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Making the Murderer's Voyeurs: The Influence of Violent Crime Exposure, Social Movements, and Desensitization on Georgia's Treatment of the Death Penalty *

I. INTRODUCTION

The clock slowly ticks to 8:00 p.m. Popcorn in hand, he plops down in front of the television and quickly flips on "Criminal Minds".¹ He shoves in a kernel of popcorn as the show sets our scene. The clock slowly ticks to 11:45 p.m. A firm hand escorts a woman dressed in a bright orange jumpsuit into a small, sterile room. Only a large pane of glass separates her from the somber faces of witnesses, friends, and family. They whisper among each other and take their seats in the theater-like arrangement. Coarse straps are tightly pulled around her arms—he pops another kernel into his mouth. She slowly settles into the cold, slightly worn chair. The clock ticks to 11:53 p.m. Her fingers grip the armrests, as she slowly realizes that this is the last surface she will ever touch. A dark sack is placed over her recently shaved head. The doctor prepares the syringe, gently squeezing some of the slightly viscous liquid that will soon be injected. The clock reads 11:59 p.m. She tightens her grip as she senses the needle approach. The phone rings. The execution is stopped.² He chomps on another kernel.

* Sarah J. Foster. Mercer Law Review, Volume 71. Furman University (B.A., cum laude, 2018); Mercer University School of Law (J.D., 2021).

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¹ *Criminal Minds: Riding the Lightning* (CBS television broadcast Jan. 25, 2006).

² See *id.*

The story described is a familiar one. Movies, television shows, novels, music, and podcasts feature similar narrations, as well as stories that end in not such a happy ending. But how do we comfortably begin an honest discussion on systematic, legalized executions? The bottom line is we cannot, at least not comfortably. Death Penalty Law is simply difficult to discuss. It is a concept that rarely appears in conversation, and is actively avoided, among family, friends, and even colleagues in the legal community. Recently, however, our society has seen these conversations emerge, thanks to the popularization of impactful novels such as *Just Mercy*³ and the eruption of social movements such as Black Lives Matter.⁴ These novels and national protests kindled an open discussion about imprisonment and, more specifically, about Death Penalty Law.

Despite this recent influx of conversation opportunities, Death Penalty Law is still a difficult topic to consider. Yet, the conversation is well worth having. As Justice Brennan noted, there is no national debate “comparable to the debate about the punishment of death.”⁵ Justice Brennan’s comment identifies the need to discuss not only the specifics of a trial and verdict, but the need to complete our discussion by considering the actual imposition of the sentence. It seems like our typical idea of a “courtroom drama” rarely continues past the conviction, relevant appeals, and death row waiting period to the final, lethal injection. However, without considering the final, lethal injection, this debate is incomplete. As Justice Brennan noted, our debate must include a serious consideration of the ultimate conclusion—the death sentence.

With this national debate comes an inherent investigation into ethical, religious, or political convictions. As Bryan Stephenson remarked, “[t]he death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, ‘Do we deserve to kill?’”⁶ This elegant and succinct question perfectly presents the internal conflict a person faces when pressed with a true and complete examination of the death penalty. Do we deserve to kill?

This Article aims to treat Death Penalty Law with a respectful and unbiased attitude, in which the author aspires to put aside personal

³ BRYAN STEPHENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 1 (2014).

⁴ For more information on the “Black Lives Matter” movement, see <https://blacklivesmatter.com/>.

⁵ *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

⁶ *Bryan Stephenson*, Goodreads.com, <https://www.goodreads.com/quotes/7525437-the-death-penalty-is-not-about-whether-people-deserve-to> (last visited Jan. 9, 2021).

convictions and encourages readers to do the same. Together, we will explore this controversial topic and will focus on (1) procedure and requirements for a death penalty, as outlined by Georgia statutory law; (2) review of death penalty verdicts; (3) imposition of a death sentence; (4) history of death penalty law; (5) significant death penalty cases in Georgia; (6) the decline of the death penalty in Georgia; (7) violent crime statistics; (8) possible explanations for this decline; (9) the impacts of violent crime exposure on death penalty law; and finally, (10) the future of death penalty law. This in-depth analysis will act as a “field guide” to death penalty law, and will specifically ask in what way, if any, has our exposure to violent crime affected our views on the death penalty and, by extension, have the findings by jurors been affected.

II. ELIGIBLE CRIMES IN GEORGIA

Within the Official Code of Georgia Annotated (O.C.G.A.), Georgia statutory law provides a detailed framework for eligible crimes, mitigating circumstance analysis, sentence review, and appeal of death sentences. First and foremost, O.C.G.A. § 17-10-30⁷ identifies crimes currently eligible for capital punishment, including (1) aircraft hijacking; (2) treason; and (3) murder, namely felony murder.⁸

After a defendant is convicted of one of these crimes, pursuant to O.C.G.A. § 17-10-31,⁹ a death sentence is not permitted unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that a death sentence be imposed. Such aggravating circumstances include: (1) murder, rape, armed robbery, or kidnapping committed (a) by someone with a prior felony conviction or (b) while the offender was engaged in the commission of another capital felony, aggravated battery, burglary of any degree, or arson in the first degree; (2) the offender's act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place; (3) the offender committed the offense of murder for himself or another in order to receive something of monetary value; (4) the murder of a present or former judicial officer, a present or former district attorney or solicitor-general, or of any peace officer, corrections employee, or firefighter, committed during or because of the exercise of his or her official duties; (5) the offender caused or directed another, or as an agent or employee, committed the murder; (6) the murder, rape, armed robbery, or kidnapping was

⁷ O.C.G.A. § 17-10-30.

⁸ *Id.*

⁹ O.C.G.A. § 17-10-31.

outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim; (7) a murder committed by someone in or who escaped from lawful custody of a peace officer or place of lawful confinement; (8) a murder committed in order to avoid, interfere with, or prevent a lawful arrest or custody in a place of lawful confinement of himself or another; (9) a murder, rape, or kidnapping committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery; or, (10) a murder was committed during an act of domestic terrorism.¹⁰

¹⁰ O.C.G.A. § 17-10-30 states:

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary in any degree or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

Without a finding of one of these aggravating circumstances, a jury must recommend a sentence of either life imprisonment without parole or life imprisonment with the possibility of parole.¹¹ As noted in *Conner v. State*,¹² if the jury fails to find at least one statutory aggravating circumstance, that panel “would have had no further duty; the death penalty could not have been imposed.”¹³ This burdensome responsibility requires an in-depth look into the life of the defendant as jurors consider any mitigating circumstances, and requires the defense to develop successful storytelling abilities in order to evoke both empathy and sympathy from the diverse group of jurors.

A. Prosecutors and the Death Penalty

A district attorney's decision to seek the death penalty is of vital importance, since, if the jury votes to impose a death sentence and any appeals are unsuccessful, a lethal injection is irreversible.¹⁴ Many factors go into a district attorney's decision to approve or encourage the pursuit of a death sentence. Personal beliefs, political and/or religious affiliations, and influence of social movements affect an individual's view of the death penalty. An attorney is no exception. A district attorney's impactful decision to seek a death penalty sentence is undoubtedly impacted by personal beliefs and convictions, as well as political and social contexts.¹⁵ As identified by both the U.S. General Accounting Office and the United States Department of Justice,

(11) The offense of murder, rape, or kidnapping was committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery; or

(12) The murder was committed during an act of domestic terrorism.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

¹¹ O.C.G.A. § 17-10-31. Notably, the crimes of aircraft hijacking and treason do not require findings of aggravated circumstances.

¹² 251 Ga. 113, 303 S.E.2d 266 (1983).

¹³ *Conner*, 251 Ga. at 117, 303 S.E.2d at 272.

¹⁴ See HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 313 (1997).

¹⁵ Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 *FORDHAM URBAN LAW JOURNAL* 767, 770–72 (1999).

particular ideologies of a district attorney are often, albeit unavoidably, one of the most important variables affecting whether a defendant will be subject to the death penalty.¹⁶ *Willis v. State*¹⁷ identified this responsibility and discretion awarded to prosecutors and district attorneys in citing that there exist few standards for “district attorneys to apply in deciding whether to seek the death penalty.”¹⁸ Despite any influences, a district attorney initiates death penalty sentencing in deciding whether to pursue a death sentence.

