death. Arizona, for example, lists murders committed by the use of a remote stun gun

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75. MO. REV. STAT. § 565.032(2)(14).

76. LA. CODE CRIM. PROC. ANN. art. 905.4(A)(4) (2015).

77. ARIZ. REV. STAT. ANN. § 13-751(f)(9) (2012).

78. *Id.*

79. NEV. REV. STAT. ANN. § 200.033(10) (West 2017).

80. LA. CODE CRIM. PROC. ANN. art. 905.4(A)(8-9) (2015); MO. REV. STAT. § 565.032(2)(12-13).

81. MO. REV. STAT. § 565.032(2)(4); A.C.A. § 5-4-604(6).

82. ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (2012) (providing circumstances for felony murder as murder in the first degree in Arizona).

83. KAN. STAT. ANN. § 21-6624(a) (West 2011).

as aggravated murders.<sup>84</sup> Going beyond this one example, the fifth category of aggravators is more problematic than any of the others in that it contains an implicit racial component which is not saved by identifying any reason for the heightened culpability of the defendant. Examples of aggravating factors in this category include murders in connection with so-called “criminal street gang activity”<sup>85</sup> or someone who is a “criminal gang member.”<sup>86</sup> In actuality, it appears that these aggravators identify no real factor that justifies heightened culpability or the heightened punishment of death. Further, statutes of this sort may be susceptible to First Amendment freedom-of-association challenges or vagueness challenges.<sup>87</sup> These provisions might function solely to ensnare members of minority groups, thereby transforming otherwise ordinary first-degree murders into aggravated ones.<sup>88</sup> This step from “ordinary” to “aggravated” can occur from a simple association with other persons, whether or not those persons were involved in the murder.

While the most aggravating factors appear to be well thought-out and appropriately drafted, it seems that some aggravators function only to elevate some murders committed by minorities to aggravated murders, even if they are substantially the same as more ordinary murders. Even if these factors do not capture many murders, this does not justify keeping them on the books. A valid aggravator must identify a particular reason why a defendant in a particular case is deserving of the ultimate punishment.

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84. ARIZ. REV. STAT. ANN. § 13-751(f)(14) (2012).

85. MO. REV. STAT. § 565.032(2)(17) (“The murder was committed during the commission of an offense which is part of a pattern of criminal street gang activity as defined in section 578.421.” MO. REV. STAT. § 578.421(1) defines a criminal street gang as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (2) of this section, which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”).

86. FLA. STAT. ANN. § 921.141(6)(n) (West 2017) (under FLA. STAT. ANN § 874.03 (West 2017), a “criminal gang member is someone who meets any two or more of eleven different criteria, including “(d) Adop[ting] the style of dress of a criminal gang,” “(g) Associat[ing] with one or more known criminal gang members,” “(j) Has been observed in the company of one or more known criminal gang members four or more times.”).

87. H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON L. REV. 601, 638–39 (2004).

88. See Chelsea Creo Sharon, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 249–50 (2011).

### III. STATE CAPITAL SENTENCING SCHEMES CURRENTLY FAIL TO ADDRESS FURMAN’S CONCERNS

Courts have shown themselves to be very deferential to states and not since *Furman* has the Supreme Court held a capital sentencing scheme, taken as a whole, to be unconstitutional. As a result, unconstitutional capital sentencing schemes that fail to narrow the death-eligible class have proliferated.

