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# The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina

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# THE RACIAL JUSTICE ACT AND THE LONG STRUGGLE WITH RACE AND THE DEATH PENALTY IN NORTH CAROLINA\*

SETH KOTCH & ROBERT P. MOSTELLER\*\*

*In August 2009, the North Carolina General Assembly enacted the Racial Justice Act (“RJA”), which commands that no person shall be executed “pursuant to any judgment that was sought or obtained on the basis of race.” One of the most significant features of the RJA is its use of statistical evidence to determine whether the race of defendants or victims played a significant role in death penalty decisions by prosecutors and jurors and in the prosecutor’s exercise of peremptory challenges. The RJA commits North Carolina courts to ensuring that race does not significantly affect death sentences.*

*This Article examines the RJA and North Carolina’s long struggle with race and the death penalty. The first part traces the history of race and the death penalty in the state, showing that racial prejudice exerted a consistent, strong, and pernicious influence on the imposition and disposition of death sentences. From colonial times into the 1960s, the overwhelming majority of those executed were African American, and although most victims and perpetrators of crime are of the same race, the overwhelming majority of victims in cases where executions took place were white. Hundreds of African Americans have been executed for a variety of crimes against white victims, including scores of African American men executed for rape. However, just four whites have been executed for crimes against African American victims, all murders.*

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*Not only does data indicate disproportionate racial impact, but events show that race frequently influenced capital prosecutions. In many cases in the first half of the twentieth century, juries sentenced African Americans to death in the shadow of lynch mobs. Newspaper reports of executions of African Americans included overtly racist images. In some instances, fairness and mercy eased the pernicious effects of prejudice. However, history shows that whether dooming African Americans or saving them from death, racial prejudice played a powerful role in the death penalty in North Carolina, enduring across the state's history despite enormous social and legal change.*

*The second part of this Article examines major legal changes in the modern period that may limit the influence of racial prejudice by restraining discretion. It shows that discretionary determinations by prosecutors and jurors continue, allowing racial motivation—particularly unconscious racial prejudice toward defendants or empathy for victims—to influence decisions. Some racial disparities are less extreme but have not been eliminated, and troubling features continue. For example, jury participation by African Americans has remained limited in many cases, and the disproportion of white victims seen throughout North Carolina's history is virtually unchanged.*

*The task of the RJA is to ensure that the strong link between race and the death penalty shown by history is finally severed. In its concluding section, this Article analyzes how the key features of the RJA will operate. That analysis, together with the historical record and legal framework of the modern death penalty, provides insight into North Carolina's effort to eliminate the effects of race from the operation of its death penalty.*

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## INTRODUCTION

On August 11, 2009, North Carolina Governor Beverly Perdue signed the Racial Justice Act (“RJA”) into law.<sup>1</sup> As she did so, she noted her support of the death penalty, but added: “I have always believed it must be carried out fairly . . . . The Racial Justice Act ensures that when North Carolina hands down our state’s harshest punishment to our most heinous criminals—the decision is based on the facts and the law, not racial prejudice.”<sup>2</sup> This Article demonstrates that the separation of race from the decision to execute, which is central to Governor Perdue’s support for the death penalty, has proven difficult throughout North Carolina history. The RJA attempts to ensure that separation.<sup>3</sup>

This Article examines the influence of racial prejudice on the death penalty in North Carolina. This history shows that racial prejudice has had a powerful impact on the death penalty that has continued despite significant legal and social change. Early in this history, race operated overtly, and its effects continued into the twentieth century in more subtle but no less pernicious forms. North Carolina was required to reformulate its death penalty laws to meet new constitutional standards after the United States Supreme Court invalidated all existing death penalty statutes in its 1972 decision, *Furman v. Georgia*.<sup>4</sup> However, despite major changes in law, the exercise of discretion continued, and race may have affected death penalty decisions. This Article chronicles the important history of race and the death penalty in North Carolina and develops the legal framework in which the modern death penalty operates. It thereby

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1. Press Release, North Carolina Office of Gov. Bev Perdue, Gov. Perdue Signs North Carolina Racial Justice Act (Aug. 11, 2009), available at <http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=554>.

2. *Id.*

3. See North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to -2012 (2009). See Appendix for full text of statute.

4. 408 U.S. 238 (1972) (per curiam) (invalidating existing state and federal death penalty statutes because they were capricious in their lack of standards); see *id.* at 310 (Stewart, J., concurring) (“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.”); see also *infra* Part II.A.

identifies the critical issues for examination in litigation under the RJA.

With the RJA, North Carolina has chosen for the first time to look squarely at the connection between race and the death penalty. The RJA's opening provision declares that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."<sup>5</sup> In its most direct provision, it commands that "[i]f the court finds that race was a significant factor in decisions to seek or impose the sentence of death . . . the death sentence imposed by the judgment shall be vacated."<sup>6</sup> It thus expressly forbids execution if the death penalty was sought or obtained on the basis of race. Among its most significant elements is its authorization for defendants to use statistical evidence to prove disparate impact based on the race of the defendant, the race of the victim, or on the use of race in jury selection. The statute provides that such statistical evidence can satisfy the defendant's burden to show discrimination and shift the burden to the prosecution to rebut that showing if the defendant's death sentence is to be sustained.<sup>7</sup>

The history of the death penalty in North Carolina before the last pre-*Furman* execution in 1961 unmistakably shows that the death penalty's strong identification with race during slavery outlived emancipation and extended into the twentieth century.<sup>8</sup> However, the history also reveals some exceptions and moderating effects. For example, throughout much of the first half of the twentieth century, when murder, rape, burglary, and arson carried mandatory death sentences, juries showed mercy by following guilty verdicts with requests for executive clemency that governors honored frequently.<sup>9</sup>

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5. N.C. GEN. STAT. § 15A-2010.

6. § 15A-2012.

7. See discussion *infra* Part III.B. The RJA goes beyond the restrictive requirements for federal constitutional remedies in criminal law enforcement. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (“[T]o prevail under the Equal Protection Clause, [the defendant] must prove that the decision makers in *his* case acted with discriminatory purpose.”).

8. For a list of all prisoners executed under state authority in North Carolina between 1910 and 1961, see M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608–2002: The Espy File* [Computer File], 4th ICPSR ed. compiled by M. Watt Espy and John Ortiz Smykla, Univ. of Ala. Ann Arbor, MI: Inter-University Consortium for Political and Social Research [producer and distributor], 2004 [hereinafter *Espy File*]; N.C. Dep’t of Corr., *Persons Executed in North Carolina*, <http://www.doc.state.nc.us/dop/deathpenalty/personsexecuted.htm> (follow hyperlinks for each time period) (last visited July 1, 2010) [hereinafter *DOC Persons Executed in N.C. 1910–1961*]. No executions took place in North Carolina between 1962 and 1983. See *Espy File*, *supra*.

9. See Seth Kotch, *Unduly Harsh and Unworkably Rigid: The Death Penalty in North Carolina, 1910–1961*, ch. 3 (2008) (unpublished Ph.D. dissertation, University of

Furthermore, North Carolina lawmakers made the state among the first in the nation to switch its method of execution from hanging to electrocution and then from electrocution to asphyxiation by lethal gas, changes intended to make the deaths of all prisoners, white and black, swifter and less painful.<sup>10</sup> Despite these procedural changes, the racial attitudes of the Jim Crow period informed the imposition of the death penalty,<sup>11</sup> and, as it had done during slavery, North Carolina disproportionately executed African Americans, especially those who committed crimes against whites. This pattern continued from emancipation until the hiatus in executions that began in 1961 in advance of the *Furman* decision.

North Carolina's history reveals a pairing of the desire for progressive change that has bolstered the state's reputation as moderate among southern states and the less forward-thinking attitudes, particularly about race, that have long troubled the South.<sup>12</sup>

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North Carolina at Chapel Hill) (on file with the North Carolina Law Review), available at <http://gradworks.umi.com/3352719.pdf> (describing various ways mercy was provided in the context of a mandatory death penalty); see also Cindy F. Adcock, *The Twenty-Fifth Anniversary of Post-Furman Executions in North Carolina: A History of One Southern State's Evolving Standards of Decency*, 1 ELON U. L. REV. 113, 117–18 (2009) (recounting that during the mandatory period 334 defendants were executed and 221 were granted clemency).

10. See *infra* notes 102–03 and accompanying text.

11. “Jim Crow” refers to the laws and customs in southern states that restricted the political and social lives of African Americans. The Jim Crow era is widely understood to have lasted from the withdrawal of federal troops from the South in 1877 to 1965, when the Voting Rights Act restored the franchise to African Americans. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (assessing the role of the Supreme Court in shoring up and then dismantling Jim Crow laws); LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998) (describing the lives of black Americans in the Jim Crow South); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955) (describing and reflecting on Jim Crow throughout the South).

12. The reputation includes moderation on matters of race despite its own episodes of racial violence. The most notable of these episodes was the 1898 Wilmington “race riot” or “insurrection” in which scores of African American residents were killed and the elected leadership of the state's largest city was deposed, signaling the end of African American political involvement in a coalition between Republicans and Populists that briefly dominated the state at the end of the nineteenth century. See DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (David S. Cecelski & Timothy B. Tyson eds., 1998). See generally WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 3–10 (1980) (describing the state's “progressive mystique,” cultivated despite harsher social realities); ROB CHRISTENSON, THE PARADOX OF TAR HEEL POLITICS: THE PERSONALITIES, ELECTIONS, AND EVENTS THAT SHAPED MODERN NORTH CAROLINA 1–3 (2008) (giving some brief examples of the limits of progressivism in North Carolina); WILLIAM A. LINK, THE PARADOX OF SOUTHERN PROGRESSIVISM, 1880–1930 (1992) (describing the paradoxical concept of “southern progressivism”).

In this context, its decision to adopt a mandatory sentence of death upon conviction of first degree murder or rape in response to *Furman*, which invalidated all existing death penalty statutes because they failed to constrain jury discretion, was uncharacteristically wooden and harsh. North Carolina's mandatory death sentence was unusual among the states,<sup>13</sup> and it was quickly ruled unconstitutional.<sup>14</sup> The RJA is more consistent with North Carolina's moderate tradition and its place in the Upper South.<sup>15</sup> At the same time, the RJA represents a new chapter in the state's history. The command of the RJA to ensure that the complex and pernicious relationship between race and the death penalty is finally severed is the challenging task the legislature has entrusted to the courts.

