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Session Two: Learning from Struggles

the Criminal Clinic at the University of Georgia and has been involved in criminal defense for many years in various places. The second speaker is Sherod Thaxton, a sociologist with a Ph.D in Sociology and Criminology. He then got a law degree and is now an assistant professor at UCLA heavily involved in the area of death penalty charging and sentencing as well as criminal justice. The third speaker is our own Teri McMurty-Chubb, who is a great additional to our faculty, incredible, in the areas of race, critical legal studies, and has a unique perspective on all of this, too.

PROFESSOR GABRIEL: Thank you, Professor Cole. I am honored to be here at Mercer. A lot of the morning speakers touched on issues that have intersections with what all of us are going to say, certainly with what I hope to address.

I want to talk about lawyers for poor people, I want to talk about lawyers who are representing defendants in the criminal justice system, and I want to connect that to some themes having to do with race and an issue that is current in Georgia with respect to our public defender system.

What is the standard of care for a public defender? What's the standard of care for a criminal defense lawyer? If your brother or sister were arrested and you had the money to hire an attorney to represent him or her, would you hire a public defender if you could?

Public defenders are full-time criminal defense lawyers. They are specialists, as are many other lawyers throughout the practice of law. They have full-time investigators on staff. They have a lot of experience, they know the prosecutors, and they know the judges. Criminal law practice tends to be local. The only criminal lawyers who try more cases are prosecuting attorneys. Apart from the fact that public defenders are not for hire, why wouldn't you hire one? The answer is likely because we know that they have too many cases. We are afraid that even if they are stellar attorneys, they will not be able to spend the time that they need to spend on that case. Specialists or not, we believe they only deliver minimal representation, and too often we are right. It's hardly news that public defenders have too many cases in places around the country, certainly in many places throughout Georgia.

By the time *Gideon v. Wainwright* was decided in 1963, it was already well understood that providing attorneys for every indigent defendant in criminal cases would be a huge undertaking. It was already understood that it would help to have standards of some sort to guide attorney performance, standards to measure attorney performance, standards with which a system could advocate for more funding, and more resources, in order to do the job right. So why aren't we closer now to

having a system that provides an attorney with adequate resources, and especially adequate time to represent every defendant?

I would suggest that there are a number of reasons. There are two camps with respect to the idea of the defense attorney. One camp supports what I would call a minimalist definition of the indigent defense attorney's role, or any defense attorney's role. The other camp supports a much higher standard. The minimalist camp looks at the criminal law system as a whole, thinks its purpose is to identify law breakers and to impose punishment—end of story. It starts with a need to protect society from law breakers. It works backwards from there. As long as the system separates the guilty from the innocent and imposes punishment, it's doing its job. Given its focus on protection of society, the minimalist camp is more concerned about the wrongfully acquitted than the wrongfully convicted. This view might be called fundamentalist. It reflects not a critique of the system but it reflects faith in the system. We use guilt as a judgment about character, punishment as the just dessert for the guilty, whose character has been proven wanting. The defense lawyer fits into this world as an unnecessary player because if we have faith in the system, then that means faith in the police, faith in the prosecuting attorney, and faith in the judiciary. Why would you need an attorney on the other side? That lawyer's role must be to defeat the truth, to defraud the system somehow. Defense lawyers do not want members of this camp on a jury.

The other camp starts at a different point altogether. This camp thinks of lawyers as professionals, the advice of counsel as a positive good in and of itself, legal representation is helpful to the guilty and the innocent, and legal representation as more than what we refer to as a procedural right. There is substance to having the benefit of counsel. That is the process of having both the case and yourself treated with dignity. It is a sincere inquiry into the charges, into the evidence, into the law. It is counseling, time to sit with and talk to your attorney to develop an attorney/client relationship. All of that is a part of the Sixth Amendment right, and counseling is part of what being a lawyer is, part of what we as lawyers deliver. This camp believes that the system is not an authoritarian but is a fundamentally democratic institution. The adversarial system, in other words, places the individual citizen on an equal footing with the government. This contrast's dramatically from a view in which is the status quo rightfully perpetuated by the work of the police and the prosecution and at times the judiciary. The adversarial system fits better with this second conception of the legal system. It elevates the importance of lawyers and professional legal representation.

I clearly side with the second camp; however, the first camp cannot be dismissed lightly. It is very influential in the politics of indigent defense

and its members sit in positions of power from county commissions, to state legislatures, to Congress, and to the U.S. Supreme Court.

Where are we now and how have the mechanisms that perpetuate racism continued and been transformed into our current world? The preservation of the status quo occurs through mechanisms that have been transformed but are still the same. There are some obvious mechanisms, but also we need to look for the less visible mechanisms of racism.

I want to start with the era of *Brown v. Board of Education* with which we are familiar, 1954 and 1955. Georgia foresaw the likelihood of the outcome in *Brown* and prepared for it in various ways. Eugene Cook, who was the Attorney General of Georgia at that time, in an opinion that he wrote, an advisory opinion from the Attorney General's office, gave the advice that the State of Georgia did not need to comply with *Brown*. He said a couple of things that you might find interesting. Georgia was not a party to the *Brown* case and declined to participate upon invitation as friends of the court. In so refusing, responsible State officials sought to not only avoid any possible holding that we had thereby become bound to abide by the decision, but also to give solemn recognition to the policies of this State. These policies were evidenced by the action of the Legislature and the people in making it clear in no uncertain terms, that segregation would not be abolished in our public school system. The *Brown* case didn't apply to Georgia because Georgia was not a party to the case.

He also stated, even should a suit be brought in Georgia, any one action could affect only one of Georgia's 201 systems. To bind all of these school systems, 201 separate suits would have to be brought. Georgia was very familiar with the use of local control as a mechanism that insulated local power from intervention by higher powers, the State and certainly the Federal government. Of course we know how the *Brown* story progressed. The *Brown* decision by itself was not enough, but it was a vibration that unleashed the avalanche of protests that simply would not stop. We ended up with the 1964 and 1965 Civil Rights Acts and schools in Georgia started to desegregate by the end of the 1960s. Although almost fifteen years after *Brown*, desegregation did happen.

Another monumental decision, in 1963, occurred and had several interesting accompanying responses. *Gideon v. Wainwright*, another unanimous decision, imposed a tremendous mandate on the states. The states must provide attorneys for indigent defendants in criminal cases under the United States Constitution. It was a large undertaking done at considerable expense. There was both a national and state response to *Gideon*.

The American Bar Association gave a response for lawyers at the national level, but it should be said that by comparison to *Brown*, *Gideon v. Wainwright* was met by silence. There was not a protest on either side of the aisle in favor of or against. There were no, and to date there are no, Civil Rights Acts passed by Congress to enforce the mandate of *Gideon*, so it was, and is, a very different response. However, lawyers, as Stephen Bright mentioned earlier, as trustees of the legal system, have a collective responsibility, and lawyers did, in fact, view it that way. Within months of the *Gideon v. Wainwright* decision, the ABA set out on a project to create professional standards in the area of criminal law. The Criminal Law Section of the ABA started in 1963. In the next ten years time, it created seventeen different types of standards for criminal law. These were standards for both prosecutors and defense lawyers. These were standards with respect to bail, guilty pleas, criminal appeals, sentencing alternatives, and criminal procedures. The realization that there was a need to significantly improve our criminal justice system led to the creation of these national standards.