Indeed, since *Furman*, the Court has not considered the question of whether particular aggravating sentencing schemes, taken as a whole, are constitutional. Even cases which ask questions of individual aggravators do not extend this analysis to aggravating factor schemes as a whole.<sup>89</sup>

#### A. *Current Capital Sentencing Schemes Fail to Perform a Limiting Function*

Despite deciding several cases, which consider whether an individual aggravator is too broad or vague,<sup>90</sup> the Supreme Court has not yet made a determination about whether a statutory scheme *as a whole* may fail to provide a sufficient amount of narrowing the death-eligible class.<sup>91</sup> However, the Court’s own decisions explicitly state that the capital sentencing scheme as a whole, not merely any particular individual aggravating circumstance, must serve a narrowing function.<sup>92</sup> To the extent that a state fails to sufficiently narrow the death-eligible class, it runs afoul of *Furman*. To insist that a single aggravating factor can be overbroad while a collection of aggravating factors that achieves the same result “genuinely narrows” the class is to place form over substance while lives hang in the balance. Just because the previous Supreme Court

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89. *Tuilaepa v. California*, 512 U.S. 967, 981 (1994) (Stevens, J., concurring) (“As these cases come to us they present a question that the Court answered in *Zant v. Stephens*. California, like Georgia, has provided a procedure for determining whether a defendant found guilty of murder is eligible for the death penalty. *Petitioners have not challenged the constitutionality of that procedure or its application in these cases. Accordingly, our decision rests on the same assumption that we made in Zant*, namely, that the statutory procedure for determining eligibility adequately confines the class of persons eligible for the death penalty to a narrow category in which there is a special justification for ‘the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”) (internal citations omitted) (emphasis added).

90. *See, e.g., Tuilaepa*, 512 U.S. 967 (“First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.”); *Godfrey v. Georgia*, 446 U.S. 420, 420 (1980); *Arave v. Creech*, 507 U.S. 463, 474 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.”). However, *Creech* only looked at one particular aggravating circumstance, not whether the scheme itself failed to whittle down the death-eligible class enough.

91. *State v. Hidalgo*, 390 P.3d 783, 790 (Ariz. 2017), *cert. denied*, 138 S.Ct. 1054 (2018).

92. *Creech*, 507 U.S. at 474 (“Our precedents make clear that a State’s *capital sentencing scheme* also must ‘genuinely narrow the class of persons eligible for the death penalty.’”) (emphasis added) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).



decisions have turned on particular, individual aggravating circumstances, which may or may not have narrowed the class of offenders eligible for death sentences, does not mean that the Court has given its blessing to statutory schemes with an all-encompassing menagerie of aggravating factors.

The Arizona Supreme Court placed form over substance in its decision in *State v. Hidalgo*.<sup>93</sup> *Hidalgo* presented evidence showing that, due to Arizona's expansive list of aggravating circumstances, nearly ninety-nine percent of first degree murders had at least one aggravating circumstance, making them death-eligible.<sup>94</sup> However, as acknowledged by the court, prosecutors only sought the death penalty in around ten percent of cases.<sup>95</sup> The court further reasoned that “[o]bserving that at least one of several aggravating circumstances could apply to nearly every murder is not the same as saying that a particular aggravating circumstance is present in every murder.”<sup>96</sup>

While it denied *Hidalgo*'s petition for certiorari, the United States Supreme Court's decision was accompanied—curiously—by a statement respecting the denial of certiorari written by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan.<sup>97</sup> The statement considered the various ways in which Arizona's statutory set-up could perform the required narrowing function. First, Arizona could “narrow the definition of capital offenses” such that the definition for capital murder was necessarily smaller than the definition for first-degree murder.<sup>98</sup> Arizona did not opt to go this route, however.<sup>99</sup>

Instead, Arizona chose to meet the narrowing requirement by setting forth aggravating factors which function to elevate a non-death-eligible murder to a death-eligible one.<sup>100</sup> Justice Breyer's statement further noted that the Arizona Supreme Court set out five grounds which it believed met the narrowing requirement:

They were: (1) Arizona's first-degree murder statute; (2) the “identified aggravating circumstances”; (3) the fact that the State must prove “one or more” of the “alleged aggravating circumstances” “beyond a reasonable doubt”; (4) the existence of “mandatory appellate review”; and (5) Arizona's statutory

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93. *Hidalgo*, 390 P.3d 783.