This Article is a combination of history and law.<sup>16</sup> The first half examines the history of the death penalty and race in North Carolina as a colony, during slavery and Reconstruction, and in the Jim Crow period. It culminates in an examination of the first fifty years of state-run executions ending in 1961, when the last pre-*Furman* execution took place. The second half deals with the revised death penalty operating in the modern period, executions during this period, the paths that led defendants to their place on North Carolina's current death row, and the development and details of the RJA.

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13. For example, Florida, Georgia, and Texas did not impose mandatory death sentences, and the Supreme Court upheld those statutes. *See, e.g.*, *Proffitt v. Florida*, 428 U.S. 242, 242 (1976) (finding that the imposition of the death penalty is valid when judges are given detailed guidance to assist them in deciding whether or not to impose the death penalty); *Gregg v. Georgia*, 428 U.S. 153, 155 (1976) (finding the Georgia statutory scheme constitutional since it required specific jury findings about the facts of the case and the character of the defendant, while requiring the state supreme court to review the jury verdict to ensure the defendant is not being treated unusually harsh compared to other criminals); *Jurek v. Texas*, 428 U.S. 262, 262–63 (1976) (upholding the exercise of “channeled” discretion by the jury through differing statutory structures).

14. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *Woodson* is discussed further, *see infra* notes 29–31 and accompanying text. Louisiana also chose a mandatory model, but, even though its crime definition was more precisely tailored than North Carolina's, it too was declared unconstitutional for the same reasons the Court gave in *Woodson*—the inherent vice of any mandatory imposition of death is a failure to focus on the circumstances of the particular offense and the character and propensities of the offender. *See Roberts v. Louisiana*, 428 U.S. 325, 331–36 (1976).

15. Kentucky is the other state to have a racial justice act. *See KY. REV. STAT. ANN.* §§ 532.300–309 (2008). The Kentucky statute differs significantly from the North Carolina Racial Justice Act, and, indeed, those differences are an important part of the interpretative history of the RJA because it helps define important differences in intended effect. *See infra* Part III.C.

16. The historical development in this Article is the principal responsibility of historian Seth Kotch. The developments after the 1972 *Furman* decision are the principal responsibility of Robert Mosteller, a member of the University of North Carolina law faculty.



Part I begins with the state's first recorded execution, which occurred while North Carolina was still a colony. It examines the death penalty's important role in slave owners' mastery over the state's enslaved population, noting that a heavy majority of those executed were black slaves. Slaves were barred by law from serving on the tribunals and juries that decided cases in which they were defendants and/or victims, and the available evidence shows that, except briefly during Reconstruction, jury participation by African Americans was negligible as the Jim Crow era began around the turn of the twentieth century.<sup>17</sup> Under Jim Crow, as before emancipation, the vast majority of those executed were African Americans, and African Americans continued to face systematic exclusion from jury service. During the entire period, only two whites were executed for crimes against African American victims.<sup>18</sup>

Part I continues as it sets out the history of the imposition of the death penalty from 1910 until 1961. The year 1910, almost a century before the passage of the RJA, was selected as the starting point because in that year the state assumed responsibility for executions. Sheriffs were relieved from publicly hanging prisoners in the counties where their crimes took place, and instead state prison staff conducted more private executions in a death chamber in Raleigh.<sup>19</sup> This Part ends in 1961 when the state of North Carolina executed its last prisoner until lawmakers revamped its capital punishment statute following the *Furman* decision.

An examination of events and executions in North Carolina during this period shows that race played a powerful role in the death penalty process. Some African American defendants were quickly charged, tried, convicted, sentenced to death, and executed under a shadow of racial hostility.<sup>20</sup> In rape cases, the vast majority of those executed were African American men sentenced for crimes against white women, and no whites were executed for the rape of African

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17. See *supra* note 11 (providing references describing "Jim Crow" period in the South).

18. The first white person executed for a crime against an African American was Mason Scott who was executed in 1820 for the murder of a slave belonging to another white man. See *infra* note 71 and accompanying text. The second was Daniel Keath, who was executed in 1880 for the murder of a child. Although Keath was charged only with murder, the victim's body showed evidence of sexual assault. See *infra* note 88.

19. This shift, while superficially an administrative detail, had important consequences because it placed a visible state agency in charge of the execution process. This change implicated state legislative concerns regarding execution method, which became its own significant element in the history of efforts to perfect the process and make executions less visibly painful. See *infra* note 103.

20. See *infra* Part I.B.1.

American women.<sup>21</sup> All those executed for burglary were African Americans.<sup>22</sup> Between 1910 and 1961, only one white person was executed for a crime against an African American.<sup>23</sup>

Although the death penalty was not exclusively imposed on African Americans, it was principally reserved for them, a fact that was deeply embedded in the mindset of the state's populace. In 1911, a white prisoner slashed his own throat before being transported to death row, explaining that " 'he would not be the first white man electrocuted in North Carolina.' "<sup>24</sup> Between 1910 and 1961, approximately sixty other white people were executed. However, over that period, the state executed 362 people, of whom 283 were African Americans. Thus, 78% of those executed were African American, and, including Native Americans, 80% were members of a racial minority.<sup>25</sup> These extreme percentages present a daunting challenge to explain on grounds that do not include race.

It is only at the middle of the twentieth century that instances of African Americans serving on juries in capital cases can be found.<sup>26</sup> Prior to the mid-twentieth century, African Americans were not included in meaningful numbers in the jury pool from which jury venires and trial juries were selected.<sup>27</sup> However, subsequent

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21. See *infra* Part I.B.2. Also, as the case of Alvin Mansel demonstrates, the conviction of an African American man for the rape of a white woman sometimes occurred based upon weak evidence. See *infra* I.B.1.b.

22. See *infra* Part I.B.2.

23. See *infra* note 184 (describing the conviction of Milford Exum, who was executed in 1938 for murdering an African American while robbing him in his home).

24. *First White Man is Electrocuted*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 25, 1911, at 7. His efforts at suicide were unsuccessful, and he became the first white man executed. *Id.*; see also Kotch, *supra* note 9, at 101 n.33.

25. See *infra* note 108 and accompanying text.

26. See *Miller v. State*, 237 N.C. 29, 40, 74 S.E.2d 513, 521 (1953) (noting that three African Americans served on a jury in the trial of an African American defendant in a capital case); *State v. Roman*, 235 N.C. 627, 628, 70 S.E.2d 857, 857 (1952) (showing that four African Americans served on the jury in the trial of an African American sentenced to death). Systematic data regarding jury service in particular cases are generally unavailable for cases prior to the last few decades and the principle source of information is litigation reflected in reported cases.

27. See *infra* Part I.B.6. For example, in *State v. Speller*, 229 N.C. 67, 70–71, 47 S.E.2d 537, 538–39 (1948), the Supreme Court of North Carolina overturned the conviction of Raleigh Speller, an African American, for rape, reversing the denial of his motion to quash the indictment because African Americans had been improperly excluded from service on the grand jury that indicted him. The Supreme Court recounted the facts as follows:

The Register of Deeds of the County testified that he had been Clerk of the Board of County Commissioners for 17 years; that Negroes comprise approximately 60% of the population of the County, and about 35% or 40% of

decisions of the United States Supreme Court forced jurisdictions to select juries from pools that were broadly inclusive of the jurisdiction's population, which had the effect of including African Americans in meaningful numbers in many jury venires. Although challenges to the composition of jury venires did not end, the primary focus of litigation shifted to exclusion from jury service by the prosecutor's exercise of peremptory challenges.<sup>28</sup>

Part II begins when North Carolina reestablished the death penalty after *Furman*. Because of North Carolina's false start with an invalid mandatory death penalty for designated crimes, which was

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the taxpayers; that the names of Negroes in jury box No. 1 are printed in red, while those of Whites are printed in black; that the Commissioners pass upon the person whose name is drawn, and either accept or reject such person when called; that in his 17 years as Clerk to the Board of County Commissioners he had never seen the name of a Negro placed on the approved list of prospective jurors; that it is "common knowledge, and generally known, that Negroes do not serve and have not served on grand or petit juries in Bertie County"; that he knows some of the Negroes whose names have been drawn and rejected and he would say they are average citizens; that "whenever the name of a colored person was called at a drawing of the County Commissioners nobody said anything", or they would say: "Strike him out" or "Let him go"; that according to his records no Negro has ever been summoned for jury duty by the County Commissioners . . .

The Chairman of the Board of County Commissioners testified that there had been "no discrimination at all" in the selection of persons to serve on juries; that he had never "known a Negro's name to be on the list of persons chosen for service on a grand or petit jury", but that all rejections were for want of good moral character and sufficient intelligence.

*Id.* at 68–69, 47 S.E.2d at 537–38. The trial court nevertheless had ruled that there had been "no intentional or purposeful discrimination against the colored race in the selection of jurors." *Id.* at 69, 47 S.E.2d at 538.

Speller was ultimately convicted and sentenced to death by an all white jury for raping a white woman, and his conviction was affirmed on appeal. *See State v. Speller*, 230 N.C. 345, 347, 53 S.E.2d, 294, 295 (1949) (noting that the defendant was Negro and the victim was a white woman); *State v. Speller*, 231 N.C. 549, 550, 57 S.E.2d 759, 759–60 (1950) (concluding that the defendant had no right to be tried by a jury that contained members of his race but only the right not to be tried by a jury from which members of his race have been unlawfully excluded, and concluding that the seven Negroes on the list from which the jurors were summoned was sufficient to satisfy that requirement). The Federal District Court denied habeas relief, finding

no discrimination against the negro race as such, and the ratio of negroes to whites in the jury boxes, in the light of the well known fact that the proportion of whites qualified for jury service is much higher than that of negroes who are so qualified, is not sufficient . . . to support the burden resting upon the petitioner to show actual discrimination.

*Speller v. Crawford*, 99 F. Supp. 92, 97 (E.D.N.C. 1951). Speller was executed in 1953. Charles Craven, *Two Rapists Pay with Lives after Long Death Row Wait*, NEWS & OBSERVER (Raleigh, N.C.), May 30, 1953, at 1.