In 1974, after many of these standards had been published and adopted by the ABA House of Delegates, Chief Justice Warren Berger said, "this project represents, I believe, the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession." So there's nothing that unusual about standards. Most professions these days have them, many occupations have them, standards and protocols for how to do what members of that profession or occupation do.

Criminal justice standards have, however, had sort of an interesting history in Georgia. In looking at Georgia's response to *Gideon*, initially, there was no response at all. In 1968 Georgia passed a Criminal Justice Act, a statute which said the responsibility for providing criminal defense lawyers for poor people rests with the counties. There are 159 counties in Georgia. The State could have taken it as its own responsibility, but essentially it punted. This connected the mechanism that was used in response to *Brown v. Board of Education*, that if you push out the responsibility to the smallest jurisdiction, in the case of education, individual school systems; in the case of the criminal justice system, individual counties in a state with 159, you have insulated the decision makers and their responsibilities from scrutiny from the State and scrutiny from some larger powers.

In 1979, there was another Criminal Justice Act in Georgia that created a small state agency. It didn't have authority over indigent defense but it did have three functions. It was called the Georgia Indigent Defense Commission, and it distributed state appropriated

money and passed it on to the counties. The State also appropriated money that met approximately 10% of county indigent defense expenditures at that time. The GIDC did provide the training for lawyers and also created guidelines, i.e., standards, which were submitted and approved by the Georgia Supreme Court. However, not much happened with the guidelines because there was no enforcement authority.

The next phase, is the phase we have been in since 2003, when the state, on the fortieth anniversary of *Gideon*, created the Indigent Defense Act, which created a statewide public defender system. At that time the legislature was very interested in the fact that we had no statewide standards that were enforceable. The creation of standards had been highly recommended by a Supreme Court initiative, the Georgia Supreme Court transmission of indigent defense report, issued the year before, in 2002. In response, the legislature stepped up to the plate and created the Georgia Public Defender's Standards Council.

The idea of standards by which performance could be judged and assessed was so important, they included it in the name of the institution. The statute required this new agency, the Georgia Public Defender's Standard's Council, to adopt standards for maintaining and operating circuit defender offices, describing minimum training and qualifications for attorneys, and setting caseloads for assistant public defenders, and appointed counsel.

Caseload is one of the most important standards you could have. If what we have is a system that is overburdened by cases, then set a number for how many cases an attorney should have. If an office can't live up to that then that office needs more attorneys and more resources. If we are going to have a criminal justice system, we need to be able to pay for it. Both attorney caseload and performance standards in capital cases and in juvenile cases were specifically included in the statute. In the first year or two of the Georgia Public Defender's Standards Council's existence, it drafted and approved these standards.

The phase we are currently in started with legislature involvement of the minute details of the agency performance. The legislature started to be a little bothered by this agency that was asking for money, by the fact that the system that was merely skeletal. The system was organized by the judicial circuits around the state. There are forty-nine circuits, forty-four of them now have circuit public defender offices. The legislature hasn't been quite willing to pay for it. The idea of standards was really bothersome to the legislature, as it turned out. Therefore, they did two things. In 2007 they moved the agency from the Judicial Branch where it was thought to be independent, to the Executive Branch, so that the public defender system now is located in the same branch of government as the prosecuting attorneys are located. More recently, the legislature

decided to eliminate the idea of standards from the statute completely. In this most recent session of the General Assembly, they purged the word "standards" from everyplace it existed in the statute. They didn't replace it with a synonym. They got rid of it, and they changed the name of the agency. They were so enthusiastic about eliminating the idea that standards might apply to the local jurisdictions that they eliminated the word from the agency's name. Now we have the Georgia Public Defender's Council instead.

I am not sure how much of a point to make out of this with respect to the notion of local control. It certainly was the watch word for the signed legislation, which required one agency to create standards that were uniform by which local public defender offices could be evaluated. The fact that local centers resonates so much with history should not be ignored. When we employ a mechanism that has historically been used to maintain hierarchy and to perpetuate a system of which we are not proud, shouldn't we think about whether that mechanism is simply repeating history?

I do not state that individual circuit public defender offices in Georgia are motivated by racism. However, when we think about how we designed the systems and the history of criminal law's use in Georgia to maintain a racial hierarchy and a wealth-based hierarchy, we should think seriously about whether local control has become a synonym for the reputation of that history. Thank you.

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

One can't talk about capital punishment in America without talking about Georgia. Approximately twenty cases that originated in Georgia have set national death penalty policy and practice. Twenty from one state! It's no exaggeration to say that some of the biggest triumphs and tragedies with respect to the administration—the fair administration—of capital punishment have occurred here in Georgia. I want to focus on three of those twenty cases before turning to my statistical analyses. These cases will provide some framing for why I engaged in the specific empirical analyses that I'm going to describe shortly. The first of those

cases was *Furman v. Georgia*, a 1972 case; the second was *Gregg v. Georgia*, a 1976 case; and the third was *McCleskey v. Kemp*, a 1987 case.

In *Furman*, the U.S. Supreme Court identified three types of constitutionally impermissible errors in the administration of capital punishment. First, arbitrariness and capriciousness violates the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the Cruel and Unusual Punishment Clause of the Eighth Amendment. Next, discrimination and bias, such as racial and gender discrimination, violates the Equal Protection Clause of the Fourteenth Amendment. And finally, disproportionality and excessiveness, which also violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

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

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

Now let's move forward eleven years to *McCleskey v. Kemp*. There's hard statistical evidence based on data collected from a multi-year study in Georgia. This statistical evidence was presented on behalf of death row inmate, Warren McCleskey, to the Supreme Court showing the very

problems that the Court said were unconstitutional and impermissible in *Furman,* and in that Georgia capital statute approved by the Court in *Gregg v. Georgia* was supposed remedy statute, were still prevalent. Simply put, the evidence showed that Georgia's statute didn't work. There was evidence of strong racial bias with respect to defendants' race, victim's race, and also with respect to interracial crimes: blacks who were convicted of murdering white victims.

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

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

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

call for the rigorous analysis of capital punishment charging and sentencing practices. So that is what I want to address now.

Map of Georgia

I collected data on every murder case in Georgia from 1993 to 2004, but my talk is going to focus on cases through 2000. The reason I focused on 1993 is because life without the possibility of parole was enacted in 1993. This sentencing option had significant influence on capital charging practices. I have looked at the data through 2004 as well, and they are essentially the same. There were about 1,900 murder convictions during this time period and almost 1,300 of them were death penalty eligible because they satisfied at least one the specific factors enumerated in Georgia's Capital Statute. In other words, about two-third of all homicides were eligible for the death penalty during this time period. Interestingly enough, Georgia's capital statute was designed to significantly narrow the class of defendants eligible for the death penalty—that is, it was supposed to reverse the death penalty for the worst of the worst. Well, death eligibility for two-thirds of all murder cases does not really sound the statute is narrowing this class of defendants in a significant way, but that is a conversation for another day.