B. Mitigating Circumstances

One of the best “weapons” in a defense attorney’s arsenal is the ability to empathize with the jury, and “humanize” the defendant, through the mitigating circumstance analysis. While Georgia statutory law, namely O.C.G.A. § 17-10-30, is somewhat uncommunicative on the definition of mitigating circumstances, the jury is permitted, and even encouraged, to consider anything mitigating which may affect the outcome of their sentencing recommendation.¹⁹ As outlined in *Eddings v. Oklahoma*,²⁰ Georgia law directs a jury to consider any mitigating circumstances, and, as such, the Georgia statute “properly confined and directed the jury’s attention to the circumstances of the particular crime and to ‘the characteristics of the person who committed the crime’[.]”²¹ These “circumstances” and “characteristics” refer to the mitigating circumstance analysis. The Court further noted, “[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”²²

But exactly what is mitigating evidence? The Georgia Supreme Court provided some guidance in *Romine v. State*,²³ by differentiating

¹⁶ See U.S. GENERAL ACCOUNTING OFFICE, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 271 (1997); BUREAU OF JUSTICE STATISTICS: U.S. DEPT’ OF JUSTICE, *Report to the Nation on Crime and Justice* 46 (2d ed. 1988).

¹⁷ 304 Ga. 686, 820 S.E.2d 640 (2018), reconsideration denied (Nov. 15, 2018).

¹⁸ *Id.* at 693, 820 S.E.2d at 650.

¹⁹ See *Barnes v. State*, 269 Ga. 345, 359, 496 S.E.2d 674, 688 (1998) (quoting *Spivey v. State*, 241 Ga. 477, 246 S.E.2d 288 (1978)) (“OCGA § 17-10-30 is wholly silent on the definition of mitigating circumstances, and the ‘conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating, without limitation or definition’”).

²⁰ 455 U.S. 104 (1982).

²¹ *Eddings*, 455 U.S. at 111 (quoting *Gregg v. Georgia*, 428 U.S. 153, 197 (1976)).

²² *Id.* at 113–14.

²³ 251 Ga. 208, 305 S.E.2d 93 (1983).

mitigating circumstances from aggravating circumstances. The court noted,

Aggravating circumstances are those which increase the guilt of the Defendant or the enormity of the offense or . . . its injurious consequences. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in all fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.²⁴

The phrase “fairness and mercy,” perfectly describe the purpose of this statutory provision. Such evidence must be considered since it could substantially affect the verdict and sentencing recommendation by reducing blame. Because of the significance of this impact, this provision is crucial to a well-rounded death penalty discussion amongst jurors. In fact, prior to jury deliberation, Georgia law permits courts to give the following jury charge:

Ladies and gentlemen, you have found [the Defendant] guilty of the offenses of murder. It is now your duty to determine the penalty that shall be imposed as punishment for those offenses as prescribed by our law. In arriving at this determination, you are authorized to consider all of the evidence received here in court as presented by the State and this Defendant throughout the entire trial. You are authorized also to consider all the facts and circumstances, if you find there to be any, in extenuation [sic] and mitigation of punishment presented by the Defendant and shown to you by the evidence in both phases of this trial.²⁵

Similarly, in *Hawes v. State*,²⁶ the Georgia Supreme Court held that the failure to inform the jury that they were “authorized” to consider mitigating evidence conflicted with the requirements of the death penalty.²⁷ While courts place different weight on the mitigating circumstance analysis, each court seems to agree that an examination of any mitigating circumstances is crucial to a death sentence discussion.

In sum, mitigating circumstances or factors are utilized to retain the “human” element at the close of cases which may well present inhuman acts and circumstances. As well-established by Georgia statutory and caselaw, juries should consider “all relevant mitigating evidence and

²⁴ *Id.* at 215, 305 S.E.2d at 100.

²⁵ *Id.* at 214–15, 305 S.E.2d at 99.

²⁶ 240 Ga. 327, 240 S.E.2d 833 (1977).

²⁷ *Id.* at 334, 240 S.E.2d at 839.

weigh it against the evidence of the aggravating circumstances.”²⁸ This consideration reminds jurors of the weight of a death sentence and encourages those burdened with this determination to consider any relevant information which could affect this decision. After all, there is no debate “comparable to the debate about the punishment of death,”²⁹ especially when engaged in by jurors. If the jury, after finding an aggravating circumstance and considering mitigating circumstances, votes to impose a death sentence, the court will engage in an immediate review of the sentence.

III. REVIEW OF DEATH PENALTY VERDICTS

Pursuant to O.C.G.A. § 17-10-35,³⁰ after a death penalty sentence is properly imposed and judgment is finalized, the Georgia Supreme Court automatically reviews the sentence, pursuant to O.C.G.A. § 17-10-35(c)(1).³¹ In this review, the court must consider the punishment and any errors enumerated in the form of an appeal. Moreover, the court must determine whether (1) the death sentence was imposed under passion or prejudice; (2) the evidence supports the finding of aggravating circumstances; and (3) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant.³²

²⁸ *Eddings*, 455 U.S. at 117.

The presentation of this mitigating evidence is subject to a “tactical choice by trial counsel” and the defendant’s choice. See *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1372 (N.D. Ga. 2017), aff’d sub nom. *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019); *Ford v. Tate*, 307 Ga. 383, 396, 835 S.E.2d 198, 210 (2019), cert. denied, No. 19-8272, 2020 WL 3405903 (U.S. June 22, 2020) (defendant unequivocally chose not to present any mitigating evidence and did not want mitigating evidence presented).

²⁹ *Furman*, 408 U.S. at 286.

³⁰ O.C.G.A. § 17-10-35.

³¹ O.C.G.A. § 17-10-35(c)(1).

³² O.C.G.A. § 17-10-35:

Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17 10 30; and

Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

After examining the above elements, the court may affirm the sentence of death or set aside the sentence and remand to resentencing.³³ The scope of this review is broad, and the court follows a plain error standard.³⁴ As the Court noted in *Conner v. State*,³⁵ it is the Georgia Supreme Court's duty to determine "whether or not the sentence of death 'was imposed under the influence of passion, prejudice, or any other arbitrary factor.'"³⁶ In order to make this determination, the court must "examine the entire record for the presence of factors improperly impacting on the decision to impose a sentence of death."³⁷ Additionally, the court looks to a particular crime, considered against all similar cases in the state, to determine if the given sentence is excessive per se or improper.³⁸ This responsibility is not to be taken lightly; every decision to impose the death penalty implicates protections under the Eighth Amendment.³⁹ Notably, the reviewing court's application of the Eighth Amendment changes based upon social context. As the Court in *Gregg v. Georgia*⁴⁰ noted,

[T]he Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.⁴¹

Here, the Court in *Gregg* recognized that the statutory burden of review, with consideration to the protections awarded by the Eighth amendment, is ever-changing. This burden, as Chief Justice Warren

³³ *Id.*

³⁴ See Kimberly C. Simmons, 12 Ga. Proc. Criminal Procedure § 28:63 (2020).

³⁵ 251 Ga. 113, 303 S.E.2d 266 (1983).

³⁶ *Id.* at 117, 303 S.E.2d at 272 (1983) (quoting O.C.G.A. § 17-10-35(c)(1)).

³⁷ *Connor*, 258 Ga. at 117, 303 S.E.2d at 272–73.

³⁸ Simmons, 12 Ga. Proc. Criminal Procedure § 28:64 (citing *Barrett v. State*, 292 Ga. 160, 733 S.E.2d 304 (2012)) ("The Supreme Court of Georgia views a particular crime against the backdrop of all similar cases in Georgia in determining if a given sentence is excessive per se or substantially out of line.").

³⁹ *Conner*, 251 Ga. at 118, 303 S.E.2d at 273. See *Barrett*, 292 Ga. 160, 733 S.E.2d 304 (2012).

⁴⁰ 428 U.S. 153 (1976).

⁴¹ *Gregg*, 428 U.S. at 172–73, 96 S. Ct. at 2925 (1976) (quoting Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

identified, is subject to influence and change since contemporary values of the nation and standards of decency alter over the years.