28. *See infra* Part II.B.3.

ruled unconstitutional in *Woodson v. North Carolina*,<sup>29</sup> a valid post-*Furman* death penalty statute was not enacted until 1977.<sup>30</sup> Over twenty years passed between the last pre-*Furman* execution in 1961 and the resumption of executions in 1984.<sup>31</sup> North Carolina executed forty-two men and one woman under the new statute.<sup>32</sup> As of July 1, 2010, 159 men and women were confined on North Carolina's death row awaiting further review of their death sentences and execution.<sup>33</sup>

Part II traces the process leading to enactment of a constitutionally valid death penalty statute in North Carolina and renewed executions. It examines the development of the present death penalty law, looking at both the changes made in the system that existed before *Furman* and in the elements of that new system that permit continuity of racially discriminatory practices. In general, the new law limited but did not eliminate the operation of discretion in decisions to seek and to impose the death penalty.

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29. 428 U.S. 280 (1976).

30. In 1977, North Carolina enacted an Act to Establish Procedures for Sentencing in Capital Cases and to Fix the Punishment for Murder, ch. 406, sec. 2, § 15A-2000, 1977 N.C. Sess. Laws 407, 407-08, which was ruled constitutional by the Supreme Court of North Carolina in *State v. Barfield*, 298 N.C. 306, 343-55, 259 S.E.2d 510, 537-44 (1979).

31. Executions resumed with the execution by lethal injection of James Hutchins on March 16, 1984. See N.C. Dep't of Corr., Executions Carried out Under Current Death Penalty Statute, <http://www.doc.state.nc.us/dop/deathpenalty/executed.htm> (last visited July 1, 2010) [hereinafter DOC Post-*Furman* N.C. Executions].

32. *Id.* North Carolina's forty-three post-*Furman* executions place it eighth among the states. Nine of the top ten states in executions are in the South. In order of executions since 1976, the states are: Texas-460, Virginia-107, Oklahoma-92, Florida-69, Missouri-67, Georgia-47, Alabama-46, North Carolina-43, South Carolina-42, Ohio-38, Louisiana-28, Arkansas-27, Arizona-23, Indiana-20, Delaware-14, California-13, Nevada-12, Illinois-12, Mississippi-12, Utah-7, Tennessee-6, Maryland-5, Washington-4, Kentucky-3, Montana-3, Nebraska-3, Pennsylvania-3, Oregon-2, Colorado-1, Connecticut-1, Idaho-1, New Mexico-1, South Dakota-1, and Wyoming-1. See State by State Database, Death Penalty Information Center, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited July 1, 2010).

33. North Carolina has the seventh largest death row population in the United States. In order of death row population, the states are: California-690, Florida-403, Texas-340, Pennsylvania-225, Alabama-199, Ohio-175, North Carolina-169, Arizona-129, Georgia-108, Tennessee-92, Oklahoma-86, Louisiana-84, Nevada-78, South Carolina-63, Mississippi-59, Missouri-52, Arkansas-43, Kentucky-36, Oregon-33, Delaware-19, Idaho-18, Indiana-17, Virginia-15, Illinois-15, Nebraska-11, Connecticut-10, Kansas-10, Utah-10, Washington-9, Maryland-5, Colorado-3, South Dakota-3, Montana-2, New Mexico-2, New Hampshire-1, Wyoming-1. See *id.* Because of a difference in the treatment of defendants who face possible resentencing, the number shown above for North Carolina's death row (169) differs from that presented in the remainder of this Article (159), which is based on North Carolina Department of Corrections data. North Carolina's death row is the seventh largest using either total.

Almost four hundred defendants have been sentenced to death in North Carolina since the *Furman* and *Woodson* decisions.<sup>34</sup> This Part traces the complex process that sorted these individuals into four different groups. One large group comprises the current death row population to which the RJA applies.<sup>35</sup> Another slightly larger group was granted relief by judicial action for a number of different reasons or received executive clemency and has been removed from death row. A small group died outside the judicial process while on death row. The final group consists of forty-three defendants who were executed. As in the previous two periods, only one white person in this period was executed for the murder of an African American.<sup>36</sup>

Part II then examines the historical and continuing importance of the race of the victim in the imposition of death sentences in post-*Furman* executions.<sup>37</sup> Today, while African Americans and minority group members are disproportionately represented among defendants relative to their population percentage, the disparity is somewhat smaller than in earlier periods. However, the figures show clear continuity for race of victims. White victims have predominated in all periods for those executed and for those currently awaiting execution despite the fact that a very heavy majority of murders are committed by defendants against members of their own race. Indeed, there is only a minor reduction in the percentage of white victims in the death penalty cases examined before and after *Furman*.

Part II also examines the importance of unconscious racial motivation in contemporary death penalty sentencing.<sup>38</sup> As public expressions of racially biased attitudes have become less frequent,

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34. See *infra* Part II.B.1 (describing 391 defendants sentenced to death since the *Woodson* decision). These defendants are listed in two documents developed by the North Carolina Department of Corrections. See N.C. Dep't of Corr., Offenders on Death Row, <http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm> (last visited July 1, 2010) [hereinafter DOC Offenders on Death Row]; N.C. Dep't of Corr., Persons Removed from Death Row, <http://www.doc.state.nc.us/dop/deathpenalty/removed.htm> (last visited July 1, 2010) [hereinafter DOC Persons Removed from Death Row]. The data presented in this Article corrects a handful of errors found in these documents, which include a few instances of double entries for defendants and several misidentifications of racial categories. Racial descriptions are corrected using other DOC data and amplified as described in specific footnotes. See *infra* notes 266, 268, 272.

35. The RJA also applies to defendants tried on capital charges after the enactment of the statute. See Racial Justice Act, ch. 464, § 2, 2009 N.C. Legis. Serv. 1193, 1194 (West); see also *infra* Part III.E. See Appendix for the full text of the Racial Justice Act.

36. See *State v. Smith*, 305 N.C. 691, 693–98, 292 S.E.2d 264, 266–69 (1982) (detailing Kermit Smith's crimes of kidnapping, raping, and murdering an African American woman which led to his execution in 1995).

37. See *infra* Part II.B.

38. See *infra* Part II.B.2.b.

unconscious discriminatory motivation has taken on greater significance. Such unconscious racial motivation, which is relevant under the RJA, is often particularly important when considering race-of-the-victim discrimination. Finally, this Part examines the continued limited presence of African Americans on juries. While discrimination in the exercise of peremptory challenges is more easily challenged,<sup>39</sup> relatively few African Americans have served on death penalty juries. Moreover, many defendants on death row were tried by juries without any African American members.<sup>40</sup>

Part III analyzes the legal issues involved in the interpretation and application of the RJA. The critical provision of the statute is that “[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.”<sup>41</sup> As noted earlier, the legislature’s decision to allow defendants to present statistical evidence supporting the disparate impact of race regarding the defendant, the victim, and jury selection has enormous significance. It means that, unlike in federal constitutional remedies in criminal law enforcement, proof is not restricted to intentional discrimination. Instead, statistical evidence regarding disparate impact may be used to meet the defendant’s burden for relief. If the defendant presents sufficient statistical evidence, then the burden shifts to the prosecution to rebut the inference of discrimination.

## I. THE HISTORY OF RACE AND EXECUTIONS IN NORTH CAROLINA

### A. *From Slavery to the Twentieth Century*

The death penalty process in North Carolina has changed a great deal since colonial authorities first imposed it with the hanging of a Native American man in 1726,<sup>42</sup> but key features have shown remarkable resilience. This Part briefly explores the interaction of race with the death penalty between that hanging, which occurred

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39. See *Batson v. Kentucky*, 476 U.S. 79, 79 (1986) (“The principle . . . that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded is reaffirmed.”); see also *infra* Part II.B.3.

40. See *infra* note 356 (listing thirty cases of death row defendants whose juries had no African American members).

41. N.C. GEN. STAT. § 15A-2010 (2009).

42. See *Espy File*, *supra* note 8. For an early history of the death penalty and other punishments in North Carolina, see generally DONNA J. SPINDEL, *CRIME AND SOCIETY IN NORTH CAROLINA, 1663–1776* (1989); Albert Coates, *Punishment for Crime in North Carolina*, 17 N.C. L. REV. 205 (1939).

when North Carolina was a colony, and 1910, when the state assumed responsibility for executions.<sup>43</sup> In this period, as in those that followed, the death penalty was used primarily against African Americans, principally in cases where whites were the victims, and upon verdicts by tribunals or juries that excluded African American participation.<sup>44</sup> Although the laws and practices that define the death penalty have changed, the influence of race, though moderated, has endured.

### 1. Colonial Settlement to Emancipation

In this limited space, it is possible to describe only the broad features of the history of slavery and the death penalty. One such feature is clear: those executed were principally African Americans.<sup>45</sup> African Americans, most of them slaves, constituted 71% of the 242 people executed from 1726 to 1865.<sup>46</sup> For the minority of capital cases

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43. See *infra* notes 102–03 and accompanying text.

44. It is difficult to know how many, if any, African Americans served on juries trying capital cases before the end of slavery because of the potential service of free blacks living in the state. However, because the free black population in the state was very small, ranging from less than 1% of the state's population in 1790 to a little more than 3% in 1860, a substantial presence by blacks on capital juries is not a realistic possibility. See North Carolina—Race and Hispanic Origin: 1790 to 1990, <http://www.census.gov/population/www/documentation/twps0056/tab48.pdf>. (last visited July 1, 2010) [hereinafter 1790 to 1990 Census]. Slaves would have been excluded from jury service until the end of the Civil War by the requirement of early North Carolina constitutions that jurors be “good and lawful men.” See N.C. CONST. of 1776, art. IX. The Constitution of 1868 and Reconstruction brought a brief era of black jury participation. One case in eastern North Carolina saw fifty men, twenty-five white and twenty-five black, produced for jury selection. *State v. Holmes*, 63 N.C. 18, 21 (1868). Four African Americans were picked for the jury. *Id.* However, Reconstruction, which ended in stages, was over by 1875. See Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 9–10 (2002) (describing the series of political events that signaled its end). Following this brief period of participation by blacks, examination of cases challenging exclusion of African Americans from jury service suggest that the constitutional command established by *Strauder v. West Virginia*, 100 U.S. 303 (1879), had little effect in putting African Americans on juries during this period. See *id.* at 309 (“It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected . . . without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.”); see also *infra* Part I.B.6.

45. See Espy File, *supra* note 8. Between 1790 and 1870, the African American population ranged from 26.6% to 36.6% of the total population. See 1790 to 1990 Census, *supra* note 44.

