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How to Assess the Real World Application of a Capital Sentencing Statute: A Response to Professor Flanders's Comment

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How to Assess the Real World Application of a Capital Sentencing Statute: A Response to Professor Flanders's Comment

John Mills*

In assessing the constitutionality of a capital sentencing regime, the raw number of aggravating factors is irrelevant. What matters is their scope. To pass constitutional muster, aggravating factors (or the equivalent) must narrow the scope of death eligibility to the worst-of-the-worst. Professor Chad Flanders wants courts to ignore empirical assessments of the scope of aggravating circumstances and uses an imagined State of Alpha as his jumping off point. This response to Prof. Flanders makes the case for looking at the actual operation of a law, not just its reach in the abstract. This response focuses on Arizona's capital sentencing regime to illustrate the importance of understanding the real world operation of the law and discusses the well-established basis in law and policy for relying on empirical studies in support of narrowing claims.

* Copyright © 2017 John Mills. Principal Attorney at the Phillips Black Project and an adjunct Professor of Law at UC Hastings College of the Law. He is also an author of a brief in support of certiorari that discusses the breadth of Arizona's capital sentencing statute. Brief of Amici Former & Current Arizona Judges, Prosecutors, Defenders, Legislators, & Others in Support of Petitioner, Hidalgo v. Arizona, No. 17-251 (U.S. Sept. 15, 2017).

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INTRODUCTION

In only twelve short pages, Prof. Flanders has managed to illustrate much of what is wrong with both the legal academy and legal scholarship. His Comment,¹ published in this Review, is out of touch with the practice of law, theoretical, and willfully blind to empiricism, leaving it vulnerable to criticisms based on how the law operates in the real world.² Prof. Flanders has proposed that in assessing whether a state's capital sentencing statute reaches every first-degree murder, courts should ignore the actual functioning of a capital sentencing statute, via empirical studies, describing this information as irrelevant. Instead, Prof. Flanders would have courts exclusively assess "conceptually" whether all first-degree murders are death eligible.

His principal argument is straightforward. He claims that the reach of a capital sentencing statute must be narrowed in the abstract and that the actual reach of a capital sentencing statute to actual homicides is irrelevant to the constitutional question of whether a capital sentencing statute narrows. For Prof. Flanders the actual reach is irrelevant because it is possible to imagine a conceptually very narrow capital sentencing statute that reaches all murders in an imagined year of very unusual and brutal homicides.

The following response to his Comment proceeds in three parts. Section I addresses the constitutional framework related to empirical assessment of Arizona's capital sentencing statute currently before the U.S. Supreme Court in *Hidalgo v. Arizona* and the Petition for Certiorari upon which Prof. Flanders has based his piece.³ This section also provides important context for the petition, including the Arizona

¹ Chad Flanders, *Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the Hidalgo Cert. Petition*, 51 UC DAVIS L. REV. ONLINE 49 (2017).

² Similarly broad critiques of the academy and scholarship are by now well known. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("[M]any law schools — especially the so-called 'elite' ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."); Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 295 (2000); Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010 7:20 PM), <https://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more>. But see David L. Schwartz & Lee Petherbridge, Ph.D., *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1352 (2011) (concluding judicial reliance on legal scholarship has increased over the last fifty years).

³ See Petition for Writ of Certiorari, *Hidalgo v. Arizona*, No. 17-251 (U.S. Aug. 14, 2017) [hereinafter Petition for Cert.].

Supreme Court's treatment of the questions that led to the petition. That context makes it clear that the court below in no way relied upon the distinctions Prof. Flanders makes.

Section II discusses the particular history of constitutional challenges based on cumulative reach of aggravating circumstances, what some commentators refer to as "aggravator creep." This section makes clear that there is, contrary to Prof. Flanders's suggestion, a well-established constitutional basis for employing empirical studies to better understand the operation of a capital sentencing statute.

Section III provides important background on the conceptual reach of Arizona's aggravating circumstances and the fallout from the extraordinary reach of Arizona's first-degree murder statute and capital sentencing statute in general. Despite Prof. Flanders's insistence on the singular importance of the conceptual reach of Arizona's statute, he provides virtually no discussion of this topic and no authority in support of the notion that "genuine narrowing," which he acknowledges is required, is limited to "conceptual narrowing." Instead, he focuses on an imagined jurisdiction with a capital sentencing statute unlike any in the country.

Section IV concludes by making the case that empirical assessments of capital sentencing statutes like the one in *Hidalgo* should be of interest to anyone, but especially courts, interested in assessing the scope of a capital sentencing statute.