There were 400 death notices filed during this time period. As you might imagine, there is also a geographical distribution of death notices. This map shows the Georgia judicial circuits. The Macon Circuit, where Mercer University is located, had about eight death penalty notices during this one period.

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

noticing judicial circuits to have the most cases deserving of the ultimate penalty.

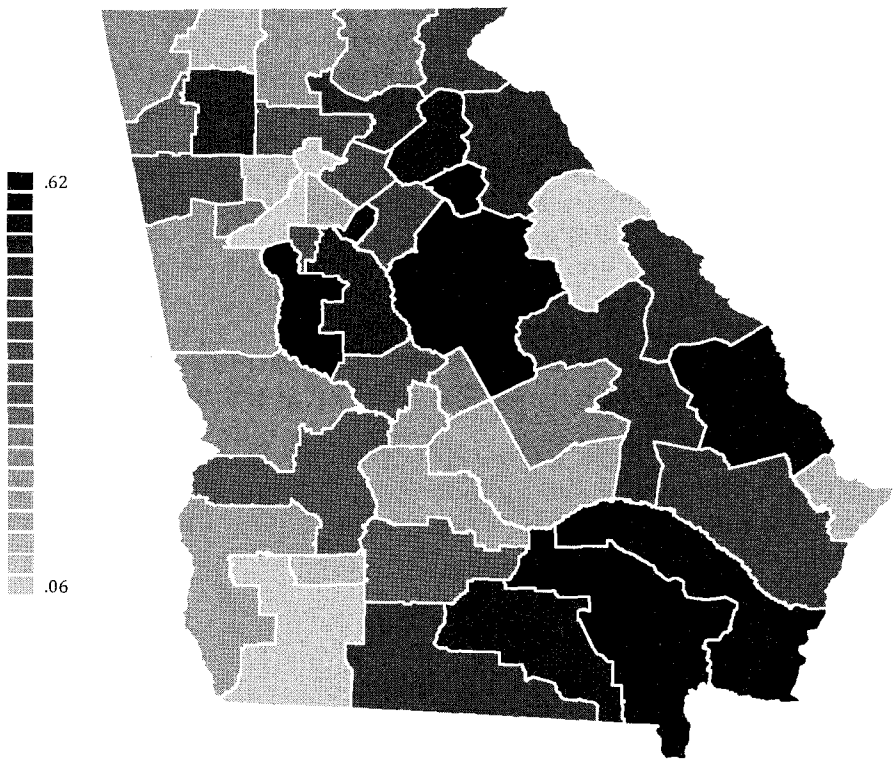

Figure 2: Jurisdictional Variability in the Probability of Receiving a Death Notice (Unadjusted)

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

Moving from numbers to pictures, Figure 2 is a map of Georgia displaying the variability in the probability that a death-eligible case will be noticed for the death penalty across the judicial circuits. This

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

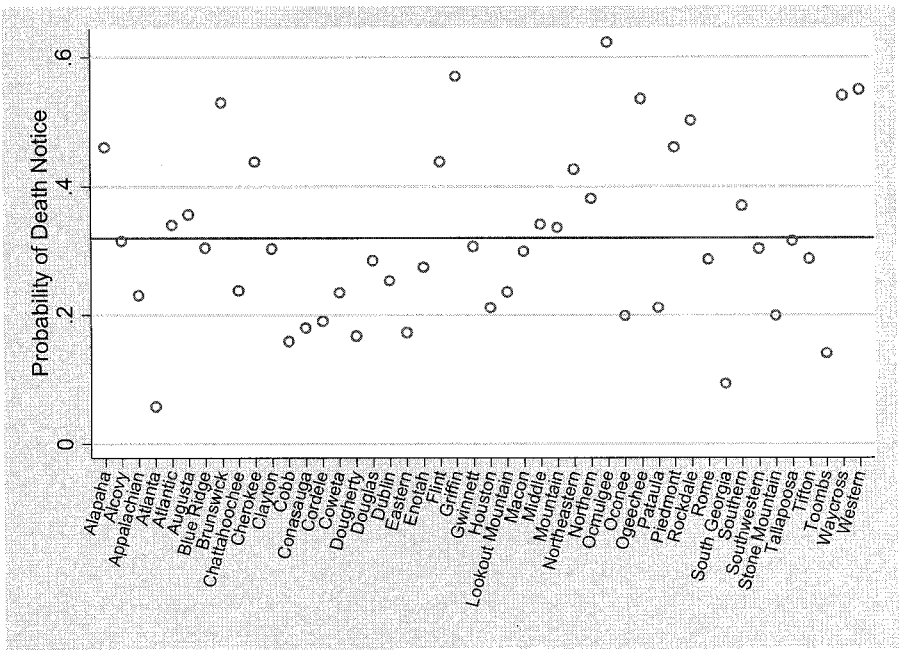

Figure 3: Jurisdictional Variability in the Probability of Receiving a Death Notice (Unadjusted)

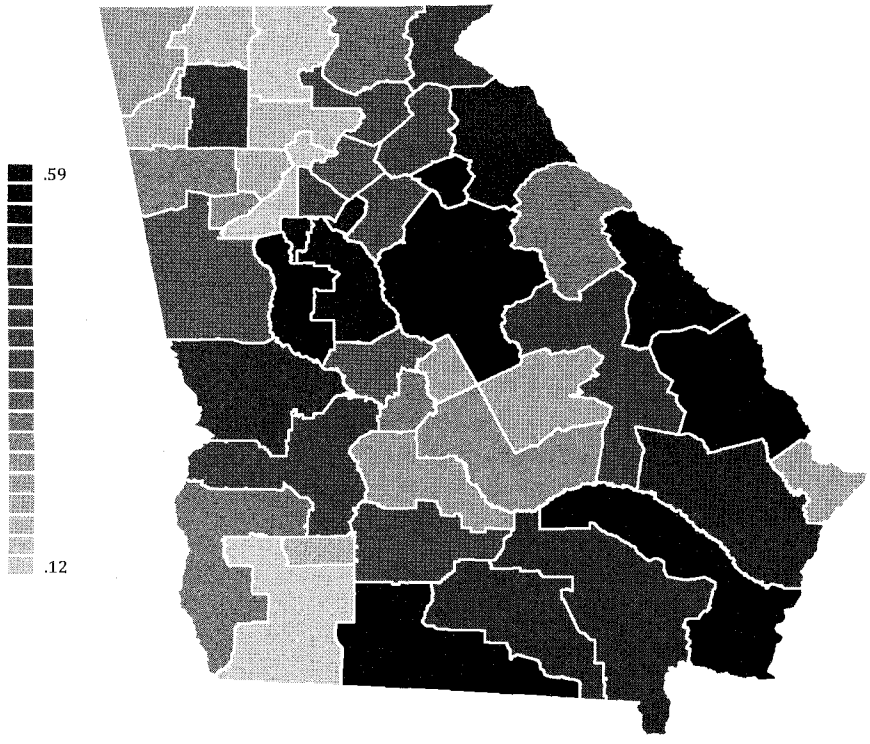

Figure 4: Jurisdictional Variability in the Probability of Receiving a Death Notice (Adjusted)

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

Similar to Figure 3, Figure 5 displays the expected probability of receiving the death penalty for each judicial circuit relative to the statewide average.