In *Barrett v. State*,⁴² for example, the court affirmed the trial court's denial of the defendant's motion for new trial of his conviction of, among other related crimes, malice murder and of the jury's recommendation for a death sentence. In *Barrett*, the jury found beyond a reasonable doubt that the murder was committed during the defendant's commission of an aggravated battery, and that the murder was outrageously or wantonly vile since it involved torture of the victim prior to his death.⁴³ The court, after a review of the case and the relevant statutory aggravating circumstances, ruled that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.⁴⁴ By contrast, as noted in *Floyd v. State*,⁴⁵ the court determined that a death sentence imposed for the armed robbery offense could not be sustained.⁴⁶ *Floyd* presented a brutal murder after a failed burglary, for which a death sentence was eligible, the court also included a discussion of what offenses were not eligible, such as armed robbery where no murder was committed, nor any aggravating circumstances found.⁴⁷ Similarly, in *Coley v. State*,⁴⁸ the court compared the evidence and sentence in the case with those of previous cases. The court in *Coley* held that the death sentence imposed for a rape was disproportionate to other similar cases which imposed life imprisonment.⁴⁹

In each case, the Georgia Supreme Court engaged in critical review of the death sentence imposed. These differences in each case, some finding for the death penalty, others finding against it, illustrate the individual, fact-intensive analysis a court and jury must utilize in coming to a death sentence decision. This review is crucial to Georgia's treatment of the death penalty and, without such a review, the Supreme Court of the United States would step in and overrule Georgia's new death penalty statutes, as occurred in *Gregg v. Georgia*,⁵⁰ which will be discussed at length later.

⁴² 292 Ga. 160, 733 S.E.2d 304 (2012).

⁴³ *Id.*

⁴⁴ *Id.* at 190, 733 S.E.2d at 327.

⁴⁵ 233 Ga. 280, 210 S.E.2d 810 (1974).

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ 231 Ga. 829, 204 S.E.2d 612 (1974).

⁴⁹ *Id.* at 830, 204 S.E.2d at 613.

⁵⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976).

IV. CARRYING OUT A DEATH SENTENCE

After a jury votes unanimously on the imposition of a death sentence, the “exciting” portion of the courtroom drama fades into a structured procedure. After a verdict, the presiding judge has a statutory duty to prescribe that sentence and indicate the sentence in writing.⁵¹ A certified copy of this sentence must then be sent by the clerk of court within ten days prior to the time of execution to the following individuals: the defendant’s counsel (if represented), the Attorney General, and the superintendent of the state correction institute where the execution is to take place.⁵² After these statutory steps are taken, the defendant will be transported to a state correctional institution. Once all appeals are exhausted, and the date of the defendant’s execution arrives, the executioner administers the lethal injection, as outlined in O.C.G.A. § 17-10-38.⁵³

Georgia statutory law further provides for which persons must be present at the execution: (1) the superintendent, or deputy superintendent, of the state correctional institution; (2) at least three executioners; (3) two physicians; (4) a certain number of witnesses, as determined by the commissioner of corrections; and (5) any other necessary correctional officers, assistants, technicians.⁵⁴ Additionally, Georgia law permits the following individuals to also be present: (1) defendant’s counsel; (2) member of the clergy; and (3) a reasonable number of relatives and friends.⁵⁵ Georgia law provides little direction in defining a “reasonable number.” Rather, courts give broad discretion to prison officials in determining what is a “reasonable number.” The Supreme Court of the United States noted,

[I]t is obvious that institutional considerations . . . require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination

⁵¹ O.C.G.A. § 17-10-33.

⁵² *Id.*

⁵³ O.C.G.A. § 17-10-38(a):

All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection. Lethal injection is the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person is dead.

⁵⁴ O.C.G.A. § 17-10-41.

⁵⁵ *Id.*

in terms of content is involved, we believe that, in drawing such lines, “prison officials must be accorded latitude.”⁵⁶

Provided this number of attendees is “reasonable” and not influenced by prejudice, it is subject to little criticism. By contrast, those persons actually subject to the death sentence are not given much choice in who or how many people may be present at their execution.

A. “Secretive” Nature of Executions

Only a small number of persons may be present at current executions, as determined by prison officials. However, public executions were well-attended and arguably the “norm” in this country until the nineteenth century.⁵⁷ American history presents copious examples of visible death sentences.⁵⁸ Hangings were well-attended and witnessed, and Salem witch trials and executions were commonplace. Today, few people follow the imposition of an average sentence (as opposed to high profile cases), after the traditional “courtroom drama” concludes. In fact, few people in Georgia are even permitted to be present for the execution. Under the 2015 version of O.C.G.A. § 17-10-41, “reputable citizens” may not attend executions, nor may members of the media.⁵⁹ By contrast, the 1983 version of this statute responded with a resounding “maybe,” when asked whether citizens and members of the media were permitted to be present during an execution.⁶⁰ This 2015 shift to a firm “no” is curious, since part of the purpose of a death sentence is to deter future crimes. Surely witnessing and fully understanding the impacts of a certain crime would serve to prevent similar, future crimes.⁶¹

⁵⁶ *Pell v. Procunier*, 417 U.S. 817, 826 (1974) (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

⁵⁷ Gil Santamarina, *The Case for Televised Executions*, 11 CARDOZO ARTS & ENT. L.J. 101 (1992).

⁵⁸ For such articles, see Philip R. Wiese, *Popcorn and Primetime vs. Protocol: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257 (1996); Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995).

⁵⁹ O.C.G.A. § 17-10-41. See Kate Esther Rapp, *The Statutory Implications of the Public's Right to View Executions: A State by State Analysis*, 34 MISS. C. L. REV. 288, 298 (2015).

⁶⁰ Kate Esther Rapp, *The Statutory Implications of the Public's Right to View Executions: A State by State Analysis*, 34 MISS. C. L. REV. 288, 298 (2015).

⁶¹ See *Pell*, 417 U.S. at 822 (“An important function of the corrections system is the deterrence of crime”).

Perhaps the purpose of “masking” the imposition of a death sentence is to protect Americans. See Earl F. Martin, *Masking the Evil of Capital Punishment*, 10 VA. J. SOC.

One example of our nation's reticence to permit media involvement with death row inmates appears in the landmark case, *Pell v. Procunier*.⁶² In *Pell*, prison inmates and journalists collectively challenged the constitutionality of certain prison regulations; specifically, these inmates and journalists challenged the restrictions to a media representative's ability to select and interview inmates, as well as the inmate's inability to request and initiate an interview.⁶³ The Court reasoned, "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." . . . Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."⁶⁴ In fact, *Pell* further held that in-person media interviews were not necessary while mail was available, citing this as ample evidence of an "alternative channels of communication that are open to prison inmates[.]"⁶⁵ In light of these alternative channels, the Court ruled, there was no infringement on First Amendment freedoms. As such, the public no longer has much, if any, access to death sentences.⁶⁶ Death sentences are now very much "out-of-sight, out-of-mind" in our society, while the courtroom drama precipitating a sentence is in popular, full view.

V. GEORGIA DEATH PENALTY HISTORY

A. Georgia Death Penalty: From 1735–2019

Legalized impositions of capital punishment in Georgia began in 1735.⁶⁷ In 1735, Georgia introduced capital punishment in the form of

POLY & L. 179, 213 (2002) ("Removing executions from the public view creates the tendency for the sanction to fall into the "out of sight, out of mind" category of events, which, in turn, encourages society to avoid confronting the moral consequences of its actions"). For more information on this topic, see Philip R. Wiese, *Popcorn and Primetime vs. Protocol: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257 (1996).

⁶² 417 U.S. 817 (1974).

⁶³ *Pell*, 417 U.S. at 817–18.

⁶⁴ *Id.* at 834 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972)).

⁶⁵ *Id.* at 828.

⁶⁶ We must also acknowledge the possible abridgment to the First Amendment right to freedom of press. For more information on this debate, see Gil Santamarina, *The Case for Televised Executions*, 11 CARDOZO ARTS & ENT. L.J. 101, 105 (1992); Jerome T. Tao, *First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions*, 60 GEO. WASH. L. REV. 1042, 1052 (1992).