I. THE NARROWING REQUIREMENT AND ITS TREATMENT IN ARIZONA COURTS

"If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not."⁴ Narrowing is a "constitutionally necessary function at the stage of legislative definition."⁵ That is, the statute itself must limit the scope of those eligible for the death penalty beyond those who are convicted of murder.⁶ This requirement enforces the Eighth Amendment's demand

⁴ *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds by Hurst v. Florida*, 136 S. Ct. 616 (2016).

⁵ *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

⁶ See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (noting it is "the legislature" that must provide the means for "narrow[ing] the class of death-eligible murderers").

that the death penalty be free from “arbitrary or irrational imposition.”⁷

The Court’s concerns about arbitrary imposition of the death penalty are at the heart of its modern⁸ death penalty jurisprudence.⁹ In 1971, in *McGautha v. California*,¹⁰ the Court held that due process did not prohibit standard-less jury sentencing in capital cases.¹¹ *McGautha* sanctioned very broad capital sentencing statutes that reached all first-degree murders and provided no objective criteria for distinguishing the worst-of-the-worst from those convicted of murder. In *McGautha*, the Court went so far as to disavow the possibility of even engaging in such an enterprise: “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”¹²

Just one year later, the Court repudiated this approach and required legislators to do what the Court had decried as impossible. In *Furman v. Georgia*,¹³ in a case that would invalidate every then-existing capital sentencing statute, the Court held that Georgia’s capital sentencing scheme violated the Eighth Amendment precisely because it failed to provide objective criteria that would limit the application of the death penalty to the worst-of-the-worst.¹⁴ The Court reasoned that such

⁷ *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

⁸ See *People v. Drake*, 748 P.2d 1237, 1260 (Colo. 1988) (Rovira, J., concurring in part and dissenting in part) (“The modern era of death penalty legislation and adjudication began in 1972 when the United States Supreme Court . . . held that the Georgia death penalty statute violated the eighth and fourteenth amendments to the United States Constitution.”).

⁹ See Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 UC DAVIS L. REV. 981, 987 n.23 (2015) (“[I]nfrequency is miner’s canary for the core problem identified in *Furman*: arbitrary or random death sentencing practices largely unchecked by statutory factors.”).

¹⁰ 402 U.S. 183 (1971).

¹¹ See *id.* at 185.

¹² *Id.* at 204. The parties had pointed the Court to the American Law Institute’s formulation of precisely such characteristics in its recently adopted Model Penal Code (“MPC”). However, because the drafters of the MPC also acknowledged that there may also be other aggravating circumstances a sentence may want to consider before imposing the ultimate penalty, the Court concluded “such criteria do not purport to provide more than the most minimal control over the sentencing authority’s exercise of discretion.” *Id.* at 207.

¹³ 408 U.S. 238 (1972).

¹⁴ See *id.* at 239.

requirement must exist to limit the role arbitrariness influences on its application.

Although *Furman* was a fractured opinion with each of the nine justices writing separately, a common thread ran through the narrowest — and thereby controlling — majority opinions.¹⁵ “For the three Justices who controlled the *Furman* holding, the constitutional defect with Georgia’s system in 1972 was arbitrariness, and a key symptom of that arbitrariness was the rarity with which death sentences were imposed in Georgia.”¹⁶ “When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.”¹⁷

Justice Stewart famously described the arbitrariness in Georgia’s statute as being “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”¹⁸ Justice White had similar concerns: “[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably contribute to any other end in the criminal justice system.”¹⁹

The problem of infrequency was manifest in Georgia’s scheme. The penalty is “so infrequently imposed that the threat of execution is too attenuated” to pass constitutional muster.²⁰ After *Furman*, “to pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty.’”²¹

As other commenters have noted, when the Court in *Furman* assessed the scope of the capital sentencing statutes before it, the Court lacked comprehensive quantitative data about how the statutes affected death-sentencing rates.²² Of course, there was little reason to

¹⁵ See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

¹⁶ Kamin & Marceau, *supra* note 9, at 989.

¹⁷ *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

¹⁸ *Id.* at 309 (Stewart, J., concurring).

¹⁹ *Id.* at 311 (White, J., concurring).

²⁰ *Id.* at 313 (White, J., concurring).