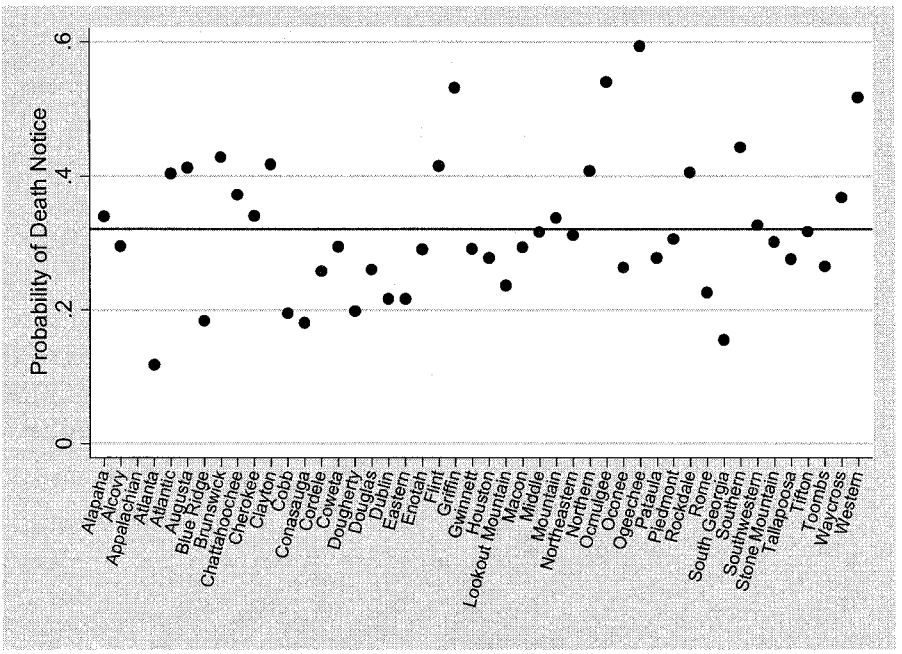

Figure 5: Jurisdictional Variability in the Probability of Receiving a Death Notice (Adjusted)

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

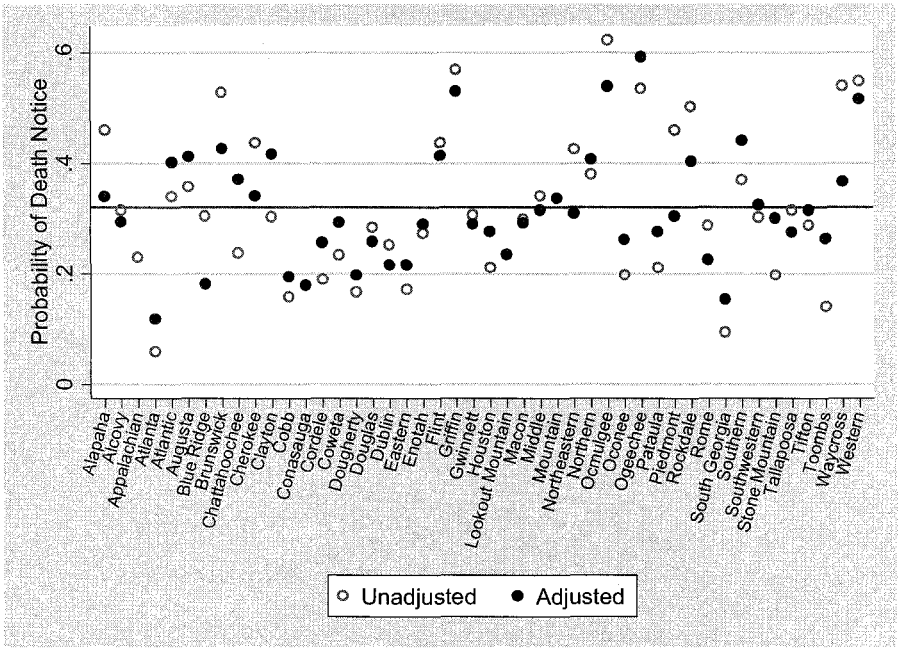

Figure 6: Jurisdictional Variability in the Probability of Receiving a Death Notice (Unadjusted & Adjusted Estimates)

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

circuit, and the median circuit was slightly more "punitive" in its charging practices than the mean circuit.] Looking at a more punitive jurisdiction, the Griffin Circuit, which is at the ninety-fifth percentile in terms of aggressive death notice practices, we would have expected 680 death notices. These are very *big* differences with respect to how many death notices were filed for cases that were factually similar along important legally relevant dimensions.

Okay, I've discussed arbitrariness and capriciousness, so now I would like to talk about bias. Most of the research shows that white victim cases are treated more punitively than non-white victim cases. As Professor Bright noted earlier this afternoon, "Black Lives Don't Seem to Matter," or when capital punishment is concerned, at least not as much.

Study	Odds Ratio	Jurisdiction	Sample Size	Years Studied
Marceau et al. (2013)	4	Colorado	658	1999-2010
Donohue (2014)	2.3	Connecticut	205	1973-2007
Baldus et al. (1990)	3.1	Georgia	1,466	1969-1979
Thaxton (2015)	2.4	Georgia	1,238	1993-2000
Paternoster et al. (2003)	2	Maryland	1,200	1978-1999
Songer & Unah (2006)	3	South Carolina	2,227*	1993-1997

Table 1: Odds of Filing Death-Notice in White-Victim Cases

Table 1 summarizes some of the robust statistical studies on race and capital punishment. What I mean by "robust statistical studies" is rigorous social science research that takes into account key variables believe to influence capital charging-and-sentencing decisions. These studies were conducted in different jurisdictions, different time frames, different sample sizes, under different statutes, but they all obtained very similar results. Even taking into account a host of legally relevant characteristics, researchers discovered that the odds of a white-victim cases receiving a death notice, relatively to non-white victim case, were four times higher in Colorado.

The famous Baldus study, which was with the centerpiece of the seminal *McCleskey v. Kemp* case discovered that white-victim cases were

3.1 times more likely to receive a death notice. And pay attention to the time-frame for the Baldus study, 1969 to 1979. My research on Georgia from 1993-2000 discovered that white-victim cases were 2.4 time more likely to receive a death notice. Granted, the number has gone down slightly, from 3.1 to 2.4, but many years after *McCleskey*, it appears that the more things change, the more things stay the same.