46. This figure excludes a group of wartime deserters who were executed in North Carolina in 1864. A total of 172 African Americans and sixty-six whites (excluding the deserters), which constitutes 25% of the total, were executed over this period. See Espy File, *supra* note 8. If the twenty-two white deserters are included, 65% of those executed were African American and 32% were white. *Id.* It is likely that the number of slaves executed under state authority, and certainly with the tacit approval of law, was much higher than this number. In addition to those slaves formally executed, many were killed

that involved white defendants and victims, the death penalty during slavery appears to have functioned much as it did in jurisdictions without slavery.<sup>47</sup> However, executions of whites were relatively infrequent, and periods of up to twenty years passed without the execution of a white person.<sup>48</sup>

These disparities arose in part from the way North Carolina's court system dealt with slaves accused of crimes. Beginning in 1715 and continuing until shortly after statehood,<sup>49</sup> punishment for crimes committed by slaves, including the death penalty, was directed under the state's slave code.<sup>50</sup> The code established a separate tribunal to try slaves, restricting its membership to slave owners.<sup>51</sup> Even after

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by their owners, killed during attempts at apprehending them, killed after being designated as outlaws, or killed during the commission of a crime. See MARVIN L. MICHAEL KAY & LORIN LEE CARY, *SLAVERY IN NORTH CAROLINA, 1748–1775*, at 74, 77, 81–82, 136 (1995) [hereinafter *SLAVERY IN NORTH CAROLINA*] (confirming eighty-six executions of slaves under state authority between 1748 and 1772 alone). The number of slave executions was likely affected by the fact that owners were often compensated for their economic loss. Between 1734, when the colony executed its first slave, and 1789, slave owners appear to have been compensated for more than 80% of confirmed slave executions. See Espy File, *supra* note 8 (listing payments but providing somewhat unclear information because of the use of a single designator for slave compensations paid to owners and fees paid to executioners). However, the frequent compensation to slave owners is well documented. See Marvin L. Michael Kay & Lorin Lee Cary, “*The Planters Suffer Little or Nothing*”: *North Carolina Compensation for Executed Slaves, 1748–1772*, 40 *SCI. & SOC'Y* 288, 306 (1976) (observing that compensation systems insured that “the capital punishment of slaves did not directly harm slave owners economically”).

47. White defendants were executed for crimes against the state and public order, such as counterfeiting, insurrection, and assisting runaway slaves, occasionally against property, such as horse stealing, and most frequently for crimes of violence. See Espy File, *supra* note 8. The execution of whites for aiding runaway slaves provides one clear difference between North Carolina and states without slaves. The death penalty for aiding runaway slaves, like that for insurrection, punished a crime against the state committed by one of its citizens who was a member of the ruling racial majority. See *id.*

48. See Espy File, *supra* note 8. No executions of whites occurred from 1752–1762 and from 1773–1793. *Id.*

49. In 1793, jurisdiction was transferred to the county courts. See Act to Extend the Right of Trial by Jury to Slaves, ch. 5, § 1, 1793 N.C. Sess. Laws 38, 38. In 1816, jurisdiction of felony cases involving slaves was transferred to superior court. See Act to Amend the Laws in Force Respecting the Trial of Slaves in Capital Cases, ch. XIV, § 1, 1816 N.C. Sess. Laws 10, 10.

50. See Act Concerning Servants and Slaves, ch. 46, 1715 N.C. Sess. Laws 21, 21 (creating slave courts). Legislation enacted in 1741, inter alia, gave the tribunal the power, upon a guilty determination, of discretion regarding the sentence imposed: “to pass such judgment upon such offender, according to their discretion, as the nature of the crime or offence shall require.” Trial of Slaves, ch. XLVIII, 1741 N.C. Sess. Laws 65, 65. See generally Ernest James Clark, Jr., *Aspects of the North Carolina Slave Code, 1715–1860*, 39 *N.C. HIST. REV.* 148, 148–51 (1962) (describing early development of the slave code from Virginia law, being compiled in 1712 as the colony's first slave code).

51. See Alan D. Watson, *North Carolina Slave Courts, 1715–1785*, 60 *N.C. HIST. REV.* 24, 25 (1983) (describing slave courts as being made up of justices of the peace, “who were



jurisdiction over slave trials was transferred to the regular courts in the early nineteenth century,<sup>52</sup> slave defendants were tried by juries composed of slave owners.<sup>53</sup> Until the end of the Civil War, slaves were barred entirely from jury service.<sup>54</sup> Free blacks, although extended some protections, were often treated differently than whites under the law, and along with slaves, were subject to the death penalty for rape committed against a white victim, which was not a capital offense if committed by a white man.<sup>55</sup> The role of race in the imposition of the death penalty became particularly conspicuous

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invariably slave owners,” and slave owning freeholders). In proceedings before slave courts and later in regular courts, the testimony of slaves and free blacks was not treated equally with that of whites, who were considered “credible witnesses.” In some situations, such as when testifying against a white, testimony by African Americans was excluded entirely. See Act for Establishing Courts of Law, and for Regulating the Proceedings, ch. 2, § XLII, 1777 N.C. 2d Sess. Laws 203, 217 (allowing African Americans to testify against each other but not against whites); *State v. Ben*, 8 N.C. (1 Hawks) 434, 434–37 (1821) (noting that under prior interpretations of the law a distinction had been drawn between the testimony of a white witness, who was presumed credible, and a slave, whose testimony had to be corroborated because he was not treated by the law as a “credible witness”); Clark, *supra* note 50, at 152–53 (describing testimonial restrictions in various periods and circumstances). Furthermore, conviction rates for accused slaves ran as high as 97%. See SLAVERY IN NORTH CAROLINA, *supra* note 46, at 72; see also Daniel J. Flanagan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J.S. HIST. 537, 538–40 (1974) (describing slave owner rationale for separate slave courts).

52. See *supra* note 49.

53. See *State v. Jim*, 12 N.C. (1 Dev.) 142, 144–45 (1826) (rejecting slave’s challenge to a jury composed of entirely white slave holders on the basis that the practice was required by law and protected not only the slave owner’s property—the defendant—but also protected the slave, who would benefit from the jury’s experience with slaves). In *State v. Patrick*, 48 N.C. (3 Jones) 443, 447 (1856), the Supreme Court of North Carolina ruled that the slave defendant could waive his right to require only slave owners serve on the jury. However, in *State v. Arthur*, 13 N.C. (2 Dev.) 217, 219–20 (1829), it held that the slave defendant could not object to the prosecutor striking prospective jurors for cause because they were not slave owners, which the statutory law specified as a qualification for service on a jury that tried a criminal charge against a slave.

54. Slave status was incompatible with the basic definition of juror eligibility. See, e.g., N.C. CONST. of 1791, art. IX (limiting jury service to “good and lawful men”).

55. Legislation enacted in 1823 clarified that assault with intent to commit rape upon a white woman by any “person of colour” was punishable by death. Act Declaring the Punishment of Persons of Colour, in Certain Cases, ch. LI, 1823 N.C. Sess. Laws 42, 42. Free blacks, although extended some protections in North Carolina courts, were denied much protection, including limitations to their testimony in court. See JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790–1860*, at 82 (1943) (describing how the Supreme Court of North Carolina rejected the competency of a free black as a witness). The law, if enforced, would have given free blacks the right to a trial by jury and the privilege of counsel. See *id.* at 84–86 (describing free blacks’ right to trial by jury and representation by counsel for a variety of offenses). However, “the legal status of the free Negro in North Carolina . . . represented liberalism in some respects, extreme conservatism in others, and contradictions in many.” *Id.* at 95; see also *id.* at 81–101 (describing the complicated legal status of free blacks).

during the execution process. Slaves were sometimes executed more brutally than whites or were mutilated before execution, and their bodies were sometimes displayed after execution as warnings to other slaves.<sup>56</sup>

The disparities between whites and enslaved African Americans under the law found vivid expression in *State v. Mann*.<sup>57</sup> According to this 1829 decision, a slave owner could not be punished for physical assault against his slave,<sup>58</sup> and so masters and those acting under their authority were free to impose discipline short of death outside the courts.<sup>59</sup> They did so often.<sup>60</sup> However, the power of slave owners to punish summarily did not formally include the right to execute.<sup>61</sup> In fact, beginning in 1774, the willful and malicious killing of a slave by any white person was made punishable as a crime, with some significant exceptions.<sup>62</sup> Moreover, many slave owners believed that public executions served an important purpose in deterring

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56. Slaves were sometimes burned to death, *see* Espy File, *supra* note 8 (noting that eight slaves were burned to death between 1760 and 1805), and some who were hanged were first mutilated, including by castration. Nearly half of the slaves executed in the colonial period suffered “comparatively brutal executions.” *See* SLAVERY IN NORTH CAROLINA, *supra* note 46, at 81. Historian Alan Watson describes the court-ordered public display of the severed heads of executed slaves. *See* Watson, *supra* note 51, at 33–34 (1983) (describing orders in two specific cases and noting other decapitations); SLAVERY IN NORTH CAROLINA, *supra* note 46, at 81 (describing the practice generally and noting another instance of beheading); *see also* KIRSTEN FISCHER, SUSPECT RELATIONS: SEX, RACE, AND RESISTANCE IN COLONIAL NORTH CAROLINA 180–81 (2002) (describing castration as a substitute for execution in some cases).

57. 13 N.C. (2 Dev.) 263 (1829).

58. *See id.* at 266 (ruling that a master was not subject to indictment for battery upon his slave, noting that “[t]his discipline belongs to the state of slavery”).

59. *See* James M. Wynn, Jr., *State v. Mann: Judicial Choice or Judicial Necessity*, 87 N.C. L. REV. 991, 1005 (2009) (discussing the anomaly of whether a serious assault was even a crime—based on the fortuity of whether the slave survived the assault; when the slave survived, there was no crime; when the slave died, it was murder).

60. *See* SLAVERY IN NORTH CAROLINA, *supra* note 46, at 73–74 (describing slave owner correction of slaves for various infractions under a system of “plantation justice”).

61. *See id.* at 74–75.