²¹ *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

²² See, e.g., Kamin & Marceau, *supra* note 9, at 1008; Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1290 n.34 (1997).

collect such data before *Furman*. It was *Furman* that first imposed the requirement that a state's capital sentencing statutes narrow the scope of death eligible offenders.²³ Prior to that requirement, there would be little reason to undertake a study to demonstrate what was obvious to everyone: pre-*Furman* capital punishment statutes did virtually nothing to identify the most culpable offenders, those worthy of a death sentence.

Nevertheless, the Court did rely on "quantitative data" when it struck down Georgia's capital sentencing statute, including an empirical assessment of the frequency with which the state's death eligible offenders were sentenced to death among those eligible. In dissent, the Chief Justice cited four sources for the proposition that "15-20% of convicted murderers who were death-eligible were being sentenced to death."²⁴ That empirical assessment was reiterated in the controlling plurality opinion in *Gregg v. Georgia*:²⁵ "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment."²⁶

The majority opinions in *Furman* were also replete with positive reliance upon empirical studies of the death penalty.²⁷ This data did not approach the scope and reliability of contemporary *Furman* challenges,²⁸ but it was important for the Court for assessing the scope of Georgia's capital sentencing statute.

²³ See *Zant*, 462 U.S. at 878; see also *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976) ("[The Eighth] Amendment was intended to safeguard individuals from the abuse of legislative power.").

²⁴ Shatz & Rivkind, *supra* note 22, at 1288; see also *Furman*, 408 U.S. at 386 n.11 (Berger, C.J., dissenting) ("Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.").

²⁵ 428 U.S. 153 (1976).

²⁶ *Id.* at 182 n.26.

²⁷ See *Furman*, 408 U.S. at 348-53, 372-75 (1972) (Marshall, J., concurring); *id.* at 250 n.15, 250-52 (Douglas, J., concurring). The parties also presented the Court with substantial empirical evidence about the actual operation of the death penalty. See, e.g., Petitioner's Brief at 11-12, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 71-5003), 1971 WL 134167 (noting the Georgia statute allowed death for a broad category of murders including death by accidental shooting that occurred during an armed robbery — an offense "noways distinguishable from thousands of others for which the death penalty is not inflicted"); Motion for Leave to File Brief as Amici Curiae & Brief Amici Curiae of the Nat'l Ass'n for the Advancement of Colored People et al. at 7, 13-22, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 71-5003), 1971 WL 134376 (dedicating substantial portion of brief to discussion of empirical studies relevant to the fair administration of the death penalty).

²⁸ See *infra* Part III.

The controlling opinions in *Furman* make clear that the actual reach of a capital sentencing statute is the matter with which it is concerned. Perhaps the most widely recalled passage from *Furman* is Justice Stewart's observation: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and usual."²⁹ Justice White rejected Georgia's scheme because it fails to provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."³⁰ And in the subsequent opinions of the Court interpreting *Furman*, the Court makes clear that it is concerned with how capital sentencing schemes function in practice, not in the abstract.³¹

The underlying reasons for imposing the requirement of aggravating circumstances — another point left unaddressed by Prof. Flanders — also highlight the Court's interest in the actual functioning of the death penalty. With aggravating factors that meaningfully narrow discretion to impose death, "unfettered discretion . . . to impose the death sentence" results in the "inevitable" influence of arbitrary factors such as race.³² As with assessing the scope of a capital sentencing statute, these factors are answerable as an empirical matter, as reflected by the opinions in *Furman*.

Prof. Flanders takes the Petition for Certiorari in *Hidalgo v. Arizona*³³ as an opportunity to promote his view that empirical evidence is irrelevant to whether a capital sentencing statute narrows the pool of eligible offenders to the worst-of-the-worst. His article, however, lacks important discussion of the decision below, discussion that would make it clear that the distinction he makes — conceptual breadth as opposed to the breadth of the actual application of its statute — was nowhere at issue.

The Arizona Supreme Court, like the trial court before it, accepted as given that Arizona's capital sentencing statute reached "virtually every" first-degree murder.³⁴ The court did not distinguish the

²⁹ *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

³⁰ *Id.* at 313 (White, J., concurring).

³¹ See, e.g., *Johnson v. Texas*, 509 U.S. 350, 359 (1993); *Walton v. Arizona*, 497 U.S. 639, 659 (1990) (Scalia, J., concurring), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *Lowenfield v. Phelps*, 484 U.S. 231, 255 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983); *Zant v. Stephens*, 462 U.S. 862, 907-08 (1983) (Marshall, J., dissenting); *Lockett v. Ohio*, 438 U.S. 586, 599, 601 (1978).