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

What I find even more interesting than the defendant-victim racial combinations is the variability in this race-of-victim effect across judicial circuits in Georgia. Recall that white-victim cases are 2.4 times more likely to be noticed for the death penalty than non-white victim cases, all else being equal. Exploring how much this racial disparity varies across jurisdictions may permit us to determine which judicial circuits seem to be the most racially biased in terms of their death penalty charging practices? Figure 7 is a map of Georgia displaying the variability of the race-of-victim effect across the judicial circuits. The effect ranges from negative 6% to approximately 41%. This means that the likelihood of a white-victim case receiving a death notice can be six percentage points lower than the likelihood of similar black-victim case all of the way up to forty percentages points higher.

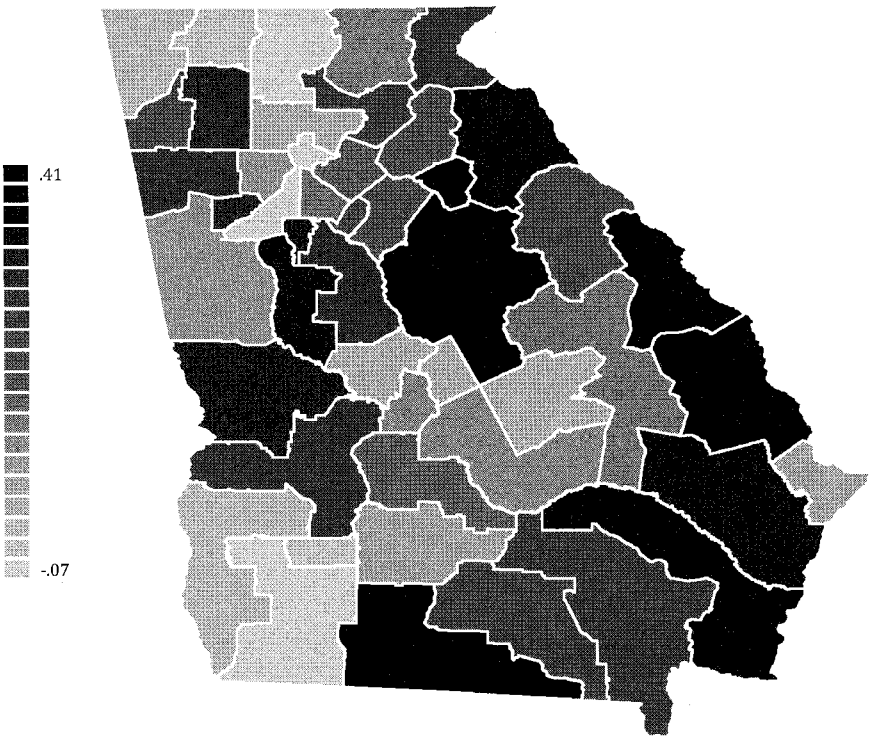

Figure 7: Jurisdictional Variability in the Race of Victim Effect (Caucasian)

Figure 8 displays the same information and the thick vertical line represents the statewide race-of-victim effect, which is fifteen percentage points. So it is one thing for Justices on the U.S. Supreme Court to conclude that a defendant, like Warren McCleskey, did not present sufficiently strong statistical evidence to permit an inference of purposeful racial discrimination; however, when one discovers race-of-victim effects in some judicial circuits that are four times as strong, if not more, than other circuits, what else can one infer?

One can also think about the relationship between racial bias and aggressive charging practices in a judicial circuit. As I noted earlier, some judicial circuits treat similar situated defendant much more punitively than others. Interestingly, the U.S. Supreme Court acknowledged that one of the major concerns with arbitrary decision-making in the capital charging-and-sentencing process is that it opens the door for

racial bias. When there's a system that is not operating according to established standards, then factors that shouldn't matter, or that are legally prohibited from mattering, may start to matter. And that is what one sees in Georgia.

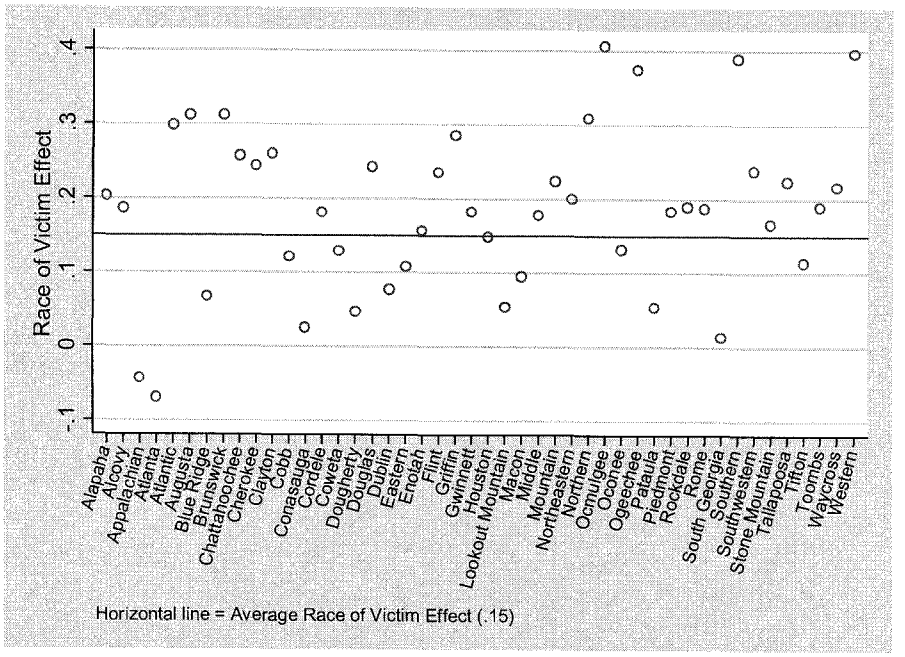

Figure 8: Jurisdictional Variability in the Race of Victim Effect (Caucasian)

The thick vertical line in Figure 9 represents the statewide race-of-victim effect and the horizontal is the statewide probability of receiving

a death notice for the typical death eligible case. The hollow circles represent how each judicial circuit scores on both the racial bias and punitiveness dimensions, and the diagonal line shows the association (correlation) between these two dimensions. One can see from this figure is that those judicial circuits that tend to have the strongest race-of-victim effect are also the ones that are the most punitiveness.