62. Under the 1774 Act, the punishment for the willful and malicious killing of a slave by a white person in the first instance depended upon whether the murderer was the slave owner who was subject to imprisonment for twelve months. *See* Act to Prevent the Willful and Malicious Killing of Slaves, ch. 31, 1774 N.C. Sess. Laws 189, 189. If he was not the slave’s owner, he was also to pay the owner the value of the slave and be committed to jail until he made payment. *See id.* On the second conviction, the murderer was to be sentenced to death without the benefit of clergy, regardless of whether he was the owner or not. *See* Act to Amend 1774 Act, ch. 4, § III, 1791 N.C. Sess. Laws 8, 9. Three exceptions were recognized for such killings: outlawed slaves, any slave in the act of resistance to his owner or master, and slaves dying under “Moderate Correction.” *Id.*

misbehavior among the slave population at large.<sup>63</sup> Thus, the state-sanctioned death penalty was not only the required legal method of executing slaves but also the ultimate method for slave owners to enforce slave discipline. It sealed the strong link between capital punishment, slavery, and race during this period of North Carolina's history.<sup>64</sup>

Race-of-the-victim information has not been systematically gathered for the slave period, but reported cases, historical studies, information about the crimes in question,<sup>65</sup> and the legal status of slave victims as their owners' property show that whites were almost exclusively the victims in cases where executions occurred. The execution of a white person for any crime against an African American was not authorized by law until the 1774 legislation, which made the second conviction for willful and malicious killing of a slave by a white person punishable by death.<sup>66</sup> However, enforcement of this law, and similar laws that followed almost never resulted in execution. For example, the first successful prosecution of a white person charged with murdering an African American did not come until after the enactment of a statute in 1791 that appeared to make the willful and malicious murder of a slave a capital offense.<sup>67</sup> Nevertheless, ten years later, the Supreme Court of North Carolina

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63. The 1715 slave code instructed slave owners to make sure their slaves were executed publicly "to the Terror of other Slaves." SLAVERY IN NORTH CAROLINA, *supra* note 46, at 91; *see also* Watson, *supra* note 51, at 33-34 (noting that masters sometimes brought their slaves to witness executions "in hope of deterring possible future offenders" and describing the public display of decapitated heads as part of the "object lesson" to "impress slaves with the gravity of criminality").

64. How fully the statutory sanctions were enforced regarding lethal violence against slaves by owners is impossible to assess as is quantifying the degree of extra-judicial lethal violence that continued during slavery outside legal executions.

65. In his examination of slave courts, Alan Watson reports that, among cases from 1755 to 1790 in which executions occurred and claims for compensation were filed, "[m]ost of the victims or intended victims were white, though they were infrequently masters or mistresses." Watson, *supra* note 51, at 31 n.27. Also, the nature of the crime offers clues as to the race of the victim. For example, under the law, all executions for rape involved white victims. *See* Espy File, *supra* note 8 (showing African Americans executed for rape in 1831 and 1837); *supra* note 55; *infra* note 77. Also, for the twenty-five African Americans who were executed for slave revolt (twenty-three in 1802 and two in 1831), the "victims" logically should be considered white. *See id.* The executions in 1802 and 1831 followed widely publicized revolts in Virginia led by Gabriel Prosser and Nat Turner. *See* Jeffrey J. Crow, *Slave Rebelliousness and Social Conflict in North Carolina, 1775-1802*, 37 WM. & MARY Q. 79, 79-102 (1980) (describing the 1802 revolt in North Carolina).

66. *See* ch. 31, 1774 N.C. Sess. Laws at 189.

67. *See* § III, 1791 N.C. Sess. Laws at 9.

declared the statute invalid.<sup>68</sup> The legislature enacted a revised statute, and, in 1820, the court affirmed the first white person's death sentence for killing a slave.<sup>69</sup> From then until emancipation, five white men were sentenced to death for murdering slaves.<sup>70</sup> But just one, who murdered a slave belonging to another man, was executed.<sup>71</sup>

During this period, the word "victim," when applied to a slave, did not have its modern meaning. *State v. Hale*,<sup>72</sup> a non-capital case, provides insight into a criminal system that effectively ignored slaves as human victims and instead treated them as the damaged property of their owner, who was considered the injured party or victim. In *Hale*, the Supreme Court of North Carolina approved an indictment for assault upon a slave by a white man other than his master.<sup>73</sup> It justified the prosecution to avoid a breach of the public peace because the assault was "a great provocation to the owner" and also noted that assaults on slaves by whites were usually committed by "men of dissolute habits" from the underclass.<sup>74</sup> The ruling explained that such crimes required punishment because, "[i]f such offenses may be committed with impunity, the public peace will not only be rendered extremely insecure [because it "awakens" the owner's resentment], but the value of slave property must be much impaired, for the offenders can seldom make any reparation in damages."<sup>75</sup> Thus, because of a slave's status as property, when a slave was injured or even killed, his owner was considered the party who suffered the

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68. See *State v. Boon*, 1 N.C. (Tay.) 191, 191–201 (1801) (finding inconsistencies between statutory language and common law usage in capital cases).

69. See *State v. Scott*, 8 N.C. (1 Hawks) 24, 34–35 (1820) (interpreting chapter 18 of the 1817 North Carolina session laws as creating a capital offense); see also *State v. Reed*, 9 N.C. (2 Hawks) 454, 456–57 (1823) (giving statute same application).

70. See *State v. Robbins*, 48 N.C. (3 Jones) 249, 254–55 (1855) (affirming sentence of death for a master who killed his own slave); *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 365, 370 (1839) (affirming death sentence for a master killing his own slave); *Reed*, 9 N.C. at 456–57 (affirming death sentence for the killing of a slave, and although not clearly stated in the opinion, it appears that it was the defendant's own slave); *Scott*, 8 N.C. at 35 (affirming death sentence for killing a slave belonging to another person); *State v. Walker*, 4 N.C. (Taylor) 662, 667–68 (1817) (affirming sentence of death for killing a slave belonging to another).

71. See *Scott*, 8 N.C. at 34–35; Espy File, *supra* note 8 (showing execution in 1820 of Mason Scott, who was nineteen years old). Walker, who also killed a slave belonging to another person, was pardoned. See *Walker*, 4 N.C. at 669.

72. 9 N.C. (2 Hawks) 582 (1823).

73. See *id.* at 582–86.

74. *Id.* at 584–85.

75. *Id.* at 585.

loss.<sup>76</sup> African American slaves were more than diminished victims; indeed, in a modern sense, they were not victims at all.<sup>77</sup>

North Carolina's death penalty law for slaves, although undeniably harsh, was harsher as written than applied in practice: even slave courts handed down fewer death sentences than was within their authority.<sup>78</sup> Furthermore, as slavery ended, the death penalty

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76. See Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 130–31 (1985). The owner's status as the injured party operated as well when the slave was killed, and owners often resorted to civil actions to receive compensation for damages to their property rather than pursue criminal sanctions. See THOMAS MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 203 (1996) (noting the general use of civil actions and that such actions, and the subsequent bypassing of criminal sanctions, frequently occurred when the killing or injury to the slave was committed by someone who had hired the slave from his owner). Outside the narrow confines of the statute, suits were not intended as punishment for the homicide but for recovery of the value of the slave. Clark, *supra* note 50, at 158 (describing security provided to slaves through civil suit while also noting that such suits were intended, not as punishment, but to recover the slave's value).

77. Whether or not rape was a capital offense when committed by an African American man depended on the race of the victim. It was a capital offense when the victim was white but not when the victim was African American. See FRANKLIN, *supra* note 55, at 98–99 (noting that the capital status was based on the defendant's race rather than slave status); *SLAVERY IN NORTH CAROLINA*, *supra* note 46, at 74. In contrast, for instance, when the "victim" was a slave and the perpetrator was a white man, there could be no conviction for fornication or adultery, "because such a woman had no standing in the courts." JOHN SPENCER BASSETT, *SLAVERY IN THE STATE OF NORTH CAROLINA* 28 (Herbert B. Adams ed., 1899), available at <http://docsouth.unc.edu/nc/bassett99/bassett99.html> (providing this "curious case" based on a statement of Supreme Court Justice Ruffin that the case was decided early in the nineteenth century but not published "in the interest of public morality"). If the "victim" slave was owned by a different master than the defendant slave, a criminal prosecution would proceed in theory, as in *Hale*, to support the white owner's interests. When both "victim" and defendant slave were owned by the same master, the master's property interest was divided. Indeed, he would have been obligated to pay for the defense of the defendant slave. See Clark, *supra* note 50, at 152. However, the owner should have had substantial control, particularly for crimes committed on his plantation, over the decision to prosecute. See Watson, *supra* note 51, at 24 (noting that slave discipline within the plantation was generally controlled by the owner or master). In any case, executions served an instrumental interest of the owner "to impress slaves with the gravity of criminality," so masters sometimes brought their slaves to witness the executions, and courts sometimes directed the decapitated heads of executed slaves be publicly displayed. See *id.* at 33. Once in court as a defendant, the slave did, in certain situations, have some recognized independent voice. See *State v. Poll*, 8 N.C. (1 Hawks) 442, 444 (1821) (ruling that when a slave did object to removal of the case to another county, the normal right of the slave owner or lawyer for the slave to consent was not effective). However, as a victim, a slave did not appear to have any ability to seek enforcement of the criminal law or civil remedies. See Clark, *supra* note 50, at 153 (noting that slaves never received the privilege of instituting proceedings in state courts and had to rely on assistance from supportive whites).

78. See Clark, *supra* note 50, at 153, 162–63 (noting that communities sometimes petitioned the governor to grant clemency, that many pardons were granted, and that

was narrowed appreciably. In 1868, the number of capital crimes was reduced to four (murder, rape, burglary, and arson)<sup>79</sup> under statutes applicable to both African Americans and whites.

## 2. Reconstruction to 1910

In the aftermath of the Civil War, North Carolinians had to reinvent their criminal punishment process as emancipation removed slave owners' authority over newly freed African Americans.<sup>80</sup> Seeking to reassert their mastery over these former slaves, white lawmakers passed black codes that limited the rights and controlled the labor of African Americans.<sup>81</sup> At the same time, the federal government offered African Americans practical help in the form of the Freedmen's Bureau,<sup>82</sup> and it promised legal protections with the enactment of the Fourteenth Amendment.<sup>83</sup>

The Fourteenth Amendment was of particular importance to African Americans seeking fuller protection from the law. Senator Jacob Howard of Michigan, who introduced the Amendment, explained that one of its purposes was "prohibit[ing] the hanging of a

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communities increased efforts during the later years of slavery to grant rights to defendant slaves); Watson, *supra* note 51, at 31–33 (describing unanimity in decisions to convict but little uniformity in sentences, even for crimes such as fomenting a slave rebellion, with "the slave courts fail[ing] to mete out the death penalty on a wholesale basis" but generally limiting it to cases within a subset of capital crimes).

79. See N.C. CONST. of 1868 art. XI, §2. See generally Coates, *supra* note 42, at 205–06 (describing progression of capital punishment provisions).

80. EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH 150 (1984). Among the more profound readjustments was the construction of a penitentiary, a move North Carolinians were slow to make. See *id.* at 49–50 (describing North Carolina's referenda votes against construction of a prison); see also N.C. STATE PRISON DEPARTMENT, BIENNIAL REPORT OF THE STATE PRISON DEPARTMENT: JULY 1, 1930 – JUNE 30, 1932, at 7 (1932); Hilda Jane Zimmerman, Penal Systems and Penal Reforms in the South Since the Civil War 30 (1947) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with North Carolina Collection, University of North Carolina at Chapel Hill).

81. See James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HIST. 461, 461–73 (1930) (describing former slave owners' decision to enact black codes and assessing the effects of these restrictions on personal, public, and economic life).

82. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 148–51 (1988) (describing freedmen's belief that the Freedmen's Bureau would protect their new rights); Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 880–81 (1987) (describing freedmen's belief that the Fourteenth Amendment would protect their rights and protect them from violence).

83. See FONER, *supra* note 82, at 256–57 (describing Republicans' intent that the Fourteenth Amendment guarantee federal protection of the rights of freedmen).

black man for a crime for which the white man is not to be hanged.”<sup>84</sup> In addition, congressional hearings addressed the unequal treatment of African American victims, with witnesses recounting the widespread but largely unpunished violence against newly freed slaves.<sup>85</sup> However, as Reconstruction ended, and with it federal protection of black defendants and victims of violence, these concerns were largely abandoned or deferred.<sup>86</sup> When the federal government withdrew from North Carolina, African Americans experienced a resurgence of personal violence and legal discrimination.<sup>87</sup>

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84. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). For more on the black codes and the Fourteenth Amendment, see Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 991–92 (2008).

85. At congressional hearings on the inequities of the southern justice system, an officer stationed in North Carolina from July 1865 until January 1866 testified:

Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons.

REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. 209 (1866). Another officer testified: “There was a case reported in Pitt County of a man named Carson who murdered a negro. There was also a case reported to me of a man named Cooley who murdered a negro near Goldsborough. Neither of these men has been tried or arrested.” *Id.* at 213; see also Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 701, 722, 788 (2002) (describing numerous incidents of unpunished violence against African Americans in the South and, specifically, in North Carolina during Reconstruction and the rise of Klan violence, including an inquiry by the United States Senate specially focused on North Carolina before the establishment of the Senate Joint Select Committee in 1871); Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 20 (2006) (describing unequal application of the law as particularly problematic in failing to prosecute white perpetrators of serious crimes against African Americans).

86. The difficulty of guaranteeing equal treatment for victims and the strength of racial prejudice shortly after the Civil War were shown by *State v. McAfee*, 64 N.C. 339 (1870), in which the court reversed the decision of the trial court to deny defense counsel’s proposal to ask the jurors on voir dire, in the trial of an African American man for rape, whether they could “do equal and impartial justice between the State and a colored man.” *Id.* at 340. In the opinion, Justice Thomas Settle recounted his observations regarding a case, tried shortly after emancipation, in which a victim was an elderly African American killed while doing his farm chores. See *id.* at 340–41; see also ALBION W. TOURGÉE, *A FOOL’S ERRAND* 256–58 (John Hope Franklin ed., Harvard 1961) (1879) (recounting details of the case described by Settle). Prospective jurors were asked if they had any feelings which would prevent them from convicting a white man for the murder of an African American. See *McAfee*, 64 N.C. at 340. Settle recounted that, in addition to the regular panel, the trial court had to order three additional venires of fifty each before he found twelve jurors who did not respond that “they would not convict a white man for killing a negro.” *Id.* at 340–41.

87. See EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 153–59 (1992); LITWACK, *supra* note 11, at 280–325, 445–47.

The use of the death penalty between the end of the Civil War and the beginning of the twentieth century continued to demonstrate the intersection of this violence and racial discrimination. As during slavery, in this period just one white person was executed for a crime against an African American.<sup>88</sup> African Americans represented 74% of the 160 people executed from the end of the Civil War to 1910,<sup>89</sup> even though the African American percentage of the population never exceeded 38%.<sup>90</sup> Other African Americans were victims of another kind of lethal punishment—lynchings. Lynchings, which are discussed further in the next section,<sup>91</sup> became increasingly frequent,<sup>92</sup> brutal,<sup>93</sup> race-based,<sup>94</sup> and southern<sup>95</sup> in the 1880s and 1890s. In some periods, lynchings outnumbered executions.<sup>96</sup>

The influence of race on the death penalty in North Carolina between the colonial era and the twentieth century was complex, yet it is clear that the state's implementation of the punishment was

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88. See Michael L. Radelet, *Execution of Whites for Crimes Against Blacks: Exception to the Rule?*, 30 SO. Q. 529, 533, 539 (1989). In 1880, Daniel Keath was indicted for the murder of a child whose "head was crushed as with a stone, and her body bore marks of violent sexual connection." *State v. Keath*, 83 N.C. 626, 627 (1880). The victim was an eleven-year-old African American. See Radelet, *supra*, at 539; see also *Hanging in Rutherford*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 19, 1880, at 2. The defendant, who had previously served a prison term in Kentucky, was described as "a horse thief, swindler, bigamist (with three wives), and rapist who drank heavily and had deserted from the Confederate Army." Radelet, *supra*, at 539.

89. See Espy File, *supra* note 8. Among those executions in this group in which the defendant's race is shown, the racial composition was as follows: African American—119, White—25, Native American—2, Unknown—14. *Id.*

90. See 1790 to 1990 Census, *supra* note 44.

91. See *infra* Part I.B.1.d.

92. See AYERS, *supra* note 87, at 155–56.

93. See LITWACK, *supra* note 11, at 284–86.

94. See W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930*, at 7–8 (1993).

95. See *id.*

96. Scholars estimate that nearly 2,500 African Americans were killed in lynchings between 1880 and 1930. See LITWACK, *supra* note 11, at 280–325; STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930*, at 17 (1995). Lynchings continued in North Carolina until at least 1941. See BRUCE E. BAKER, *THIS MOB WILL SURELY TAKE MY LIFE: LYNCHINGS IN THE CAROLINAS, 1871–1947*, at 167–70 (2008) (listing confirmed lynchings in North Carolina); Espy File, *supra* note 8 (listing executions in North Carolina for comparison to list of lynchings). The relationship between lynchings and the death penalty is discussed in Part I.B.1.d. On a yearly basis, neither lynchings nor executions in North Carolina were particularly frequent in contrast with some states in the Deep South, but lynchings outnumbered legal executions between the end of the Civil War and the beginning of state-run executions in 1910. See BAKER, *supra*, at 168. In some years during this period, the number of lynchings dwarfed the number of legal hangings: in 1869 there were twenty-three lynchings but just one legal execution, and, in 1888, ten lynchings took place but no executions. See *id.* at 167–70.



cruelly unfair to both African American defendants and victims.<sup>97</sup> From 1726 to 1910, 72% of those executed were African American.<sup>98</sup> Various exceptions that benefitted both white and black defendants reduced the total number of executions;<sup>99</sup> however, operating alongside the systematic exclusion of African Americans from the criminal justice decision-making process, they did not make the system fair or the process just.

### B. *Continuity and Change in a New Era*

This Part examines executions between 1910, when North Carolina transferred authority over executions from counties to the state and replaced the gallows with the electric chair,<sup>100</sup> and 1961, when the state's last pre-*Furman* execution took place.<sup>101</sup> The change from locally conducted hangings to electrocutions at a central location made North Carolina among the region's, and indeed the

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97. Moreover, African Americans were, except for a brief period during Reconstruction, almost totally excluded from jury service. *See supra* note 44 (discussing limited African American presence on juries).

98. Between 1726 (the first recorded legal hanging in the colony) and 1910 (the last hanging under county authority), the record shows that North Carolina executed at least 424 people. Espy File, *supra* note 8. Race of the defendant is known in 404 cases. *Id.* Of these executions, 291 were of African Americans, 110 were of whites, and three were of Native Americans. *See id.* The race of twenty people during this period is unconfirmed. The African American population percentage ranged from 26.8% to 38.0% over the period. *See* 1790 to 1990 Census, *supra* note 44.

99. *See, e.g.*, State v. Jim, 12 N.C. (1 Dev.) 142, 143 (1826) (voiding death sentence for a slave because of the court's enforcement of strict rules requiring the sufficiency of indictments); State v. Boon, 1 N.C. (Tay.) 191, 191–200 (1801) (interpreting a statute that punished the murder of a slave by a white man as a capital offense to be invalid because of a slight imperfection in its use of terminology); State v. Sue, 1 N.C. (Cam. & Nor.) 277, 281–84 (1800) (voiding a death sentence against a slave because the statute applicable to slaves did not specifically provide for punishment and the common law applicable to free men did not carry a death sentence). “[F]ear, compassion, formalism, material security, and recognition of moral qualities played a role in each judicial finding,” creating gaps that allowed for occasional leniency for slave defendants. Reuel E. Schiller, Note, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1251 (1992); *see also* Flanigan, *supra* note 51, at 557–58 (discussing such leniency). Some courts were, however, willing to eschew this so-called formalism in order to protect the interests of the slaveholding class. *See* Sally Greene, State v. Mann *Exhumed*, 87 N.C. L. REV. 701, 727–50 (2009) (discussing the ideological context of the decision).

100. N.C. GEN. ASSEMBLY, SENATE JOURNAL SESSION 1909, at 18 (1909) (noting the introduction of Senate Bill 37 to establish a permanent place in the State Penitentiary for executions and to change the mode of executions to electrocution); Act to Prescribe the Mode of Capital Punishment in North Carolina, ch. 443, § 1, 1909 N.C. Sess. Laws 758, 758.

101. *See supra* note 8 and accompanying text.

nation's, first participants in the process of "delocalization."<sup>102</sup> North Carolina's leaders hoped to regularize the execution process and make it more humane, but their focus lay in how the death penalty was applied,<sup>103</sup> rather than to whom and in what circumstances it was imposed. This Part ends in 1961 when North Carolina executed the last prisoner under the death penalty system later invalidated by *Furman v. Georgia*.<sup>104</sup>

For much of this period, North Carolina law mandated a death sentence for four crimes: first degree murder, rape, first degree burglary, and arson.<sup>105</sup> These mandatory laws were enacted shortly after the end of the Civil War, and it was not until the 1940s that the death penalty for these crimes became a matter of discretionary judgment for the jury.<sup>106</sup> North Carolina's 362 executions during this period placed it sixth nationally and third in the South.<sup>107</sup>

As developed in Part I.A, the death penalty prior to emancipation was principally used for the execution of slaves, thus closely linking the death penalty and race. After the end of slavery, legal structures changed. However, the influence of race on executions from the Civil War to 1910—a period that includes Reconstruction, its termination, and the beginning of the Jim Crow

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102. See WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 37–38 (1974) (describing the movement to state-imposed executions both nationally and in the South).