³² *Pulley v. Harris*, 465 U.S. 37, 55 (1984); see also *Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion . . . in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

³³ Petition for Cert., *supra* note 3.

³⁴ *State v. Hidalgo*, 390 P.3d 783, 791 (Ariz. 2017).

conceptual reach of the capital sentencing statute from its actual reach in the 866 first-degree murder cases examined as part of the decade-spanning study before it. Instead, the court assumed that it was true that ninety-nine percent of all first-degree murders were death-eligible.³⁵

The Arizona Supreme Court reasoned that this state of affairs was permissible for two reasons. First, per that court, there are other sources of “narrowing.” Specifically, Arizona prosecutors do not seek death in every first-degree murder case, the Arizona Supreme Court conducts proportionality review on appeal, and the capital sentencing statute limits the reach of the death penalty to first-degree murder cases.³⁶ Necessarily neither of the first two sources of narrowing constitutes a statutory source, as required by *Furman*. As for the latter, the stunning breadth of Arizona’s first-degree murder statute³⁷ means that this element of Arizona’s statute likewise fails to provide a meaningful source of narrowing, a point conceded by the State of Arizona in other contexts.³⁸

The second reason the Arizona Supreme Court upheld its statute was that Mr. Hidalgo could not point to an aggravating factor that, on its own, reached every first-degree murder: “Observing that at least one of several aggravating circumstances could apply to every murder is not the same as saying that a particular aggravating circumstance is present in every murder.”³⁹ Perhaps this is where Prof. Flanders finds inspiration for his critique. However, the point being made by the Arizona Supreme Court is formalistic in the extreme: if Arizona characterized all of its aggravating circumstances as a single aggravating circumstance, then the statute would fall. If not, then it would stand.⁴⁰

Mr. Hidalgo’s briefing before the high Court succinctly rebuts this point:

³⁵ See *id.* at 790.

³⁶ See *id.* at 791-92.

³⁷ See *infra* Part IV.

³⁸ Relying on the definition of first-degree murder to conduct the narrowing function, rather than the aggravating circumstances, also runs contrary to the state’s own position regarding its statute. The state has been clear: it is the aggravating circumstances in Arizona’s capital sentencing scheme that are responsible for the constitutionally required narrowing. Respondent’s Brief on the Merits at 22-25, *Ring v. Arizona*, 536 U.S. 584 (2002) (No. 01-488), 2002 WL 481144.

³⁹ *Hidalgo*, 390 P.3d at 791.

⁴⁰ An *amicus* brief in support of certiorari in *Hidalgo* makes this point. Brief of Amici Former & Current Arizona Judges et al. at 12-13, *Hidalgo v. Arizona*, No. 17-251 (U.S. Sept. 15, 2017).

[U]nder that logic, a State would be free to adopt two aggravators: one that covers all murders with a particular feature, and the other that covers all murders that lack the particular feature. Or — as Arizona has done here — it could adopt a long list of aggravators such that every convicted murderer is somehow made eligible for death. Either system utterly fails to offer a “meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not.”⁴¹

Prof. Flanders suggests this is a hypothetical situation, emphasizing Mr. Hidalgo’s reliance on the empirical assessment of over a decade of first-degree murders, ninety-nine percent of which were death eligible. That suggestion, however, is belied by reality: the (conceptual and empirical) breadth of Arizona’s capital sentencing statute reaches virtually every first-degree murder.⁴² It is also belied by the above passage itself and the manner in which the Arizona Supreme Court resolved the case. It was assumed by all that virtually every first-degree murder in Arizona was death eligible, both conceptually and in the real world.

Setting to the side the context of *Hidalgo*, Prof. Flanders’s argument is that empirical assessments of the reach of a capital sentencing statute’s aggravating circumstances provide no relevant information about whether those circumstances perform the constitutionally required narrowing function. Where the statutory narrowing occurs elsewhere (e.g. in the definition of murder itself⁴³), that is plainly correct. But where, as in Arizona, the statutory narrowing occurs via the aggravating circumstances, a well-designed empirical study, such as the one in *Hidalgo*, provides important information about how the statute is functioning.

As discussed below, there is a growing body of research into the actual reach of capital sentencing statutes that builds on nearly a century of empirical research into the administration of the death penalty. Arizona’s capital sentencing regime is sweeping and has caused and enabled the influence of precisely the arbitrary and pernicious factors that animate the Court’s insistence on narrowly drawn statutes.

⁴¹ Petition for Cert., *supra* note 3, at 14-15 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

⁴² See *infra* Part IV.