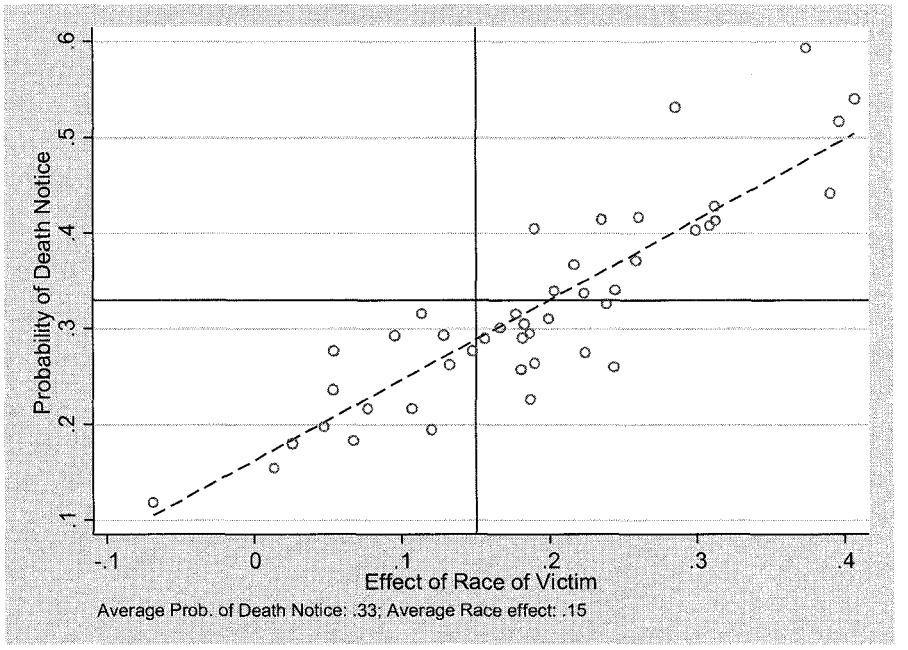

Figure 9: Relationship between Aggressive Charging Practices and Victim-Based Racial Bias (Caucasian)

What does this tell us and why is this important? Returning to the model-based predictions, one can also classify the judicial circuits based on their level of racial biasedness and make predictions about the number of expected death notices across the state if statewide charging practices mirror the practices of specific judicial circuits. If state charging practices were similar to Dougherty Circuit, a low racial bias jurisdiction scoring in the fifth percentile, one would expect 259 death notices. Remember that the actual number of death notices during this time period was 400. If we chose a median judicial circuit, such as Toombs Circuit, one would expect 397 death notices. Selecting a high

racial bias circuit, such as Southern Circuit (ninety-fifth percentile) yield 505 death notices. So moving from the fifth percentile to the ninety-fifth percentile increases the number of expected death notices by nearly double. In my humble opinion, these are compelling statistics. I believe these are the type statistics to which Justice Breyer was referring that need to be presented to the judiciary to really empower them, to give them the narrative to engage in this type of judicial intervention, because the Constitutional buck does stop with at the court. Thank you very much.

PROFESSOR COLE: Now, Professor McMurtry-Chubb.

PROFESSOR McMURTRY-CHUBB: Before I get started, I would like to ask that when I point to you, I want you to say, "say her name." Let's practice.

AUDIENCE: Say her name.

PROFESSOR McMURTRY-CHUBB: So the name of my talk today is "Say Her Name, Black Women's Lives Matter: State Violence in Policing the Black Female Body." I want to start my talk with a song.

(Music playing)

AUDIENCE: Say her name.

PROFESSOR McMURTRY-CHUBB: Alberta King. On June 30th, 1974, Alberta Williams King was shot and killed in the sanctuary of the Ebenezer Baptist Church in Atlanta, Georgia as she played the organ for Sunday morning services. Mrs. King, seventy years old, was the mother of the Reverend Dr. Martin Luther King, Jr. The Court was focused on the irony that Mrs. King was shot and killed so close to where her son was buried. They also highlighted that the violence against Mrs. King was another installment of racial disturbances in Atlanta that week.

One Wednesday, when a young black male parolee was shot, black Atlantans responded in protest. This shooting occurred amidst the ongoing standoff between Maynard Jackson and the white Atlanta Police Chief John Inman. Jackson fired Inman who refused to step down from his post. The men at loggerheads threatened to further arouse racial tensions in the City. Mayor Jackson was abruptly summoned back to Atlanta to deal with the shooting from a conference he was attending on the West Coast. Just when all was looking up and the protesting

seemed to be quelled Marcus Wayne Chenault, Jr., age twenty-one, shot and fatally wounded Alberta Williams King on Sunday morning.

I recount Alberta King's story to illustrate the tension between black women, black men, the State and its actors. Alberta King, as a black woman, was viewed only in relationship to her child, the Reverend Dr. Martin Luther King, Jr.; the shooting of a recent black male parolee at the hands of a white male police officer; Mayor Jackson's election as Atlanta's first black male and his standoff with Atlanta's white police chief; and the stigma and threat of untreated mental illness in the body and mind of her children, all of these were men. Alberta's story is lost to us because it is consumed in an intersectional narrative of State violence, patriarchy and white supremacist politics all employed to preserve the city and insure Alberta King's erasure.

AUDIENCE: Say her name.

PROFESSOR McMURTRY-CHUBB: Alberta's story highlights how the invisibility of black women and policing is a type of State violence against black women. Her story is but one line in the stanza of a song about black women's encounters with the police, a song that silences our names. Her story brings into sharp focus that to comprehend how black women are policed in the U.S. requires a deep knowledge and understanding of her historic and contemporary relationship with capitalism, patriarchy, white supremacy, and its children. This relationship commences in the Plantation South.

AUDIENCE: Say her name.

PROFESSOR McMURTRY-CHUBB: Since her arrival in the Americas as human chattel, the black woman's relationship with the State and State actors was a highly conflicted forced love affair. The State, as a body of lawmakers and plantation owners, was enamored with the black female body, especially its reproductive capacity as a foundation of the economy, particularly the plantation economy. Through rape she would be impregnated and then give birth to girls and boys who were owned by the white plantation master and mistress. She had no parental authority over her children.

The plantation master, the children's father and owner, was their patriarch even when back women bore these women through love or forced relationships, forced breeding with male slaves. Both boys and girls worked in the fields cultivating cotton, sugar, rice, and indigo. Upon reaching puberty, both boys and girls increased in monetary value because of their ability to reproduce human chattel to fuel the slave

economy. Also, each became more valuable because older and stronger, they could cultivate more cotton, sugar, rice, and indigo.

In emancipation, plantation masters transferred their immediate patriarchal authority to black men who now had the responsibility, if they elected to take it, to care for black women and their children. Newly divested of their labor force, former plantation owners struggled to make sense of the freedom and the unrestrained bodies of the perceived inferior and former slaves. One such effort to make sense of emancipation's new reality was the book *The Plantation Negro as a Freeman*, authored by Phillip A. Bruce in 1889. According to Bruce, black parents lacked the strong patriarchal hand to guide and correct, much to their detriment.

I want to pause here. I talked about black women's reproductive labor as a foundation of the plantation economy, and as I go forward, I'm going to go from slave period to Jim Crow and into the modern era very quickly. I want you to think about black women's reproductive labor also produces all the men we hear about in the prison industrial complex right now.