⁶⁷ *A History of the Death Penalty in Georgia: Executions by Year 1924–2014*, STATE OF GEORGIA DEPARTMENT OF CORRECTIONS: OFFICE OF PLANNING AND ANALYSIS, Jan. 2015.

death by hanging, in which the sheriff of the county or judicial circuit would carry out the sentence. Scholars differ on the first victim of capital punishment, but according to the Georgia Department of Corrections' Office of Planning and Analysis, Alice Ryley, an Irish immigrant, was convicted of murdering her "master," Will Wise, and was sentenced to death by hanging.⁶⁸

By 1924, the Georgia General Assembly had abolished death by hanging for all persons convicted of a capital crime. Georgia then shifted and relied on electrocution as a means to carry out sentences.⁶⁹ The first electrocution occurred on May 6, 1938, when Archie Goodwin, a thirty-seven-year-old black male, was executed for murder. Electrocutions in Georgia continued until 1964.⁷⁰

In 1964, the Supreme Court of the United States suspended all executions in the United States.⁷¹ Through *Furman v. Georgia*,⁷² which will be discussed later, the Supreme Court struck down all then-existing laws that allowed the executions for persons convicted of specific crimes.⁷³ This prohibition was short-lived. By July 2, 1976, the Supreme Court reviewed Georgia's rewritten death penalty laws, passed in March of 1973 by the Georgia General Assembly.⁷⁴ This review occurred in *Gregg v. Georgia*,⁷⁵ in which the Supreme Court upheld Georgia's new statutes. In *Gregg*, the Court considered Georgia's new death sentence provisions and allowed Georgia to resume executions.⁷⁶

Death by electrocution resumed and continued until 2000, when Georgia House Bill 1284⁷⁷ shifted the method of execution to lethal

Please note that the data and history data relied upon in this paragraph was provided by the Georgia Department of Corrections. This Article in no way seeks to purposefully exclude any minorities wrongfully ignored or unrepresented in these statistics. This data also does not include those persons wrongfully killed by individuals not authorized by law to do so.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² 408 U.S. 238 (1972).

⁷³ *Id.* The Court struck down these laws in *Furman v. Georgia*, 408 U.S. 238 (1972) which will be discussed later in the Article.

⁷⁴ *A History of the Death Penalty in Georgia: Executions by Year 1924–2014*, STATE OF GEORGIA DEPARTMENT OF CORRECTIONS: OFFICE OF PLANNING AND ANALYSIS, Jan. 2015.

⁷⁵ The Supreme Court of the United States upheld Georgia's death penalty statute in *Gregg*, 428 U.S. 153, which will be discussed later in the Article.

⁷⁶ *Gregg*, 428 U.S. 153.

⁷⁷ Ga. H.R. Bill 1284, Reg. Sess. (2000) (codified at O.C.G.A. § 17-10-30–42).

injection, which is still currently used in Georgia.⁷⁸ Notably, capital punishment sentences are down in Georgia.⁷⁹ As of March 2019, Georgia had gone five years (since March 2014) without imposing any death penalty sentences.⁸⁰ This statistic highlights Georgia's shift away from death sentences.

VI. KEY DEATH PENALTY CASES

Perhaps most notorious in Georgia history of death penalty law are the cases of *Furman v. Georgia* and *Gregg v. Georgia*. In these two cases, the Supreme Court significantly impacted Georgia's treatment of death penalty law.

A. *Furman v. Georgia*

In *Furman*, the Supreme Court considered the constitutionality of death sentences for rape and murder convictions.⁸¹ In *Furman*, the defendant burglarized a private home when a family member interrupted him. Defendant Furman attempted to flee, and, while carrying a gun, tripped and fell. As he fell, the gun went off and killed a resident of the home. Furman was convicted of murder and was sentenced to death.⁸² In *Furman*, the Court held that the implementation of the death penalty in certain cases constituted cruel and unusual punishments, as a violation of the Eighth and Fourteenth Amendments.⁸³

This case was instrumental in redefining the death penalty in Georgia. Within *Furman*, the Supreme Court identified that, for a death penalty statute to be permissible, certain sentencing procedures must be included within the state's statutory provision. Specifically, the Court noted that a state's supreme court must review every death sentence to determine whether (1) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the

⁷⁸ *A History of the Death Penalty in Georgia: Executions by Year 1924–2014*, STATE OF GEORGIA DEPARTMENT OF CORRECTIONS: OFFICE OF PLANNING AND ANALYSIS, Jan. 2015.

⁷⁹ *See id.* This report includes the name, race, age, county of conviction, crime, and execution date of each individual executed between 1924 and 2014.

⁸⁰ *See Georgia Continues Shift Against Capital Punishment*, EJI.org (January 24, 2019), <https://eji.org/news/georgia-continues-shift-against-capital-punishment/>; Bill Rankin, *Georgia executions rise, while death sentences plummet*, AJC (Dec. 5, 2016) <https://www.ajc.com/news/local/georgia-executions-rise-while-death-sentences-plummet/atGjGmB9aNVsRIBnavjSYO/>.

⁸¹ *Furman*, 408 U.S. at 240.

⁸² *Id.* at 251.

⁸³ *Id.* at 374.

evidence supports the finding of a statutory aggravating circumstance; and (3) sentence of death is excessive or disproportionate.⁸⁴

The concurring opinions within the Court's Opinion proved that no Justice could agree on a rationale behind the decision. However, despite the logic behind this decision, the case notified Georgia lawmakers, as well as the rest of the nation, that the Court would not tolerate death penalty statutes if such statutes were not narrowly tailored and structured to prevent possible injustices, such as racially-based sentences. As Justice Stewart stated in his concurring opinion,

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.⁸⁵

Justice Stewart's concurrence, working in concert with the opinions and concerns of Justices White and Douglas, identified the need in future death penalty statutes for specificity and certain protections against potential injustices. If this "suggestion" to reframe all Georgia death penalty statutes was too subtle, the Court commuted all pending death sentences to life imprisonment and warned that death sentences should only make rare appearances in the legal system. As journalist Barry Schweid wrote in a 1972 article for "The Free Lance Star," "[t]he Supreme Court decision outlawing the death penalty as it is now imposed leaves the door open for Congress or the states to write new laws that would be considered valid. But the door isn't open very much."⁸⁶ Schweid's comment would prove to be accurate; the door was open for death penalty punishments in Georgia but was narrowed significantly.

B. Gregg v. Georgia

After *Furman*, Georgia rewrote its overturned death penalty statutes. The Supreme Court of the United States commended the

⁸⁴ *Gregg*, 428 U.S. at 165–66.

⁸⁵ *Furman*, 408 U.S. at 309–10.

⁸⁶ Barry Schweid, *New laws unlikely on death penalty*, FREE LANCE STAR (June 30, 1972), <https://news.google.com/newspapers?id=pAoQAAAAIIBAJ&sjid=2YoDAAAAIIBAJ&pg=3786,38609&hl=en>.

Georgia Supreme Court's response in *Moore v. State*,⁸⁷ stating, "we view it to be our duty . . . to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed'."⁸⁸ *Gregg*⁸⁹ articulated Georgia's response to the Supreme Court's ruling in *Furman*. The Court in *Gregg* recognized the changes to Georgia statutes and approved of the additional precautions Georgia included within its statutes.⁹⁰ During its review of *Gregg*, the Supreme Court noted that Georgia had "taken its review responsibilities seriously,"⁹¹ and ruled that no violation of the Eighth and Fourteenth Amendments occurred, where the death penalty had been imposed for the crime of murder after the jury's verdict included a recommendation of the death penalty and a finding of statutory aggravating circumstances.⁹²

Gregg presented Georgia's response to *Furman*, and a successful one. By affirming the imposition of the death penalty in *Gregg*, as well as Georgia's new death penalty statutory guidelines, the Supreme Court of the United States enabled Georgia to continue its use of capital punishment.

VII. DECLINE OF THE DEATH PENALTY

Journalists and scholars estimate that Georgia and Texas accounted for nearly eighty percent of executions in 2016.⁹³ However, the decline of Georgia's death sentences began years prior. In 2003, for example, the number of Georgia defendants sentenced to death dropped from an average of ten per year, to four or fewer per year.⁹⁴ This decline may possibly be attributed to jurors voting instead for life without parole, prosecutors limiting their pursuit of death sentences, or increased plea bargains. For instance, between 1993 and 2003, 369 people in Georgia were sentenced to life without parole, and 162 pleaded guilty.⁹⁵

⁸⁷ *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975).

⁸⁸ *Moore*, 233 Ga. at 864, 864, 213 S.E.2d at 832. See *Gregg*, 428 U.S. at 203–05.

⁸⁹ In *Gregg*, Defendant Troy Gregg appealed his convictions of armed robbery and murder and the subsequent imposition of a death sentence.

⁹⁰ *Gregg*, 428 U.S. at 153.

⁹¹ *Id.* at 203–05.

⁹² *Id.*

⁹³ Josie Duffy Rice, *Executions in America fall to 25-year low*, Daily Kos (Dec. 30, 2016), <https://www.dailykos.com/stories/2016/12/30/1613536/-Executions-in-America-fall-to-25-year-low>.