94. Petition for a Writ of Certiorari, *Hidalgo v. Arizona*, No. 17-251 (U.S. Aug. 14, 2017), 2017 WL 3531089 (U.S.) (“[V]irtually every’ person — around 99% — convicted of first-degree murder is eligible for the death penalty.”)

95. *Hidalgo*, 390 P.3d at 791.

96. *Id.*

97. *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018).

98. *Id.* at 1055.

99. *Id.* (“Unlike the Louisiana and Texas statutes, Arizona's capital murder statute makes all first-degree murderers eligible for death and defines first-degree murder broadly to include all premeditated homicides along with felony murder based on 22 possible predicate felony offenses.”).

100. *Id.* at 1055–56.

provisions applicable to “individualized sentencing determinations” through consideration of “mitigating circumstances.”<sup>101</sup>

Justice Breyer’s statement flatly rejected the first<sup>102</sup> and second<sup>103</sup> reasons. The statement also brushed aside the third and fourth reasons as “beside the point” since they did not focus on the “*legislative* narrowing that [the Supreme Court’s] precedents require.”<sup>104</sup> Despite all of this, however, the statement ultimately *respected* the denial of certiorari—surely a huge blow for anti-death penalty voices.

However, Justice Breyer’s statement left the door open for future challenges along these same lines. The statement acknowledged that the overwhelming majority of murderers in Arizona may be death-eligible.<sup>105</sup> This fact “points to a possible constitutional problem.”<sup>106</sup> The statement laid out a roadmap for future defendants to follow by pointing out that “[c]apital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here.”<sup>107</sup> The statement closed: “And the issue presented in this petition will be better suited for certiorari with such a record.”<sup>108</sup>

This appears to be nothing if not a call for capital defendants to make every attempt to arm themselves with empirical studies showing that outcomes vary according to race. Of course, only four Justices signed onto this statement. Additionally, the composition of the Court has changed since the *Hidalgo* petition was denied and there is no guarantee that a record augmented with empirical studies, as described by Justice Breyer, would find the necessary votes. Still, capital defendants as well as prosecutors should now be alert to the fact—if they weren’t already—that courts appear to be warming to the idea of utilizing empirical studies in properly developed records.

At any rate, Arizona’s formalistic statutory set-up is allowed to live on, despite performing no substantial (or indeed, any) narrowing function at the eligibility phase. The Arizona Supreme Court even recognized that the use of

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101. *Id.* at 1057.

102. *Hidalgo*, 138 S.Ct. at 1057 (2018) (“We have considered (and rejected) the first of these other ways since Arizona’s first-degree murder statute does not “provid[e] for categorical narrowing at the definition stage.”) (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

103. *Id.* (“What about the second way—that is, narrowing by means of the ‘statutory aggravators’? Again, the Arizona Supreme Court assumed that those factors do not, in fact, narrow the class of death-eligible first-degree murder defendants. Instead it assumed that ‘Hidalgo is right in his factual assertion that nearly every charged first degree murder could support at least one aggravating circumstance.’ *That assumption, without more, would seem to deny the constitutional need to ‘genuinely’ narrow the class of death-eligible defendants.*”) (emphasis added) (quoting *State v. Hidalgo*, 390 P.3d 783, 791 (Ariz. 2017)).

104. *Hidalgo*, 138 S.Ct. at 1057 (2018).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

aggravating circumstances is a *means* to the end of genuinely narrowing the death-eligible class, not an end in and of itself.<sup>109</sup> However, it is difficult if not impossible to view such a step a part of a procedure which “minimize[s] the risk of wholly arbitrary and capricious action.”<sup>110</sup> A defendant going through such a scheme is no differently placed than the defendant in *Furman*. Indeed, Justice Stewart’s words apply just as readily to *Hidalgo* as they did to *Furman*: “of all the people convicted of [murder]. . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>111</sup> The fact that there is no single overly broad or vague aggravating circumstance in Arizona does not mean that Arizona’s statutory set up is not guilty of subjecting individuals to the machinery of death in an unconstitutionally arbitrary and capricious fashion.