⁴³ See *Jurek v. Texas*, 428 U.S. 262, 270 (1976).

II. A BRIEF OVERVIEW OF EMPIRICAL ASSESSMENTS AND THE MODERN DEATH PENALTY

Prof. Flanders suggests that reliance on empirical studies to assess the scope of a capital sentencing statute relevant to its compliance with a narrowing requirement is a relatively new phenomenon. This is only half true. As Prof. Flanders and other commentators have observed, “other measures of a capital regime’s fairness” and related constitutional claims have “eclipsed” challenges based on the “defining command of the *Furman* decision — that discretion must be cabined at the stage of objective legislative definition so as to ‘genuinely narrow the class of persons eligible for the death penalty.’”⁴⁴

However, the Court in *Furman* itself relied on empirical assessments of the administration of the death penalty.⁴⁵ And, in subsequent decisions, the Court acknowledged the empirical reach of Georgia’s capital sentencing regime at the time of *Furman*.⁴⁶ Moreover, the research in *Furman* drew on a large body of pre-existing empirical “literature . . . commencing in 1930,” which over time had and has “grown in scope and methodological sophistication.”⁴⁷ After *Furman*, a large body of work has examined many aspects of the operation of capital sentencing regimes, including, e.g., the influence of race on capital sentencing decisions.⁴⁸ Thus, it is inaccurate to suggest that empirical examinations of the actual administration of capital sentencing statutes are novel.

Although Prof. Flanders and others are accurate to note that *Furman*’s narrowing requirement has not been subject to the level of empirical scrutiny one might expect, there are a handful of significant post-*Furman* examinations of whether a capital sentencing statute performs the required narrowing function. California alone has had

⁴⁴ Kamin & Marceau, *supra* note 9, at 984 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)).

⁴⁵ See *supra* notes 24-27 and accompanying text.

⁴⁶ See *Gregg*, 428 U.S. at 182 n.26.

⁴⁷ DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 229 (1990). See generally, e.g., Marvin E. Wolfgang, *The Social Scientist in Court*, 65 J. CRIM. L. & CRIMINOLOGY 239 (1974) (discussing pre-*Furman* examination of the application of various capital sentencing statutes).

⁴⁸ See generally *McCleskey v. Kemp*, 481 U.S. 279, 324 (1987) (discussing empirical study of racism and implementation of Georgia’s death penalty); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2012); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 1, 18-21 (2004).

four such studies.⁴⁹ Georgia,⁵⁰ Nebraska,⁵¹ New Jersey,⁵² Maryland,⁵³ Connecticut,⁵⁴ and Colorado⁵⁵ have all also had similar studies after *Furman*. With *Hidalgo*, Arizona is now among the jurisdictions where, post-*Furman*, there has been a substantial study of its capital sentencing statute's narrowing function.

III. THE CONCEPTUAL REACH OF ARIZONA'S STATUTE AND THE PROBLEMS IT HAS WROUGHT

Prof. Flanders has foregone any discussion of Arizona's capital sentencing statute. Instead, he discussed an imagined statute in an imagined place, the State of Alpha. Arizona's statute is decidedly beta.⁵⁶ Even passing examination of it would have revealed its stunning sweep.

As the Eighth Amendment effectively requires, death eligibility in Arizona is limited to murder.⁵⁷ Although eligibility is limited to what Arizona deems "first-degree murder," its definition of first-degree murder exceeds the constitutional scope of death eligibility.

⁴⁹ See Amended Declaration of David C. Baldus, *Ashmus v. Wong*, No. 93-594 (N.D. Cal. Sept. 19, 2010); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227 (2013); Shatz & Rivkind, *supra* note 22; Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GEN., L. & JUST. 64, 93-94 (2012).

⁵⁰ See BALDUS ET AL., *supra* note 47.

⁵¹ See David Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002).

⁵² See OFFICE OF LEGISLATIVE SERVS., NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 24 (Jan. 2007), www.njleg.state.nj.us/committees/dpsc_final.pdf.

⁵³ See Paternoster et al., *supra* note 48.

⁵⁴ See generally John J. Donohue, III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973, Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUDIES 637 (2014).

⁵⁵ See generally Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2012).

⁵⁶ See *beta*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) ("A second-class mark given for a piece of work or an examination paper.").