⁹⁴ *Georgia Jurors, Prosecutors Favor Life Without Parole*, Death Penalty Information Center (Dec. 30, 2003), <https://deathpenaltyinfo.org/news/georgia-jurors-prosecutors-favor-life-without-parole>.

⁹⁵ *Id.*

Notably, following the trend of this decline, as of early 2016, Georgia imposed no new death sentences.⁹⁶ This marks the longest period that state had gone without imposing a death sentence since capital punishment was reinstated, as of 1976. However, this decline presents a paradox: as of 2016, Georgia executed inmates at a record pace, but no new death sentences were imposed. Between 2014 and 2016, Georgia executed five inmates; however, within this period, the last time a Georgia jury imposed a death sentence was in March 2014. Additionally, even ten years ago, state prosecutors filed notices of intent to seek the death penalty against thirty-four accused killers; however, the number dropped to twenty-six in 2011 and thirteen as of 2015.

Having considered the form, history, and requirements of Georgia death penalty law, the Article will discuss the causes of this marked and notable decline. What has caused this marked decline?

VIII. VIOLENT CRIME STATISTICS

Before analyzing why death sentences are in decline, we must consider the prevalence of violent crimes. Since death penalty sentences are specific to few distinct crimes (aircraft hijacking, treason, and murder, including felony-murder), we must rule out a decrease in violent crimes as the basis for this decline.

A. *Statistics in Georgia*

While death penalty crimes of aircraft hijacking and treason rarely appear in newspapers and news casts, the crimes of murder, including felony murder, as well as the violent crimes of rape, aggravated assault, and robberies are, unfortunately, more commonplace.

The Georgia Crime Information Center produces annual surveys of crime rates in the state. In 2014, the Georgia Crime Information Center reported an estimated 579 murders, 2,091 rapes, 12,373 robberies, and 21,830 aggravated assaults. This number changed in 2015, with 606 murders, 2,222 rapes, 11,947 robberies, and 21,517 aggravated assaults. As of 2016, 666 murders, 2,407 rapes, 12,069 robberies, and 23,751 aggravated assaults were reported. Finally, in 2017, law enforcement agencies reported 701 murders, 2,684 rape cases, 9,878

⁹⁶ See *Georgia Continues Shift Against Capital Punishment*, EJI.org (Jan.24, 2019), <https://eji.org/news/georgia-continues-shift-against-capital-punishment/>; Bill Rankin, *Georgia executions rise, while death sentences plummet*, AJC (Dec. 5, 2016) <https://www.ajc.com/news/local/georgia-executions-rise-while-death-sentences-plummet/atGjGmB9aNVsRIBnavjSYO/>.

robberies, and 23,258 aggravated assaults.⁹⁷ These statistics, while not all inclusive, represent the yearly trends of violent crimes in Georgia. From this information, we may deduce that violent crimes, while lowered somewhat as of 2017, are still largely prevalent in the state of Georgia.

B. National Statistics

Since it is likely that a portion of these Georgia violent crimes may be attributed to non-Georgia residents, or “out-of-towners,” we must also look to national statistics. According to the Federal Bureau of Investigation’s (“FBI”) report on crime in 2018, an estimated 16,214 murders occurred in the nation in 2018. In other words, the FBI estimates 5.0 murders per 100,000 people.⁹⁸ An estimated 46.2 percent of these reported crimes occurred in the South, 22.0 percent were reported in the Midwest, 19.9 percent reported in the West, and 11.9 percent were reported in the Northeast.⁹⁹

By contrast, according to the U.S. Department of Justice (“DOJ”), Bureau of Justice Statistics, the number of violent-crime victims increased between 2015 to 2018. From 2017 to 2018, violent crimes increased from 5.2 million to 6.0 million.¹⁰⁰ According to the DOJ, this increase was the result of a rise in victims of rapes, sexual assaults, aggravated assaults, and simple assaults. Notably, the number of victims of serious crimes decreased from 2014 (1.89 percent) to 2018 (1.68 percent).¹⁰¹ Notably, these statistics, only include those crimes reported by victims.¹⁰² By comparison, *The New York Times* reported an estimated rise of 21.8 percent of murders in thirty-six major U.S. cities, but an overall decrease by 5.3 percent as of 2019.¹⁰³

⁹⁷ “2017 Summary Report,” *Uniform Crime Reporting (UCR) Program*, Georgia Crime Information Center. Notably, these statistics only cover those crimes reported to law enforcement.

⁹⁸ “2018 Crime in the United States,” Federal Bureau of Investigations, fbi.gov (accessed 08/12/2020).

⁹⁹ *Id.*

¹⁰⁰ “Criminal Victimization, 2018,” Bureau of Justice Statistics, U.S. Department of Justice (Sept. 2019).

¹⁰¹ *Id.*

¹⁰² An estimated only 43 percent of violent victimizations were reported to the police in 2018. See “Criminal Victimization, 2018,” Bureau of Justice Statistics, U.S. Department of Justice (September 2019).

¹⁰³ Jeff Asher and Ben Horwitz, *It's Been 'Such a Weird Year.' That's also Reflected in Crime Statistics*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/06/upshot/murders-rising-crime-coronavirus.html>.

C. Meaning of these Statistics

These statistics show us that violent crime fluctuates over the years. However, largely in Georgia, it appears that violent crimes are lowered, but still prevalent. Similarly, national statistics reflect a high number of serious and violent crimes, while representing a decrease in overall figures. These statistics show us that, while any decrease in violent crime rates undoubtedly contributes to the decline of death sentences, it is hardly the sole cause.

IX. EXPLAINING THE DECREASE IN DEATH PENALTY SENTENCES

Since violent crime is not completely absent from Georgia and national society, what caused this decline in the imposition of death sentences? The next section of this Article will address potential causes of this decline, as well as where Georgia death penalty law may go from here.

A. Cost

Perhaps the most obvious explanation of this decline is money. According to the Georgia Department of Corrections, the state of Georgia allocated an estimated \$1,249,085,608.00 in prison and probation costs.¹⁰⁴ States typically measure the cost of imprisonment by calculating the average cost per inmate, determined by dividing total state spending on prisons by the average daily prison population. The estimates for Georgia, based upon this equation, were \$19,977 average cost per inmate, the total expenditure of funds for Georgia in 2015 was \$921,844,210.00.¹⁰⁵ By contrast, death penalty costs an average one to two million dollars per person and can cost up to three.¹⁰⁶ As Michael Myers noted, while serving as head of the Georgia Public Defender

¹⁰⁴ *Correction Costs*, GEORGIA DEPARTMENT OF CORRECTIONS, <http://www.dcor.state.ga.us/sites/default/files/FY18%20Cost%20Per%20Day%20Consolidated%20Summary%2012.13.19.pdf> (last accessed Sept. 29, 2020).

¹⁰⁵ *Prison Spending in 2015*, VERA, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last accessed Sept. 30, 2020).

¹⁰⁶ See *Decision to Seek the Death Penalty in One Case Costs Georgia More Than \$3 Million*, DEATH PENALTY INFORMATION CENTER (July 24, 2009), <https://deathpenaltyinfo.org/news/decision-to-seek-the-death-penalty-in-one-case-costs-georgia-more-than-3-million>; *Rethinking Georgia's death penalty*, BETTER GEORGIA (Jan. 27, 2017),

<https://bettergeorgia.org/2017/01/27/rethinking-georgias-death-penalty/#:~:text=The%20death%20penalty%20does%20cost,prison%20including%20the%20prison%20time>.

Standards Council, the imposition of life without parole sentences are significantly less expensive than the death penalty.¹⁰⁷ While this high cost may explain a state or prosecutor's interest in reducing the imposition of death sentence, it does not represent the average juror's considerations in voting for or against a death sentence and certainly does not explain the total marked decline.

B. Social Movements and Awareness

Whether a person (juror or prosecutor) is for or against the death penalty, there are certain moral and ethical considerations that accompany this issue. Among these religious and political considerations comes the most basic argument of a person's rights to live and be free from cruel punishments.¹⁰⁸ Social movements such as Black Lives Matter shed light on social injustices which fuel death penalty punishments. Many of these movements and novelists provided voices to those persons improperly imprisoned and improperly executed.