*B. Current Capital Sentencing Schemes Fail to Direct Sentencing Discretion*

By failing to suitably direct the discretion of prosecutors and juries, capital sentencing schemes today allow some of our nation’s most shameful practices to surface within the death penalty context. The racial bias inherent in the machinery of death is an area often studied.<sup>112</sup> Commentators have also acknowledged the inherent tension between uniformity and flexibility when it comes to jury verdicts in death penalty cases.<sup>113</sup> While the Supreme Court has “decline[d] to assume that what is unexplained is invidious,”<sup>114</sup> it is clear that invidiousness is part of the system.

A New Yorker article from 2016 makes this point in a way that legal scholarship often cannot.<sup>115</sup> The article relates shocking stories of two different death penalty cases: one in Georgia and another in Texas.<sup>116</sup> In the Georgia case, Kenneth Fults—an African-American man—was sentenced to death for the murder of his white neighbor.<sup>117</sup> One of the jurors in the case, a white male who

109. *Hidalgo*, 390 P.3d at 791. See also *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988).

110. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

111. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

112. See John D. Bessler, *The Inequality of America’s Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 494, 546, 560 (2017); Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1431–33 (2016); Shatz & Dalton, *supra* note 60 at 1233, 1239.

113. Chaka M. Patterson, *Race and the Death Penalty, the Tension between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 46 (1995).

114. *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

115. Lincoln Caplan, *Racial Discrimination and Capital Punishment: The Indefensible Death Sentence of Duane Buck*, NEW YORKER (Apr. 20, 2016), <https://www.newyorker.com/news/news-desk/racial-discrimination-and-capital-punishment-the-indefensible-death-sentence-of-duane-buck> [https://perma.cc/5CA7-VJ2P] (last visited Apr. 22, 2019).

116. *Id.*

117. *Id.*

indicated to the court during *voir dire* that his views on race would not prevent him from giving the defendant a fair trial, was later quoted by an investigator working on the defendant’s appeal: “I don’t know if he ever killed anybody, but that nigger got just what should have happened. Once he pled guilty, I knew I would vote for the death penalty because that’s what that nigger deserved.”<sup>118</sup> The Eleventh Circuit rejected this appeal as it was procedurally barred.<sup>119</sup> While discretion is part and parcel of the criminal justice system, it is clear that the discretion left to the jury in Fults’ case was not sufficiently narrowed to prohibit overt racist sentiments from helping to condemn the defendant. While an appellate court found that the evidence at trial was sufficient for a trier of fact to conclude that an aggravating circumstance existed,<sup>120</sup> the fact remains that the jury that actually made this determination exhibited overt racist sentiments. This same jury would have been charged with considering mitigating evidence. While Fults was certainly guilty of committing a gruesome crime spree and could have been sentenced to death on the evidence,<sup>121</sup> nothing redeems the process that ultimately condemned him.

Prosecutors also exercise their discretion, and often do so in a way that suggests they do more narrowing work than the aggravating statutes do. One Missouri study found that

[D]iscretionary choices by prosecutors eliminated about 53.7% of the intentional-homicide cases from the [first-degree murder] category, whereas the statute eliminated only about 15.5% of the cases from the [first-degree murder] category. Thus, prosecutors do about 3.5 times more “work” than the statute in narrowing the class of intentional-homicide cases to yield [first-degree murder] convictions.<sup>122</sup>

The study is unique in that it examines the prosecutor’s discretion in whether to bring charges as first- or second-degree murder or voluntary manslaughter, and found that roughly 62.3% of second-degree murder or voluntary manslaughter charges could have been brought as first-degree murder charges.<sup>123</sup> The authors also conclude that roughly ninety percent of the first-degree murder-eligible non-capital cases studied would have been death-eligible in Missouri.<sup>124</sup> Prosecutorial discretion will always be a part of the criminal justice system, but this discretion should be more narrowed and directed than it currently is.