⁵⁷ The Court in *Kennedy v. Louisiana* held that the Eighth Amendment forbids death sentences for rape of a child, effectively eliminating the death penalty for all non-homicide offenses. 554 U.S. 407 (2008). Prof. Flanders refers to the lawyers in *Hidalgo* as "abolitionists." Counsel of record for Mr. Hidalgo, Neal Katyal, represented the State of Louisiana in *Kennedy*, defending that state's desire to execute persons for the crime of rape, a curious undertaking if he is the death penalty abolitionist as the professor implies. Petition for Rehearing, *Kennedy v. Louisiana*, No. 07-343 (U.S. July 21, 2008), <http://scholarship.law.georgetown.edu/scb/47>.

As it did at the time of *Furman*, first-degree murder in Arizona encompasses both felony murder and premeditated murder.⁵⁸ Premeditated murder extends to any intentional homicide involving a mental state more considered than “a snap decision made in the heat of passion.”⁵⁹ Felony murder is similarly broad: It encompasses twenty-two felonies, including felony flight and transporting marijuana for sale.⁶⁰ “Despite contrary recommendations from many sources, the Arizona Legislature has fashioned a felony murder rule that seems to be the broadest and most unprincipled in the United States.”⁶¹ In addition to premeditated murder and felony murder, first-degree murder also encompasses any intentional homicide of a member of law enforcement.⁶²

It should, perhaps, be no surprise then that it required the Supreme Court's intervention to mandate a jury finding of, at a minimum, reckless disregard for human life before a death sentence can be imposed in Arizona.⁶³ Even after its intervention, however, Arizona has not changed the definition of first-degree murder or its capital sentencing statute to reflect this requirement.

Arizona's definition of murder, unchanged since *Furman*, does not meaningfully narrow the class of murders that are death eligible.⁶⁴ As Justice Scalia put it, “What compelled Arizona (and many other States) to specify particular ‘aggravating factors’ that must be found before the death penalty can be imposed . . . was the line of this Court's cases beginning with *Furman*.”⁶⁵ In *Ring v. Arizona*,⁶⁶ the State of Arizona took the position that its Arizona aggravating circumstances alone are responsible for the constitutionally required narrowing: the legislature adopted aggravating circumstances “to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion,” and did not narrow the definition of first-

⁵⁸ See ARIZ. REV. STAT. § 13-1105(A)(1)-(2) (2017).

⁵⁹ *State v. Kiles*, 213 P.3d 174, 180 (Ariz. 2009) (quoting *State v. Thompson*, 65 P.3d 420, 427 (Ariz. 2003)).

⁶⁰ See ARIZ. REV. STAT. § 13-1105(A)(2).

⁶¹ Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 147 (2001).

⁶² See ARIZ. REV. STAT. § 13-1105(A)(3).

⁶³ See *Tison v. Arizona*, 481 U.S. 137, 138 (1987).

⁶⁴ Texas, by way of contrast, has defined “capital murder” to incorporate aggravating circumstances in the definition of the offense in such a way that differentiates that crime for first-degree murder. See *Jurek v. Texas*, 428 U.S. 262, 270 (1976).

⁶⁵ *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

⁶⁶ 536 U.S. 584 (2002).

degree murder “which remains today substantially identical to its nineteenth century territorial counterpart.”⁶⁷

Thus, to understand whether Arizona meets *Furman*’s narrowing requirements, it is necessary to understand its aggravating circumstances. Unlike the professor’s State of Alpha, Arizona’s aggravating circumstances, both as originally drafted and after years of “aggravator creep,” are very broad.

In fact, the day after *Furman* was decided, then-State Senator Sandra Day O’Connor approached Rudy Gruber, who was serving as the Associate Director of Arizona’s Criminal Code Commission. She “asked Gerber, in her words, to draft a death-penalty statute ‘we can live with’ — one that excluded ‘ordinary’ murders and gave uniformity to capital sentencing consistent with [the Supreme] Court’s instructions.”⁶⁸

The post-*Furman* statute contained six aggravating circumstances and, like many other state statutes, was modeled closely after the Model Penal Code.⁶⁹ If one of the following conditions were present, a defendant would be death-eligible: (1) prior conviction for an offense for which life imprisonment was a possible sentence; (2) prior conviction for a felony involving “the use or threat of violence;” (3) creating a “grave risk of death to another person or persons in addition to the victim of the offense;” (4) procuring the offense by payment or promise of payment; (5) committing the offense in exchange for payment or promise of payment; and (6) committing the offense “in an especially heinous, cruel, or depraved manner.”⁷⁰ Even this relatively modest list of aggravating circumstances lost favor with the authors of the Model Penal Code precisely because they failed to perform their intended function of narrowing the pool of eligible offenders in a manner that would eliminate arbitrariness from the administration of the death penalty.⁷¹

But Arizona in no way limited itself to this more modest list. Instead, Arizona, like many jurisdictions, fell sway to what has been

⁶⁷ Respondent’s Brief on the Merits, *supra* note 38, at 22-25; *see also* ARIZ. REV. STAT. § 13-1105.