Moreover, journalists looked to social movements, such as Black Lives Matter, to address systematic injustices. For instance, Mark MacDougall argues in his article, "Death Penalty: Do All Black Lives Really Matter?"¹⁰⁹ that the systematic imposition of the death penalty on black defendants has highlighted just how significantly lives do not matter in America's administration of the death penalty. MacDougall argues that Black Lives Matter will help remove any judicial decision-making based upon racial motivators. Novelist and Attorney Bryan Stephenson supports this argument in his novel, *Just Mercy*,¹¹⁰ and notes that the death penalty is rarely an easy issue. Stephenson identifies that often defendants, even if truly guilty, face death sentences punishments as a result of biases, and in spite of any mental incompetence or extenuating circumstances which led to the crime.

¹⁰⁷ *Georgia Jurors, Prosecutors Favor Life Without Parole*, Death Penalty Information Center (Dec. 30, 2003), <https://deathpenaltyinfo.org/news/georgia-jurors-prosecutors-favor-life-without-parole>.

¹⁰⁸ For information on organizations aimed at ending the death penalty, see https://www.amnestyusa.org/issues/death-penalty/?gclid=Cj0KCQjwhb36BRcfARIsAKcXh6EzrZaop0BjatDNpz6bK5E3tOrhsxoDcGZOx6qORbJ2Im0_BslK6V8aAhy3EALw_wcB. For information on organizations which argue for the continuation of the death penalty, see <https://prodeathpenalty.com/info/pro-death-penalty-arguments>.

¹⁰⁹ Mark MacDougall, *The Future of the Death Penalty: Do all Black Lives Really Matter?*, LAW.COM, THE NATIONAL LAW JOURNAL, <https://www.law.com/nationallawjournal/2020/07/06/the-future-of-the-death-penalty-do-all-black-lives-really-matter/?sreturn=20200811152454> (last accessed Sept. 11, 2020).

¹¹⁰ STEPHENSON, *supra* note 3.

Regardless of the arguments presented, it is undeniable that such movements affected national and statewide acceptance of the death penalty.

In addition to the Black Lives Matter movement, the legal movement known as Applied Legal Storytelling propels historic attempts to better educate defense attorneys in combatting death sentences. Attorneys involved in Applied Legal Storytelling seek to utilize storytelling and narrative elements to sway a jury's finding as to sentencing.¹¹¹ As described by Ruth Anne Robbins, arguably one of the single most influential contributors for the Applied Legal Storytelling movement, "[t]he goal of applied legal storytelling is to help lawyers serve their clients through the use of story and to help professors create the foundation for future lawyers by using story as part of their pedagogy."¹¹² This movement is responsible for an increased awareness within the legal defense community of the significance of storytelling, when arguing against the death penalty to jurors. A defense attorney's increased ability to "tell a story," and connect jurors to a defendant, may significantly impact the outcome of a death penalty verdict.¹¹³ Robbins described the movement of storytelling as "the backbone of the all-important theory of the case, which is the essence of all client-centered lawyering."¹¹⁴ This "backbone" of a theory of a particular case—cases which often contain gruesome and shocking details—has the ability to "humanize" a defendant in the eyes of the jury.

While the courtroom is rarely as glamorous as portrayed in television or film dramas, jurors, while considering sentencing, are often thrust into this story-like review of a defendant's life story. In fact, defense attorneys encourage jurors to consider evidence about extenuating, or mitigating, factors, such as the defendant's personal history, past circumstances, and any relevant social context.¹¹⁵ Robbins went on to

¹¹¹ Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC 247, 248 (2015).

¹¹² Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling and to This Symposium*, 14 LEGAL WRITING 3, 7 (2008).

¹¹³ The Author would like to thank Professor Pamela Wilkins, Associate Professor of Law at Mercer University School of Law, for her contributions on this subject. Professor Wilkins' scholarship and teaching contributions focused on areas including the death penalty and legal storytelling. Her stories and comments were invaluable to the Author in learning more about this Legal Storytelling Movement and death penalty law.

¹¹⁴ Robbins, *supra* note 111, at 3.

¹¹⁵ *See id.* ("Capital defendants are easily mis-portrayed in the courtroom to jurors predisposed to see them that way, namely, as protagonists in the crime master narrative, and exactly the kinds of persons whose nature a pervasive media criminology has presumed to 'explain.' In modern capital jurisprudence, precisely because the penalty phase of a capital case requires issues of blameworthiness and culpability to be explicitly

note that lawyers, specifically criminal defense attorneys, “need to realize the importance of story towards accomplishing the goals of legal communication and legal persuasion.”¹¹⁶ Perhaps the increased awareness of the importance of storytelling, through movements such as Applied Legal Storytelling, has impacted death penalty law. Perhaps the advancement of this storytelling skill within the criminal defense community contributes to the decline in juror death penalty verdicts.

C. Violent Crime Exposure: TV Shows, Movies, and Podcasts

An estimated 91 percent of movies on television contain some form of violence.¹¹⁷ Such media violence includes visual portrayals of physical aggression by one person or character upon another.¹¹⁸ Popular movie titles like *Pulp Fiction*, *Dirty Harry*, *Saw*, and television shows, such as *Gunsmoke*, *Miami Vice*, and *CSI*, represent the vast use of violence in modern entertainment.¹¹⁹ These films are just a small illustration of our familiarity with some form of violence in the media, and they identify America’s fascination with violence in entertainment. This fascination is not new, beginning with gangsters, Westerns, and Hitchcock killers.

Today, America has found new outlets for violent stories, such as true crime podcasts and streaming service documentaries. The popular podcasts “Serial,”¹²⁰ “In the Dark,”¹²¹ and “Undisclosed,”¹²² each provide outlets for an audience interested in true crime, serial killers, and murder mysteries.¹²³ Similarly, Netflix has had recent success in its documentaries and murder mysteries, such as “Making a Murderer,”¹²⁴

addressed, jurors are legally mandated to consider evidence about the defendant’s social history, past circumstances, and relevant social context.” *Id.*) See O.C.G.A. § 17-10-30.

¹¹⁶ Robbins, *supra* note 111, at 3.

¹¹⁷ *Violence in the Media and Entertainment (Position Paper)*, AAFP, <https://www.aafp.org/about/policies/all/violence-media-entertainment.html#:~:text=Multiple%20studies%20have%20shown%20a,should%20concern%20all%20family%20physicians> (accessed 08/12/2020).

¹¹⁸ L. Rowell Huesmann, *The Impact of Electronic Media Violence: Scientific Theory and Research*, J. ADOLESC HEALTH, 2007 DEC. 41 (Sept. 5, 2007).

¹¹⁹ *Id.*

¹²⁰ *Serial Podcast*, Julia, <https://open.spotify.com/show/1APBFZkZnbFY1mZKoCvpEm?si=fYxwX9f2TxGhhWVKm8Eu-g>.

¹²¹ *In the Dark*, APM Reports, <https://open.spotify.com/show/1aFyRYDJ1pHEaPMnZAGaOr?si=YqbSkGyoQNmQVpRHeIzk6A>.

¹²² *Undisclosed*, Undisclosed, https://open.spotify.com/show/0dEnvtvK0AzFCXskFRgYt8?si=cojzINd3R_KD37E_zw9xew.

¹²³ For more information on these podcasts, see <https://www.rollingstone.com/culture/culture-lists/beyond-serial-10-true-crime-podcasts-you-need-to-follow-93729/>.

¹²⁴ *MAKING A MURDERER* (Synthesis Films 2015).

“Conversations with a Killer: The Ted Bundy Tapes,”¹²⁵ and “Extremely Wicked, Shockingly Evil and Vile.”¹²⁶ The tremendous popularity of these violent podcasts and shows is possibly the response to the triggering of a powerful emotive response of fear, as explained by criminology professor Scott Bonn. Bonn hypothesizes that just like horror films, violent crime media allows us to experience fear in a controlled environment.¹²⁷ The American courtroom presents another such “controlled” environment. While in a courtroom, jurors are often faced with horrific acts and painful cases; however, at the close of the day, the jurors are allowed to return to their homes (unless sequestered) and are, generally speaking, safe from the physical effects of the crime. In this courtroom, jurors partake in their own, albeit less glamorous, version of the “courtroom drama,” and after their service, they are allowed to return to their lives.