103. See Trina N. Seitz, *The Killing Chair: North Carolina's Experiment in Civility and the Execution of Allen Foster*, 81 N.C. HIST. REV. 38, 39–40 (2004) (noting belief that the electric chair was more civilized and humane than hanging). In 1936, North Carolina began using the gas chamber to execute criminals. *First Lethal Gas Victim Dies in Torture as Witnesses Quail*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 25, 1936, at 1. For more on this change and its implications, see generally Seitz, *supra*.

104. 408 U.S. 238 (1972).

105. See Adcock, *supra* note 9, at 116 (providing the history of enactment for these four mandatory death penalty crimes through constitutional provision and legislation in 1868 and 1869).

106. See *id.* at 117 (describing how mandatory death sentences were replaced with a discretionary system, first for burglary and arson in 1941, and then for murder and rape in 1949). The mandatory nature of North Carolina's death penalty system likely added to the number of executions, but clear cause and effect is difficult to determine since other parts of that system, such as the frequent grants of clemency, see *id.* at 117–18, seemed to respond to the obvious need to ameliorate its harshness.

107. North Carolina executed 362 people under state authority between 1910 and 1961. The Espy File lists 360 of these executions but does not include the execution of Taylor Love on December 1, 1911, or Edward Floyd on October 25, 1946. See Espy File, *supra* note 8; *Slayer Executed in Gas Chamber*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 26, 1946, at 10; *Taylor Love Pays Death Penalty*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 2, 1911, at 5; DOC Persons Executed in N.C. 1910–1961, *supra* note 8. Additionally, this count does not include the 1910 hanging of Henry Spivey, as Spivey was not executed under state authority. See Seitz, *supra* note 103, at 40 (noting that Spivey's hanging in Elizabethtown was the last judicial, county-based execution in the state).

era—remained strong and pernicious. This influence persisted into the twentieth century, as borne out by events and execution data. Of the 362 people executed, 283 were African American and six were Native American, meaning that 78% of those executed were African American and 80% were minorities.<sup>108</sup> By contrast, 75% of the victims in these cases were white.<sup>109</sup> Census figures show that North Carolina's African American population during this period declined from a high of 32% in 1910 to a low of 25% in 1960.<sup>110</sup> The race-of-the-defendant and race-of-the-victim percentages are so extreme as to make explanation by non-racial factors very unlikely.

### 1. Racial Discrimination Against African American Defendants

The experiences of three African American defendants in capital cases reveal the influence of race on the death penalty in North Carolina. All three men were tried quickly in communities where whites responded angrily to reports of attacks by African American men against white females. Tom Gwyn was executed for rape in 1919, only two months after his crime.<sup>111</sup> Alvin Mansel was convicted of rape in 1925 but later had his sentence commuted and received parole.<sup>112</sup> Larry Newsome was executed for murder and attempted rape in 1928, less than a year after the crime, even though the reversal of his first death sentence required a retrial.<sup>113</sup> These cases reveal the strong, if not uniform, influence of race on the death penalty in the twentieth century.

#### a. Tom Gwyn

On April 29, 1919, Tom Gwyn was arrested for raping Ruth Hildebrand,<sup>114</sup> a sixteen-year-old white girl near Hickory, North

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108. See Espy File, *supra* note 8.

109. See *id.* Race-of-the-victim information is developed from the Espy File, supplemented and corrected principally by examination of contemporary newspaper reports. The race-of-the-victim calculation was performed using the 325 executions during this period where the race of the victim could be confirmed. Of that total, 244 (75%) were white, 78 (24%) were black, and 3 (1%) were Native American. See *id.*

110. Between 1910 and 1960, the percentage of African Americans in North Carolina ranged from 31.6% to 24.5%, declining throughout the period; less than 1% of the population was Native American. See 1790 to 1990 Census, *supra* note 44.

111. See *infra* notes 115–23 and accompanying text.

112. See *infra* notes 125–44 and accompanying text.

113. See *infra* notes 145–64 and accompanying text.

114. Indictment, State v. Gwyn, May Special Term (N.C. Super. Ct. 1919) (on file with the North Carolina Law Review).

Carolina.<sup>115</sup> Gwyn was jailed in nearby Newton shortly after the victim reported the crime, but he was “spirited away,” first to Lumberton and then to an undisclosed location, after a mob broke down the doors of the jail in an effort to lynch him.<sup>116</sup> As Gwyn awaited trial, a local newspaper reported that “there is no longer any doubt that [Gwyn] was the guilty brute” whose “beast-like hands had throttled” the neck of his victim.<sup>117</sup>

The trial occurred at a special term of court<sup>118</sup> less than a month later in Newton. Large crowds gathered around the courthouse, and the Catawba County sheriff summoned all his officers and deputized twenty-five soldiers in the area to protect Gwyn.<sup>119</sup> With tensions running high inside and outside the courtroom,<sup>120</sup> the trial was completed in a single day, even with jury selection taking place that morning and an adjournment for lunch. Jury deliberations took just ten minutes.<sup>121</sup> Gwyn was rushed to the state prison to await his execution.<sup>122</sup> He died in the electric chair on June 27, 1919, less than two months after the crime was reported.<sup>123</sup>

b. Alvin Mansel

On September 19, 1925, Alvin Mansel was arrested for the rape of Lucy Cartee,<sup>124</sup> a thirty-year-old white woman, near Asheville, North Carolina.<sup>125</sup> Although Mansel, “thoroughly frightened,” insisted to a reporter that he was innocent, many Asheville residents thought otherwise, and because the alleged rape was the second such incident in recent days, locals were on edge.<sup>126</sup> That night, sheriff’s deputies saved Mansel from a mob of as many as 1,000 people by

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115. *Mob Attempts to Lynch Negro Accused of Crime*, HICKORY DAILY REC., Apr. 30, 1919, at 1.

116. *Id.*

117. *Negro Thought Girl Would Not Tell*, HICKORY DAILY REC., May 1, 1919, at 1.

118. *Sentence of Death for Negro Assailant*, HICKORY DAILY REC., May 28, 1919, at 9.

119. *Large Crowd at Newton for Trial*, HICKORY DAILY REC., May 26, 1919, at 1.

120. *Gwin [sic] Is Sentenced to Die on June 27*, HICKORY DAILY REC., May 26, 1919, at 1.

121. *Id.*; *Large Crowd at Newton for Trial*, *supra* note 119.

122. *Gwin [sic] Is Sentenced to Die on June 27*, *supra* note 120; *Large Crowd at Newton for Trial*, *supra* note 119.

123. *Tom Gwyn Dies in Electric Chair*, NEWS & OBSERVER (Raleigh, N.C.), June 28, 1919, at 12.

124. *Indictment, State v. Mansel*, 192 N.C. 20, 133 S.E. 190 (1926) (No. 547) (on file with the North Carolina Law Review).

125. *Sheriff Takes Negro from the City as Big Crowd Begins to Form*, ASHEVILLE CITIZEN, Sept. 20, 1925, at 1.

126. *Id.*

secretly removing him from the jail where he had been confined.<sup>127</sup> The deputies took Mansel several hours away to Charlotte,<sup>128</sup> where he remained until his trial date. After returning to Asheville for his trial, he was escorted into the Buncombe County courthouse by armed National Guardsmen.<sup>129</sup> Local whites gathered in large numbers for the trial and were searched for weapons before entering the courtroom; local African Americans were urged to stay out of sight.<sup>130</sup> The presiding judge warned jurors against letting race influence their verdict,<sup>131</sup> and the press opined that the trial would result in the most “perfect expression of right possible for fallible mankind—we should accept it with confidence in its verity and its justice.”<sup>132</sup>

Hastened by night sessions, Mansel’s trial proceeded swiftly.<sup>133</sup> On the morning of November 6, just two days after his arraignment, Mansel was sentenced to death. “I hope to meet you all in heaven,” he said. “I am not guilty, but the jury has come out, and said I was.”<sup>134</sup> Indeed, the facts of the case suggested that Mansel was innocent.<sup>135</sup> For instance, the survivor of the attack had described her assailant as

127. *Asheville Mob Enters Jail in Quest of Negro Prisoner*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 20, 1925, at 1; *Quiet Sunday at Buncombe Jail*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 21, 1925, at 1; *Report of Mob Proves Mistake*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 22, 1925, at 1; *Sheriff Takes Negro from the City as Big Crowd Begins to Form*, *supra* note 125.

128. *Negro Assailant of Woman Is Held in Charlotte Jail after All Night Ride with Mitchell*, ASHEVILLE CITIZEN, Sept. 21, 1925, at 1.

129. *Negro Goes on Trial Today for Attacking White Woman of City*, ASHEVILLE CITIZEN, Nov. 2, 1925, at 1. Preston Neely, another African American man charged with rape, was tried immediately after Mansel, but he was acquitted. *See Preston Neely Goes on Trial for His Life*, ASHEVILLE CITIZEN, Nov. 6, 1925, at 1; *Preston Neely Is Acquitted and Rushed to South Carolina Under Guard*, ASHEVILLE CITIZEN, Nov. 8, 1925, at 1.

130. *See Negro Leaders Advise Race of Present Duties*, ASHEVILLE CITIZEN, Nov. 2, 1925, at 1.

131. *See Fate of Accused Negro Is in Hands of Jury*, ASHEVILLE CITIZEN, Nov. 5, 1925, at 1.

132. Editorial, *Even Handed Justice*, ASHEVILLE CITIZEN, Nov. 4, 1925, at 4.

133. *Alvin Mansel Sentenced to Die in the Electric Chair*, ASHEVILLE CITIZEN, Nov. 6, 1925, at 1.