⁶⁸ Brief of Amici Former & Current Arizona Judges et al., *supra* note 40, at 4.

⁶⁹ *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 374 (1995).

⁷⁰ ARIZ. REV. STAT. § 13-454(E) (1973) (current version at ARIZ. REV. STAT. § 13-751(F) (2017)).

⁷¹ *See* AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 5 (Apr. 15, 2009).

deemed “aggravator creep,” the tendency of legislators to make aggravating factor lists “longer and longer” over time, so that death-penalty statutes “which might [have] be[en] narrowly tailored at the outset, begin[] to get away from us.”⁷²

Arizona has not been exempt from the “pressure to expand the ambit of the death penalty over time.”⁷³ Although, as Prof. Flanders notes, the raw number of aggravating circumstances itself may not mean much if the circumstances apply only to a small subset of murders, such is not the case for Arizona’s present list of aggravating circumstances. He does not dispute the latter point or even address the specifics of any actual state’s aggravating circumstances at all.

In Arizona, a person convicted of first-degree murder is death eligible if one of fourteen circumstances apply: (1) prior conviction for an offense for which life imprisonment was a possible sentence; (2) prior or concurrent conviction of a serious offense; (3) creating a “grave risk of death to another person or persons in addition to the person murdered during the commission of the offense;” (4) procuring the offense by payment or promise of payment; (5) committing the offense in exchange for payment or promise of payment; (6) committing the offense “in an especially heinous, cruel, or depraved manner;” (7) committing the offense while in custody or on supervised release or probation; (8) the offense involved more than one homicide; (9) the defendant was an adult and the victim was under fifteen years old, a fetus at any stage of development, or over seventy years old; (10) the victim was a member of law enforcement; (11) the offense was part of the activity associated with a “criminal street gang or criminal syndicate;” (12) the offense was committed for the purpose of preventing a person from cooperating with law enforcement; (13) the offense was committed in a “cold, calculated manner without pretense of remorse or moral justification;” or (14) the offense involved use of a stun gun.⁷⁴

Like aggravating circumstances in other, real world jurisdictions, assessing the breadth of Arizona’s aggravating circumstances requires more than pat reliance on games of logic. However, even taking Arizona’s aggravating circumstances at face value, examining them “conceptually,” as Prof. Flanders suggests, easily leads to serious questions about whether any first-degree murder would be excluded,

⁷² Edwin Colfax, *Fairness in the Application of the Death Penalty*, 80 IND. L.J. 35, 35 (2005).

⁷³ CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 161 (2016).

⁷⁴ ARIZ. REV. STAT. § 13-751(F)(1)-(14).

even from individual aggravating circumstances: what first-degree murder does not lack “moral justification”? What murder is not “heinous”?⁷⁵

Some of Arizona’s aggravating factors are objectively narrow. For example, using a stun gun is quite specific. However, even some superficially narrow provisions have the potential for sweeping reach. It is, for example, very unusual to commit first-degree murder without simultaneously also committing another serious offense, such as assault. This circumstance is, in fact, the one most commonly present in Arizona murders.⁷⁶ Without testing one’s conceptual assumptions against actual murders, it would be easy to fail to appreciate the breadth, conceptual or otherwise, of Arizona’s statute.

Examining Arizona’s actual statute, as opposed to the imagined statute in the State of Alpha, provides some insights about the utility and limitations of limiting the assessment to the “conceptual” reach.

IV. MAKING THE CASE FOR EMPIRICISM

More broadly, Prof. Flanders’s approach, untethered from how the law operates in practice, runs afoul of Justice Oliver Wendell Holmes’s admonition that “we must think things not words.”⁷⁷ That is, the professor’s Comment reflects a troublingly formalistic orientation. His orientation is formalistic because he categorically opposes the relevance of the actual operation of the law in assessing whether a law is constitutional. That orientation is troubling because it would require jurists to blind themselves to information that could challenge their assumptions and concepts.

These problems are manifest in the operation of Arizona’s capital sentencing statute. Ninety-nine percent of all murders over an eleven-year period were death eligible. Whatever conceptual questions one may have about the reach of Arizona’s statute, the reality is that “virtually every” first-degree murder in Arizona is death eligible.