According to Bruce, slave parents were ill-prepared to instill moral character in their children, which caused them to revert to their natural animalistic tendencies. The average father and mother are "morally obtuse and indifferent," said Bruce, and at times "even openly and unreservedly licentious. Far too many members of the older generation set the demoralizing examples by showing any appreciation in word or action alike for order, cleanliness, competence, temperance, veracity and integrity." In Bruce's words, "Black women were imperfect mothers because there was no one to teach them how to mother." Note that these same women had mothered white children all through slavery and beyond, but they had the moralizing, mentoring force of the plantation owner, both master and mistress, now their employer. This turned into the female job of the Mammy. The Mammy was able to mother white children successfully under the moralizing influence of the slave master and mistress, but left to her own devices cannot mother her own children.

Bruce also noted that single black women, without a white or black patriarch, were left to their lascivious impulses without the purifying effects of slavery. Their mothers taught them no moral values, with chastity chief among them. She had sense of moral or personal purity and no sense of consequences for her sexual immorality. However, Bruce observed that this woman was remarkable for a certain cheerfulness of spirit and amicability of temper that made up for her moral decay, Jezebel.

Bruce's narrative contained yet another black woman—the industrious daughter whose labors would be used for the benefit of her family under the watchful eye of the big black patriarch. "These girls," said Bruce, "are more easily managed than the boys because they are more amenable to physical restraint." "Of this woman," Bruce recounted, "that they harvested the corn being planted or tobacco stripped, many of them are regularly employed and are paid well for their work. These are then found in the fields or barns at all hours of the day and to the extent of their physical strength are as good hands as males of their same age"—Sapphire.

Mammy is the asexual domestic care giver. Jezebel is sexually irresponsible, promiscuous, and in current terms she is a hoochie, or chicken head. Sapphire is an angry black woman, strong, demasculinizing, deceptive, a liar, and lacking in loyalty. These are the tropes that are used to sort black women and to police them in the modern era.

The plantation master's ultimate authority transferred to the State as it made laws to specifically recapture those recently emancipated bodies and use them again to further the aims of capitalism. I'm going to talk about the Thirteenth Amendment exception specifically to how it relates to the Georgia State Criminal Code and how it was gendered in the policing of black women.

The Thirteenth Amendment reads: slavery and involuntary servitude is unconstitutional, "except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Prior to the passage of the Thirteenth Amendment, the last incarnation of the Georgia Criminal Code looked something like this for people of color and slaves. It was named Criminal Law for Persons of Color and County Regulations. Cheating, swindling, or malicious mischief, offenses related to slaves.

Now, if you could just pause a moment and think about this title, doesn't it link both blackness and criminality together? These were all of the crimes that black people could commit: assault with intent to murder another slave or a free person of color; battery upon a slave or a person of color; kidnaping a free person; or kidnaping a free white child—that's my personal favorite—stabbing a slave or a free person of color; robbery; larceny; forgery; perjury; aiding an escape; conspiracy; unlawful assembly; rioting; affray; keeping gaming houses; gambling. All of the crimes that could be committed by slaves and free people of color were punished at the discretion of the court, including the imposition of the death penalty for those slaves or freed people of color who killed white people. Sound familiar? The sentences for white people who killed black people did not include death.

By 1867, after the Thirteenth Amendment was passed, comes our next incarnation of the Georgia Criminal Code. In this particular Code, all indications of race were removed from the Criminal Code as it governed slaves and free people of color. The new neutral Code was then folded into the Criminal Code that had governed slaves and free people of color, so it looked like the same but really, let's see if it is the same.

Between 1867 and 1882, and this is all the incarnations of the Criminal Code that are popping up after the Thirteenth Amendment, Georgia is actually keeping step with how to exploit this exception to the Thirteenth Amendment. All of the crimes that were formerly in the Criminal Code for Slaves and Free People of Color now carry the penalty of labor in the penitentiary, all of them. The penalties could also include a fine of $1 to $1000. Now, think about it. We heard Stephen Bright talk earlier about how today $500 is daunting for people who are living in abject poverty. These are people who have been recently emancipated who have no resources to speak of and fines of $1 to $1000; imposition of zero to six years in the penitentiary; whipping of zero to seventy-nine lashes. We'll see later on that the chain gangs had overseers, which were the same type of overseer on the plantations, who were empowered to whip the convicts—obviously this is in 1867—because there were a lot of deaths and they were losing people. It was not for altruistic reasons, and sentenced to work on the chain gang for zero to twelve years. All imposed at the discretion of the court. The court could impose any or all of these sentences on each person convicted.

Georgia's prisons prior to 1865, which were predominantly white, turned overwhelmingly black after 1865. Who are these convicts? Georgia did not segregate convicts by gender on these chain gangs. Let me say that again. Georgia did not separate convicts by gender on these chain gangs. What does this mean? There were not separate chain gangs for male and female prisoners. If you want to know more about it, a wonderful book just came out in April called *Chained in Silence - Black Women in Convict Labor in the New South* by Talitha LeFlouria. She's an Assistant Professor at Florida Atlantic University. She also wrote an article entitled I love, "The Hand that Rocks the Cradle Cuts Cordwood."

AUDIENCE: Say her name.

PROFFESOR McMURTRY-CHUBB: Black women's lives matter. Between 1868 to 1908, 3% of the Georgia convict leasing system was comprised of black women. Black women were arrested for these crimes over all other crimes: larceny, gambling, bootlegging, liquor, adultery, fighting, drunkenness, vagrancy, prostitution, petty larceny and disorderly conduct. Sapphire, Sapphire, Sapphire, Sapphire, Jezebel,

Sapphire, Jezebel, Sapphire, Sapphire. Eighteen percent of black women's arrests were for murder, manslaughter, and assault. The State's legal incarceration of black women was gendered. The Jezebel and Sapphire tropes persisted to justify the sexual exploitation of women and their ability to do men's work.

Black women were hanged for murder or assault against a white person or arson or theft of white property. For those of you who are black women in the room, this should resonate with you because to this day who is followed around stores? Theft of white property was punishable by hanging. Assaults were a defense against sexual attacks. Again, because convict labor and leasing camps were not segregated by gender, black women were not only subjected to the sexual assaults of their male convict counterparts but also from the overseer.

Gendered policing and Jim Crow according to trope thinking in the Jim Crow era. Ida B. Wells, a well-known author and anti-lynching advocate brought a lawsuit against the Chesapeake O&SR Company Railroad in 1887. She bought a first class ticket to the ladies car and a white male conductor told her she couldn't sit there and then escorted her to the Jim Crow or colored car. Ida B. Wells, being Ida B. Wells, said I bought a first class ticket in the ladies car and in her recounting of the incident said she firmly planted her teeth on the back of the gentleman's hand who escorted her from the car. He ejected her anyway and she brought the lawsuit and won at the trial court level, but at the appellate court level the court overturned the conviction. This was a policing of Ida B. Wells's ability to be at a particular place. She was not a lady. She was colored for the purposes of this act.

I'm now going to talk about how this resonates and how slavery and policing of black women resonates now in Georgia prisons. The Georgia State Prison statistics are not disaggregated by both race and gender. These are my recent numbers. They're not as recent as of March. They fluctuate daily, so when the article comes out it will have the ones that are most recent then. They represent 298 women in Georgia State prisons; 150 of those women are African-American; 148 of those women are white. African-Americans make up roughly 30% of the Georgia population but only half of that population, 15%, is female; yet, 50% of the Georgia State female prison population is comprised of African-American females, so our disproportionality with respect to white women is evident.