A juror’s introduction to the true “true crime” story hardly begins with courtroom, as identified by the popularity of violent crime novels, films, and television shows. Numerous researchers, in studies cited by *Psychiatric Times*, *Science Daily*, and *The Telegraph: UK*, suggest that violent crime increases a viewer’s propensity for violence. In fact, Naples Mayor Luigi de Magistris claims violent crimes “skyrocket” in the city whenever the TV series “Gomorra”¹²⁸ is shown.¹²⁹ Whether Mayor Luigi de Magistris is correct in his assessment on the relation between violent shows and the city’s crime rate, we must next ask in what way, if any, has our exposure to violent crime affected our views on the death penalty and, by extension, have the findings of jurors and judges been affected by this exposure?

In addition to violent crimes, death penalty appears both explicitly and implicitly in television shows, films, podcasts, and media. Even if a

¹²⁵ CONVERSATIONS WITH A KILLER: THE TED BUNDY TAPES (Elastic, Gigantic Studios, Outpost Digital, RadicalMedia 2019).

¹²⁶ EXTREMELY WICKED, SHOCKINGLY EVIL AND VILE (COTA Films, Voltage Pictures, Third Eye Motion Picture Company).

¹²⁷ Scott Bonn, *Why We Are Drawn to True Crime Shows*, TIME, <https://time.com/4172673/true-crime-allure/> (last accessed December 12, 2020). See *Why are People Obsessed Watching True Crime Series*, THE INSIDE EDITION, <https://www.insideedition.com/why-are-people-obsessed-watching-true-crime-series-50224> (accessed January 2, 2021).

¹²⁸ *Gomorra* (Sky Atlanta television broadcast May 6, 2014–present).

¹²⁹ Gianluca Mezzofiore, *Gomorra TV show causes immediate rise in violent crime claims Naples mayor*, CNN (May 7, 2019), [https://www.cnn.com/2019/05/07/europe/naples-mayor-gomorra-violent-crime-scli-intl/index.html#:~:text=Mayor%20claims%20TV%20show%20'Gomorra'%20causes%20immediate%20rise%20in%20violent%20crime&text=\(CNN\)%20Naples%20mayor%20Luigi%20de,TV%20series%20Gomorra%20is%20shown.](https://www.cnn.com/2019/05/07/europe/naples-mayor-gomorra-violent-crime-scli-intl/index.html#:~:text=Mayor%20claims%20TV%20show%20'Gomorra'%20causes%20immediate%20rise%20in%20violent%20crime&text=(CNN)%20Naples%20mayor%20Luigi%20de,TV%20series%20Gomorra%20is%20shown.)

juror never served on a capital crime case, or on any jury, a juror has already been exposed to the media's own version of the courtroom. A person's exposure to violent crime and courtroom dramas undoubtedly impacts his or her perception of crime and death penalty sentences. In his article examining the media's impact on the legal system, Craig Haney argues:

[t]he over-representation of homicide is problematic also because of the way that the death penalty—as the most forceful and definitive law enforcement response possible—is explicitly offered or implicitly suggested as the only appropriate way to address these worst possible crimes.¹³⁰

1. Humanizing a Serial Killer

Media and entertainment genres seem to echo several fundamental strategies of the Legal Storytelling movement. Specifically, both rely upon talented narration and storytelling. However, for many programs and films, convicted murderers are portrayed as welcoming, educated, and even charming. The most obvious example is Ted Bundy. In both the documentary "Conversations with a Killer: The Ted Bundy Tapes," and the film "Extremely Wicked, Shockingly Evil and Vile," Ted Bundy is portrayed as handsome, appealing, and charming. While some of this portrayal serves to explain Bundy's success in brutally attacking his victims, it goes overboard in these productions. In the film, the actor's¹³¹ "schoolboy" attitude, perceived innocence, and sweet demeanor are retained until the final scene of the movie, where we finally receive a glimpse of the truth of Bundy's crimes. Similarly, the documentary featuring various interviews of Ted Bundy portrays him as alluring and intelligent. This representation of Bundy was echoed during sentencing of Bundy's final Florida trial. Judge Edward Cowart, presiding judge at the Bundy trial, even remarked, "You're a bright young man. You'd have made a good lawyer and I would have loved to have you practice in front of me."¹³² Judge Cowart received severe scrutiny at the time of these comments, and the film productions, which included and highlighted this comment, only further shocked its audience. By glorifying and practically praising Bundy's intelligence and appeal, Judge Cowart and these films seem to encourage the audience to see

¹³⁰ Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689, 727 (2009).

¹³¹ Zac Efron plays the lead role of Ted Bundy in this film.

¹³² *People have some STRONG opinions about the judge in Ted Bundy's trial after watching the docu-series*, HER, <https://www.her.ie/entertainment/people-strong-opinions-judge-ted-bundys-trial-watching-docu-series-448994> (last accessed Sept. 29, 2020).

the goodness of his character. Additionally, internet users have access to sources such as the article, “Who is the most handsome serial killer or mass shooter in history?”¹³³ Names such as Jeffrey Dahmer, Ted Bundy, Paul Bernardo, and Rodney Alcala grace this list.

These films and internet resources show us the over humanization, and even borderline glorification, of such violent and merciless men and women. While the Legal Storytelling movement focuses on providing defendants with a fair and impartial opportunity to be seen as less monstrous, but film, media, and entertainment genres have arguably taken this too far. Furthermore, this “beautification” of the reputation of these murderers and rapists must make an impact on the average citizen’s impression of real-life killers.

X. EFFECTS OF VIOLENT CRIME EXPOSURE ON DEATH PENALTY LAW

A. Influence on Jurors

“Citizen-jurors”¹³⁴ must choose between life and death in a capital trial. While reaching a verdict, jurors must consider the imposition of a death penalty or a life sentence. *Ring v. Arizona*¹³⁵ outlined this responsibility: “[c]apital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”¹³⁶ This great burden is inherently met with a juror’s opinions and biases. As such, capital punishment is driven by public opinion. Craig Haney supported this concept in his article, *Media Criminology and the Death Penalty*, “[i]n no other kind of criminal case [capital punishment] does the public’s collective view of the nature of criminality—the upshot of their flawed criminological education—play so significant a role.”¹³⁷

This national debate among potential jurors is, as Haney argues, fueled by public opinion concerning the death penalty. A national poll, referred to as the “Gallup Poll,” cited by Death Penalty Information Center, found that, as of May 2020, 54 percent of adults in America

¹³³ *Who is the most handsome serial killer or mass shooter in history*, QUORA <https://www.quora.com/Who-is-the-most-handsome-serial-killer-or-mass-shooter-in-history> (last accessed Sept. 30, 2020).

¹³⁴ Haney, *supra* note 129, at 691.

¹³⁵ 536 U.S. 584 (2002).

¹³⁶ *Ring*, 536 U.S. at 589.

¹³⁷ Haney, *supra* note 110.

consider the death penalty morally acceptable.¹³⁸ This 54 percent represents a six-percentage point decline over the last year. This statistic also represents the lowest percentage point in the twenty-year history of the poll. For instance, in 2006, 71 percent of citizens polled found the death penalty morally acceptable.¹³⁹ Based upon these statistics and the role given to jurors, public opinion significantly impacts the death penalty.

B. Desensitization

Having considered death penalty and violent crime statistics, violent crime motivations, and relevant case and statutory law, we may now turn to the effects of violent crime exposure on death penalty statistics. As mentioned above, social movements such as Black Lives Matter, and novels such as *Just Mercy*, certainly impacted the nation's understanding and opinion of the death penalty. However, perhaps some of the recent downward trend away from death penalty punishments could be attributed to desensitization. Dr. L. Rowell Huesmann suggests that repeated exposures to violent media leads to adaptation of certain natural emotional reactions.¹⁴⁰ Huesmann identified this process as "desensitization."¹⁴¹ Through desensitization, an individual who has been repeatedly exposed to violent crimes develops a natural stoicism when faced with violence.¹⁴² The concept of "desensitization" is hypothetical; however, the statistics show that Americans are more exposed to violence than ever, and death penalty sentences, even in regions which are historically noted as high in death penalty impositions, are down.¹⁴³

In addition to desensitization to violence, the American public has grown desensitized to violence and crime through media, such as

¹³⁸ *National Polls: The Evolution of Public Opinion on Capital Punishment*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/national-polls-and-studies> (last accessed Sept. 9, 2020).