⁷⁵ These questions remain even after Arizona’s “limiting construction” of heinousness. See *State v. Smith*, 707 P.2d 289, 301 (Ariz. 1985) (“All first degree murders are to some extent heinous, cruel or depraved; therefore, to warrant the imposition of the death penalty, a murder must be more heinous, cruel or depraved than usual.”).

⁷⁶ Report of Cassia Spohn, on file with the author. The tenth aggravating factor (“[t]he murdered person was an on duty peace officer”) spans the third species of first-degree murder (intentionally causing “the death of a law enforcement officer who is in the line of duty.”). ARIZ. REV. STAT. §§ 13-751(F)(10), 13-1105(A)(3) (2017).

⁷⁷ Oliver W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

As the high Court has predicted, Arizona's unbridled discretion has created a "unique opportunity for racial bias to operate."⁷⁸ "Between 2010 and 2015, 57 percent of the defendants sentenced to death in Maricopa County were people of color 18 percent of the defendants from Maricopa were African-American, even though African-Americans are just six percent of Maricopa's population."⁷⁹ A common bias in the administration of the death penalty is a race of victim bias,⁸⁰ but Arizona has a race of *defendant* bias: a Hispanic man accused of killing a white victim is 4.6 times as likely to be sentenced to death as a white man of killing a Hispanic victim.⁸¹

The breadth of the Arizona capital statute has created other problems. Maricopa County is a national and statewide outlier in seeking and imposing death sentences.⁸² In particular, the charging practices of the prosecutor's office there have created an ongoing "capital case crisis" whereby there are far fewer qualified counsel than required by the number of pending cases with capital charges.⁸³ A lack of qualified counsel has caused predictably higher death sentencing rates, making the now all too common observation particularly apt in Maricopa County: a defendant is sentenced to death not for the worst crimes, but for having the worst lawyer.⁸⁴

In light of these problems, it should then be no surprise that, particularly with regards to the application of the Eighth Amendment's

⁷⁸ *Turner v. Murray*, 476 U.S. 28, 35 (1986).

⁷⁹ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX: PART I, at 11-12 (Aug. 2016), <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf>.

⁸⁰ Johnson et al., *supra* note 48, at 1941 (reporting race of victim disparities in Delaware and eight other states).

⁸¹ See Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65, 73 (1997).

⁸² See RICHARD C. DIETER, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COST TO ALL, at 21-22 (Oct. 2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> ("On a per capita basis Maricopa County had four times as many cases pending as Los Angeles, California, and Harris County (Houston), Texas, both known for their high use of capital punishment."); FAIR PUNISHMENT PROJECT, *supra* note 79, at 8 (noting Maricopa County's "rate of death sentencing per 100 homicides is approximately 2.3 times higher than the rest of Arizona").

⁸³ Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 JUDICATURE 216, 217-19 (2012); Michael Kiefer, *Maricopa County Runs Out of Death-Penalty Defense Attorneys*, ARIZ. REPUBLIC (Apr. 22, 2017), <http://www.azcentral.com/story/news/local/arizona-investigations/2017/03/26/death-penalty-cases-maricopa-county-attorney-bill-montgomery/99238852>.

⁸⁴ See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

protections against cruel and unusual punishments, courts do not engage in formalistic inquiry. They are concerned with the actual operation of the law.⁸⁵

But perhaps Prof. Flanders's complaint is much, much smaller. Perhaps it is simply that some sample sizes are not representative. After all, he posits a year in which the only homicides for an entire state were each either preceded by three weeks of torture or were committed along with twenty-six other homicides. Sampling problems are dealt with in all manner of areas of scientific inquiry, and is a problem readily addressed via the rules of evidence.⁸⁶ Indeed, a study that used Prof. Flanders's anomalous year as a sample set would undoubtedly be excluded under existing law.⁸⁷ As the many empirical studies of the death penalty demonstrate, using a representative sample set is no barrier to the empirical enterprise. We need not throw out the empirical baby with the bath water.

My hope is that persons making decisions about the wisdom and constitutionality of any social program would want to examine how that program is operating in the real world. My concern with Prof. Flanders's position is that he would have decisionmakers set such information aside, substituting their own intuition for facts on the ground.

⁸⁵ See *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931) (“[I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form and . . . the [statute] must be tested by its operation and effect.”); *supra* notes 4-31 and accompanying text.

⁸⁶ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

⁸⁷ See *id.*