Most alarming, African-American women are convicted and imprisoned at a higher rate than white women for a majority of the crimes linked with black female criminality in the 19th Century. The legacy of slavery and of black criminality remains. If you look, of the 70% of all women incarcerated for murder, black women are incarcerated at a higher rate

than their white counterparts, at 28%. Involuntary manslaughter, 75%. Aggravated assault, 86%. Aggravated assault of a peace officer, 100% of the women incarcerated for this particular crime are black in the state of Georgia. Aggravated battery, 80%. Kidnaping, 100%. Contributing to the delinquency of a minor, 100%. Mammy, when left to her own devices, could not raise proper children. Attempted robbery, white women have us on that. Robbery sudden snatching, 100%. Theft by shoplifting, 83%. Fraudulent credit cards, we're 50/50 on that. Theft by credit card, 100% of the women incarcerated in the state of Georgia are black for that charge.

Now let's look at some contemporary examples, and what I want to do now, I want us to say, "Black women's lives matter."

AUDIENCE: Black women's lives matter.

PROFESSOR McMURTRY-CHUBB: So let's go back to Ida B. Wells. This is the most recent suit that was brought. I don't know if you heard about the black women book club on the Napa Valley Wine Train. Lisa Johnson, Catherine Neal, Deborah Neal, Allisa Carria, Dinninne Neal, Sandra Jamerson, Linda Carlson, Debbie Reynolds, Georgia Lewis, Briana Rosenburg, and Sharon McDonald were on the wine train. What were they doing on the wine train? Drinking wine, everyone was. But apparently this group of women were threatening because they were black and laughing. This started the hash tag laughing while black on Twitter. They were ejected from the train at the next stop because they were being too rowdy and too boisterous—Sapphires.

Kamilah Bock. Last September, as most of us have done, had a moment at a stop light where she was jamming in her car to her music. She took her hands off the wheel, and a police officer arrested her for a traffic violation. She said, I was at a stop light and the car wasn't moving. Regardless, they took her to jail and they impounded her car, so she sat there for awhile. They let her go home and said come back the next day to get your car. She came back the next day to get her car. She was questioned as to which car was hers. She said I drive a BMW, but they did not believe her. She said, no, really, I drive a BMW. I'm a bank executive. However, they did not believe her. Instead, they handcuffed her, put her in an ambulance, and said they were going to take her to her car but they didn't. They took her to the Harlem Hospital Psychiatric Ward where she stayed for the next eight days. This is the consequence in 2015 for rejecting the tropes that black women are sorted under. She refused to be called a Mammy, a Sapphire, or a Jezebel and as a result she was incarcerated in an insane asylum. She is currently suing.

I want to talk about the silence on policing resulting in black males and black female fatalities because black women, aside from being policed more harshly also die at the hands of police just like our male counterparts.

AUDIENCE: Black women's lives matter.

PROFESSOR McMURTRY-CHUBB: We can say her name, too. Mammy Alesia Thomas died at age thirty-five in Los Angeles, California. Ms. Thomas dropped her children off at the police station because she couldn't take care of them, and the DFACS people had her under suspicion of child endangerment. During the course of her arrest, a struggle ensued with her arresting officer, a white woman, Mary O'Callaghan. Several other officers were involved. While O'Callaghan placed Thomas in a police car, she allegedly threatened to kick Thomas in the genitals and did so seven times. O'Callaghan's blows were on Thomas's groin, abdomen, and side. Thomas died shortly thereafter in the hospital. There was autopsy and the cause of death was undetermined. O'Callaghan pleaded not guilty to an assault charge and the trial is pending.

AUDIENCE: Black women's lives matter.

PROFESSOR McMURTRY-CHUBB: Jezebel—Rekia Boyd. Rekia Boyd happened to be in the presence of the bad black man. Detective Dante Servin was driving by his home one late evening when he saw a group of four people walking outside. He spoke to them briefly and then turned the wrong way down a one way street. Servin then alleged, as he looked over his shoulder, saw that one of the men pulled a gun from his pants and pointed it at him. Servin then fired five rounds over his shoulder through his car window. The shots struck the alleged shooter in the hand and Rekia Boyd in the back of the head. Boyd was taken to the hospital and died the same day. The alleged shooter was holding—not a gun but a cell phone.

AUDIENCE: Black women's lives matter.

PROFESSOR McMURTY-CHUBB: Lastly we have Shelly Frey. You remember those statistics about black women in the state of Georgia and shoplifting. An off-duty sheriff's deputy working as a Wal-Mart security guard, Louis Campbell, shot and killed Frey. Allegedly, she and two other women were caught stealing. Campbell tried to detain them and shot into the car where Frey was a passenger. Frey was in the car with

two children and another woman, and he just shot into the car. Frey pled guilty to stealing shirts from Wal-Mart and was prohibited from entering the store. Campbell, the off duty police officer, was not charged.

Say her name, black women's lives matter. We have many more names. This issue cannot remain in silence; so, hopefully, you will not continue the trend of silencing our names. Thank you.

PROFESSOR COLE: We will take a five minute break and then reassemble.

PROFESSOR GERWIG-MOORE: Thank you for continuing with us through the afternoon. What a riveting panel the previous panel was and here we are moving into our next panel: Learning from Innovators. Everyone who has spoken today is thinking about working on these issues in some innovative ways, and we have four special people speaking on this panel.

I am going to do a brief introduction of each: The Honorable Daniel Craig from the Augusta Circuit; then Professor Angela Allen-Bell; Ilham Askia, Executive Director of the Gideon's Promise; and Mr. Teddy Reese from Georgia Appleseed. Then, of course, we have our wrap up Q&A panel immediately after these panelists. Thank you. Judge Craig.

JUDGE CRAIG: Professor Gerwig-Moore, thank you very much for organizing this event, inviting everyone to attend, and for giving me the chance to participate.

I would like to first of all tell you a little bit about me because you will need to have that background in order to appreciate some of the things that I might say. Thirty-nine years ago I matriculated to Mercer Law School, and just in case any of you think that a lot has changed, let me tell you that Professors Mike Sabbath, Professor Hal Lewis, Professor Jack Sammons, Professor John Cole, Professor Joe Claxton, and Professor Dick Creswell were all teachers of mine. As much as things change, they stay the same more often.

I was a 1979 graduate of Mercer Law School, and I practiced law for thirteen years. A significant part of my practice was criminal defense work, which included capital defense work as well because there wasn't a capital defender at the time. After thirteen years of private practice, on a lark I ran for district attorney and was elected. I served as district attorney for a little over fifteen years. I'm a Catholic. I was born and raised a Catholic, a Cradle Catholic they call it. One of the campaign issues in running for district attorney was "Don't vote for him, he's a Catholic, therefore, he's against the death penalty." People somehow filtered through that, and I was elected nonetheless. I inherited ten