¹³⁹ *Id.*

¹⁴⁰ See L. Rowell Huesmann, *The Impact of Electronic Media Violence: Scientific Theory and Research*, J. ADOLESC HEALTH, 2007 DEC. 41 (Sept. 5, 2007). Doctor Huesmann is a professor of Communication Studies and Psychology at the University of Michigan and is director of the Research Center for Group Dynamics with the University of Michigan's Institute for Social Research.

¹⁴¹ *Id.*

¹⁴² Dr. Huesmann's Article relied on statistical evidence, as well as earlier meta-analyses and studies, in arriving at his conclusion.

¹⁴³ See *A History of the Death Penalty in Georgia: Executions by Year 1924–2014*, STATE OF GEORGIA DEPARTMENT OF CORRECTIONS: OFFICE OF PLANNING AND ANALYSIS, Jan. 2015.

memes. Memes are one of the most popularized and widespread ways of expressing opinions, providing comic relief, and commenting on social contexts. Many memes, while couched in humor, even identify social issues prevalent in American society. The following are common examples of serial killer “comedy”:

(1) “When serial Killer Rodney Alcala was on trial in 2010, he chose to act as his own attorney. He interrogated himself on the witness stand for five hours, asking questions in a deep voice and then answering them in his normal voice. [Why?] ‘Because I’m batman.’”¹⁴⁴

(2) “Serial killer: ‘Played video games when he was 8’ Media: ‘What a juicy coincidence.’”¹⁴⁵

(3) “What if Bob Ross was a serial killer and his paintings are of locations where he hid bodies”¹⁴⁶

(4) “‘Hey Jeff... Got any shampoo?’ ‘Nope, [Ted] just head and shoulders.’”¹⁴⁷

These memes barely scratch the surface of serial killer jokes available on the web; however, these examples represent the humor, albeit distasteful, and entertainment that many Americans found in death and violent crime. Through these memes, the audience makes light of the victims, the crimes, and the criminal process, and purposefully ignores the “aftermath” of violent crime. This media presents another example of America’s fascination with, and even occasional lighthearted view of, violent crimes. This interest is likely here to stay. It is unlikely that viewers will suddenly lose interest in violent crime entertainment, considering the decades-old prevalence of violence in films and novels. However, what is missing from these conversations, is where American opinion will go from here.

XI. DEATH PENALTY LAW: MOVING FORWARD

As we see, Death Penalty Law, regardless of personal beliefs on the issue, is an issue subject to many variables, such as the following: (1) it is subject to economic restraints; (2) it is subject to the political context,

¹⁴⁴ *Serial Killer Memes*, FILM DAILY.CO, <https://filmdaily.co/news/serial-killer-memes/> (last accessed Sept. 10, 2020).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Serial Killer Funnies*, Pinterest.com, <https://www.pinterest.com/sclaro/serial-killer-funnies/> (accessed Sept. 11, 2020).

as well as any social movements at work on a state or national platform; (3) it is subject to the present public opinion surrounding the criminal justice system and death sentences; (4) it is subject to personal biases, evidenced by countless early death sentences imposed on the basis of race;¹⁴⁸ (5) it is subject to the particular district attorney, as well as any influences affecting that attorney's opinions, at the time the case is prepared; and (6) it is subject to the influences at work upon jurors, as well as any individual biases—whether religious, political, or moral.

In fact, as the Court noted in *Gregg*, the review of a death sentence, with consideration to the protection afforded by the Eighth amendment, requires that a court “look to objective indicia that reflect the public attitude toward a given sanction.”¹⁴⁹ Here, the Court recognized the clear link between public attitude toward a judicial sentence and death penalty law. Statistical evidence and caselaw proves that, currently, popular opinion for the death penalty is down. This recent reduction in capital punishment sentences may not only be attributed to the above influential factors, but also due to the aforementioned factors, including recent social awareness and movements, ethical implications of capital punishment, stricter sentencing requirements, and desensitization.

Georgia's treatment of the death penalty appears to be following the trend of further limiting the original requirements for a death sentence. The above caselaw and statutory law shows us that Georgia began refining its death penalty treatment many years ago, as evident in *Gregg* and *Furman*, and has continued to refine its process since. For example, in *Davenport v. State*,¹⁵⁰ the Georgia Supreme Court recently adjusted its customary practice related to murder appeals not involving the death sentence. Prior to *Davenport*, in murder appeals not involving death sentences, the Georgia Supreme Court would determine sua sponte whether sufficient evidence supported all of a defendant's convictions.¹⁵¹ In *Davenport*, the court noted that it would continue to conduct a sufficiency analysis for all murder convictions but will not perform sua sponte sufficiency review of murder appeals not involving death sentences.¹⁵² This shift does not directly affect death penalty

¹⁴⁸ Notably, Georgia's re-write of its death sentence statutes was a direct result of the Court's intention and instruction in *Furman v. Georgia*, to prevent future bias, most commonly racially-motivated biases.

¹⁴⁹ *Gregg*, 428 U.S. at 153 (quoting Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁵⁰ 309 Ga. 385, 846 S.E.2d 83 (2020).

¹⁵¹ *Id.*

¹⁵² *Id.* at 92. See *Barton-Smith v. State*, 309 Ga. 799, 848 S.E.2d 384 (2020).

cases, however, *Davenport* shows the recent adjustment to Georgia's historic treatment of non-death penalty cases. Since the treatment of murder cases is on the move, perhaps the shift away from voluntary review of non-death penalty cases primed the Georgia Supreme Court for change to death penalty cases.

XII. CONCLUSION

Where death penalty law goes next is uncertain. Where we, as a society, go next in our treatment and fascination with violent crimes is uncertain. However, there are indicators present that provide answers to these questions and suggest that death sentences will continue on the downward trend.

First, Georgia statutory and case law show us that Georgia has significantly narrowed its application and implementation of death sentences. Specifically, statutes such as O.C.G.A. § 17-10-30 serve as a reminder that death sentences may not be imposed unless very specific factors or circumstances are found. Similarly, in both *Furman v. Georgia* and *Gregg v. Georgia*, the Supreme Court of the United States reminded lawmakers of a state supreme court's duty to scrutinize each death sentence, and the Court's ability to overturn or uphold the state's relevant statutes. Moreover, this Court twice informed the Georgia Supreme Court that, unless it concluded (1) the sentence was influenced by no passion, prejudice, or arbitrary factor; (2) the evidence supported the finding of a statutory aggravating circumstance; and (3) the death sentence was neither excessive nor disproportionate, no death sentence could be imposed. *Furman* and *Gregg* reminded Georgia and the nation that the Supreme Court was watching, and when the state supreme courts failed in these duties, the effect was the removal of the state's death sentence provisions.

Second, it is clear from the statistical evidence and caselaw that popular opinion for the death penalty is at an historic low. Georgians, whether that be Georgia jurors and/or Georgia prosecutors, no longer seem as ardent for death sentences. For the first time since the reinstatement of the death penalty, Georgia had gone over five years without imposing a new death sentence.¹⁵³

Finally, it is clear from statistics, research, and articles, that the average American citizen is heavily exposed to violent crime prior to any real role as a courtroom juror. Regardless of whether this exposure is presented via podcasts, films, novels, television shows, or media,

¹⁵³ See *A History of the Death Penalty in Georgia: Executions by Year 1924–2014*, STATE OF GEORGIA DEPARTMENT OF CORRECTIONS: OFFICE OF PLANNING AND ANALYSIS, Jan. 2015.

whether it concerns “Jack the Ripper,” Jeffrey Dahmer, Pedro Lopez, or Ted Bundy, this exposure undoubtedly has an impact on the average psyche. Surely some toll must be taken on a person, whether that be less “shock” when presented with violent crimes, added interest in the entertainment provided by violent crimes, or a complete desensitization to the types of crimes presented to a citizen-juror. After all, we can all now joke that “[t]hey laughed at my crayon drawing, I laughed at their chalk outline.”¹⁵⁴

Two things are certain. First, we are now clobbered with both the presentations of violent killers as “intelligent” and “alluring,” and with lighthearted jokes about heinous crimes,¹⁵⁵ and second, for a landmark period of five years, Georgia did not impose a new death sentence. Perhaps America’s newly-acquired fascination with the crimes that precipitate the death penalty explains this decline. Perhaps America’s increased interest in watching the “Making” of the Murderer, explains our new reticence to execute them.

Sarah J. Foster

¹⁵⁴ *Id.*

¹⁵⁵ This final note serves to remember the victims of these violent crimes. They, and not solely their killers, deserve our thoughts and remembrances.