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118. *Id.*

119. *Fults v. Warden*, 764 F.3d 1311, 1314–15 (11th Cir. 2014).

120. *Fults v. State*, 548 S.E.2d 315, 319 (Ga. 2001).

121. *Id.* at 318–19.

122. Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ L. REV. 305, 317–18 (2009).

123. *Id.* at 315–16.

124. *Id.* at 319.

C. *Overly Broad Capital Sentencing Schemes do not Identify a Heightened Punishment for Increased Culpability*

To the extent that aggravating factor schemes are vague or do not identify factors that are indicative of a sufficiently high degree of culpability, they do not justify the heightened punishment of death. In some instances, there is a danger of overlap between multiple aggravators or between an aggravator and an element of the crime itself. In other instances, the explosion of aggravating factors in some states may be motivated by political considerations, such as being “tough on crime” or the perceived need to respond to a high-profile murder. While American politicians should ultimately be held accountable by their constituents, this should not permit the stripping away of criminal defendants’ rights.

The reality that the existence of some aggravators is correlated with the existence of others is problematic. Studies have suggested that juries may resort to a sort of box-checking when it comes to identifying aggravating factors in capital murder cases.<sup>125</sup> In many jurisdictions, for example, contract killings almost necessarily implicate two aggravators.<sup>126</sup> Further, jurisdictions that have one aggravator for “heinous, atrocious, or cruel” murders and another for “cold, calculated, and premeditated” ones risk unfairly piling on the absolute number of aggravators against a defendant.<sup>127</sup> Even though such aggravators are typically required to have limiting constructions, it is difficult to see how a murder that satisfies one would not satisfy the other. In such a case, the same criminal act can run afoul of two similar aggravators. While this does not necessarily make the murder twice as aggravated, it gives jurors an opportunity to come to that very conclusion.

In other instances, the adoption of aggravating factors seems less about the culpability of a particular class of murderers than whether a particular murder was a high-profile one. A prime example of this phenomenon is the addition of terrorism-related concerns after September 11, 2001.<sup>128</sup> Similar patterns exist for school shootings, domestic violence, and child abuse.<sup>129</sup> Adding to ever-expanding lists of aggravators might help to signal outrage at a particular crime. However, it can be argued that any unjustified, premeditated murder—and therefore any murder where the judicial system would need to worry about the death penalty—is horrible. However, the task of aggravating factor schemes is

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125. See Bentele and Bowers, *supra* note 51.

126. For example, compare MO. REV. STAT. § 565.032(2)(4) and MO. REV. STAT. § 565.032(2)(6) with NEV. REV. STAT. ANN. § 200.033(4) (West 2017) and NEV. REV. STAT. ANN. § 200.033(6) (West 2017).

127. FLA. STAT. ANN. §921.141(6)(h) (West 2017); FLA. STAT. ANN. §921.141(6)(i) (West 2017).

128. Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 27–29 (2006).

129. *Id.* at 30–31.

not to identify whether society is outraged by a particular killing; its task is to identify the worst of the worst offenders who then receive the worst of the worst punishment. Additionally, while each individual addition to an aggravator scheme might be justified, that justification only works for the individual trees, not the forest that some of these schemes have become. What holds for the individual may not, and in this case does not, hold in the aggregate.

#### IV. CONCLUSION

A constitutional capital sentencing scheme must provide a way to “genuinely narrow” the class of those eligible for the death penalty and must “reasonably justify” imposing a more severe sentence compared to others found guilty of murder. It must do so in a way that avoids both arbitrariness and invidious discrimination. Many schemes as they exist today fail to live up to *Furman*’s lofty standards. At their worst, they are arbitrary, all-encompassing, discriminatory, and ever-growing Hydras which erode the constitutional rights of criminal defendants. As they exist today, state aggravating factor schemes are just as arbitrary and *capricious* as those struck down in *Furman*. In order to save their aggravating factor schemes, states need to reform them.

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