134. *Id.*

135. Mansel’s attorneys tried to demonstrate that Mansel could not have been present at the scene of the crime, given that witnesses placed him at his workplace, and they apparently had substantial evidence of that alibi. *See* Transcript of Record at 38–45, State v. Mansell, 192 N.C. 20, 133 S.E. 190 (1926) (No. 547) (on file with the North Carolina Law Review) (describing testimony of witnesses that Mansel remained at work during the time of the crime); *id.* at 63–65 (summarizing alibi evidence); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 143 (1987) (describing evidence of Mansel’s likely innocence).

a thirty-five year-old, light-skinned black man.<sup>136</sup> Alvin Mansel was dark-skinned, and he was seventeen years old.<sup>137</sup> The Supreme Court of North Carolina heard Mansel's case a few months later, and, in addition to arguing that Mansel was innocent, the young man's attorneys claimed that Mansel was the target of an effort to meet the demands of the mob with a legally sanctioned but illegitimate execution.<sup>138</sup> The court rejected the arguments and affirmed the conviction.<sup>139</sup>

In a reversal of the sentiments that Mansel's lawyers had decried, four thousand people, including the victim,<sup>140</sup> wrote to Governor Angus MacLean urging that he stop Mansel's execution.<sup>141</sup> MacLean responded, commuting Mansel's death sentence to life imprisonment and stating that only the execution of an innocent was more troubling than the crime of rape.<sup>142</sup> Soon, Mansel's life sentence was reduced to a thirty-year term, and in October 1930, he left prison on parole.<sup>143</sup> The *News and Observer* recognized his supporters for saving him "from being killed for a crime he knew nothing about."<sup>144</sup>

136. See Transcript of Record at 48, *State v. Mansell*, 192 N.C. 20, 133 S.E. 190 (1926) (No. 547) (on file with the North Carolina Law Review) (giving testimony of witness regarding early description).

137. *Id.* at 65–66 (giving judge's summary of defense evidence).

138. The attorneys argued:

Under the circumstances, we respectfully submit the prisoner did not have a fair trial; that it was impossible in the presence of armed Militia to remove the idea from the public generally, including the Jury, that the Court was simply protecting the defendant to the end not that he should have a fair trial, but, that the law should have its course and that the law should execute him instead of the mob. The whole atmosphere of the Court House spoke out and said: "Let the law have him. It will do what ought to be done and let individuals stand back and let it have its way."

Brief of Defendant at 7, *State v. Mansell*, 192 N.C. 20, 133 S.E. 190 (1926) (No. 547) (on file with the North Carolina Law Review).

139. *Mansell*, 192 N.C. at 25, 133 S.E. at 193 (finding no errors of law and affirming the judgment); see also *Supreme Court Decides Alvin Mansel Must Die*, ASHEVILLE CITIZEN, May 28, 1926, at 1.

140. *Woman Victim Pleads to Spare Negro's Life*, WASH. POST, Dec. 12, 1925, at 2.

141. Bedau & Radelet, *supra* note 135, at 143.

142. Application for Pardon of Alvin Mansel (July 8, 1926), in PUBLIC PAPERS AND LETTERS OF ANGUS WILTON MCLEAN, GOVERNOR OF NORTH CAROLINA 1925–1929, at 756 (David Leroy Corbitt ed., 1931).

143. Bedau & Radelet, *supra* note 135, at 143–44 (describing the *Mansel* case).

144. *Mansel and His Benefactor*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 8, 1930, at 1. Meanwhile, although six thousand people—two thousand more than supported Mansel—appealed to Governor MacLean on behalf of the imprisoned members of the lynch mob, the governor announced that he would not pardon them. See Brock Barkley, *McLean Refuses to be Moved by Appeals for Participants in Riot*, ASHEVILLE CITIZEN, Feb. 11, 1926, at 1.

c. Larry Newsome

On December 8, 1927, Larry Newsome was arrested in Wayne County, North Carolina, for the murder of Beulah Tedder, a fourteen-year-old white girl.<sup>145</sup> Although the county physician who examined her body testified that she had not been raped,<sup>146</sup> sheriff's deputies testified that Newsome, while being transported to Goldsboro from the state prison in Raleigh where he had been placed for safekeeping because of a threatened lynching, admitted attempting to rape Tedder and killing her to keep her from telling her father about the assault.<sup>147</sup>

Newsome's trial began in Goldsboro just two days after the murder, starting on Saturday and concluding in an unusual Sunday session of superior court.<sup>148</sup> Given the lynching threat and high tensions in the community, the presiding judge took steps to protect Newsome in case of violence at the trial.<sup>149</sup> Nevertheless, during the testimony of a deputy sheriff, the victim's father and her uncle grabbed Newsome and, joined by others, attempted to drag him from

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145. Tedder's father discovered the body late in the afternoon of that day. *State v. Newsome*, 195 N.C. 552, 553, 143 S.E. 187, 188 (1928).

146. *See id.*; Transcript of Record at 7, *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928) (No. 74) (on file with the North Carolina Law Review). The *News and Observer* went further and reported that the victim had been "criminally assaulted." *Larry Newsome Dies at Prison*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 29, 1928, at 1.

147. *See Newsome*, 195 N.C. at 554-56, 143 S.E. at 188-89 (stating that the evidence "tended to show" that Newsome seized the victim around the waist, but she fought him off and ran from him, and he killed her when he caught her because she said she would tell her father); Transcript of Record at 14-16, *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928) (No. 74) (on file with the North Carolina Law Review) (setting out testimony of Deputy Sheriff J.R. Kornegay describing defendant's confession of crime); *id.* at 16 (providing corroborating testimony of Deputy Carl Smith who witnessed the conversation); *see also id.* at 18 (summarizing testimony of psychiatrist W. C. Linville providing less detailed but similar description of crime). Newsome unsuccessfully challenged the statements to the deputies as involuntary because they were made after the deputies assured him they would protect him, *see Newsome*, 195 N.C. at 556, 143 S.E. at 190, and he unsuccessfully challenged a less detailed admission to a psychiatrist at the state mental hospital that was secured through efforts by his attorney to testify to his mental limitations, *see* Transcript of Record at 18, *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928) (No. 74) (classifying defendant as "high grade moron"), on grounds of physician-patient privilege. *Newsome*, 195 N.C. at 558-59, 143 S.E. at 190-91.

148. *Near Riot Marks Trial in Carolina*, ATLANTA CONST., Dec. 12, 1927, at 2 (stating that the trial included the only known Sunday trial session); *see also* Transcript of Record at 35-36, *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928) (No. 74) (on file with the North Carolina Law Review) (setting out defense attorney's objection under category of "Assignment of Error Not Noted as Exceptions" to the court "ordering a trial immediately after the alleged homicide and before the prisoner could prepare himself for trial").

149. The presiding judge sought to keep secret the news of Newsome's arrival from Raleigh. *See Girl's Alleged Slayer Faces Trial on Sunday*, WASH. POST, Dec. 11, 1927, at 7.

the courtroom to cries of “Take him! Take him!”<sup>150</sup> The sheriff rushed into the crowd, wrestled Newsome away from the victim’s uncle, and took him into the relative safety of the jury room.<sup>151</sup> Returning to the courtroom, he fired two shots into the ceiling to “quell the tumult.”<sup>152</sup> The presiding judge held a pistol on the crowd, warning that “[t]he next man who undertakes to lay hands on this prisoner I will shoot dead” and that “there will not be a lynching here.”<sup>153</sup> As the judge held the crowd at bay, the prosecutor jumped onto a table and rang the courthouse bell—the prearranged signal for members of a waiting military company to give aid—bringing soldiers to the courtroom within a few minutes.<sup>154</sup>

The soldiers formed a cordon around Newsome when the trial resumed on Sunday morning.<sup>155</sup> The defense relied on testimony of a psychiatrist, who found that the defendant had the mental age of a ten to twelve-year-old, to argue that Newsome was incapable of appreciating the nature of the crime and therefore he was not guilty.<sup>156</sup> But after eighteen minutes of deliberation, the jury found Newsome guilty of murder, and after receiving a death sentence, he was rushed from the courtroom and taken to death row.<sup>157</sup> According to the *News and Observer*, the speed of the conviction set a record: it came just sixty hours after the victim’s death.<sup>158</sup>

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150. *Newsome*, 195 N.C. at 576, 143 S.E. at 199 (Brodgen, J., concurring) (quoting from memorandum of trial judge submitted to the Supreme Court regarding events in the courtroom); Transcript of Record at 30–31, *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928) (No. 74) (on file with the North Carolina Law Review) (setting out trial judge’s statement); *Near Riot Marks Trial in Carolina*, *supra* note 148, at 2.

151. *Newsome*, 195 N.C. at 576, 143 S.E. at 200 (Brodgen, J., concurring).

152. *Id.*

153. *Judge Grady, Pistol in Hand, Foils Attempt to Lynch Negro Murderer*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 12, 1927, at 1; *Newsome*, 195 N.C. at 576, 143 S.E. at 200 (Brodgen, J., concurring in result).

154. *Newsome*, 195 N.C. at 576, 143 S.E. at 200 (Brodgen, J., concurring); *Judge, with Pistol, Defies Court Mob at Trial for Life*, WASH. POST, Dec. 12, 1927, at 1.

155. *Judge, with Pistol, Defies Court Mob at Trial for Life*, *supra* note 154.

156. See Transcript of Record at 27–28, *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928) (No. 74) (on file with the North Carolina Law Review) (providing judge’s summary of defense contentions); *Judge Grady, Pistol in Hand, Foils Attempt to Lynch Negro Murderer*, *supra* note 153; *Newsome*, 195 N.C. at 558–59, 143 S.E. at 189 (describing psychiatrist’s testimony regarding defendant’s mental development).

157. See *Governor Lauds Action of Grady in Foiling Mob*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 13, 1927, at 1.

158. See *Judge Grady, Pistol in Hand, Foils Attempt to Lynch Negro Murderer*, *supra* note 153, at 1; *Negro Scheduled for Death Today*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 28, 1928, at 20 (describing the death sentence as coming quickly—within forty-eight hours—of the victim’s death).



On appeal, the Supreme Court of North Carolina denied Newsome's argument that a new trial should be granted because of the attempt to drag him from the courtroom. The decision relied on the trial judge's finding that "during the . . . demonstration, the jury sat in perfect order, and did not appear to be at all disturbed" and concluded that nothing in the record showed that the jury disobeyed the judge's charge not to be influenced by the courtroom incident.<sup>159</sup> However, the court granted Newsome a new trial because the trial court failed to instruct the jury on second degree murder.<sup>160</sup>

Despite the reversal of his conviction and death sentence, Newsome's story does not end like Mansel's. At his retrial, conducted in another county to avoid the "intense feeling" in Wayne County,<sup>161</sup> he was again convicted of murder and sentenced to death.<sup>162</sup> Although his counsel filed a notice of appeal, the appeal was not "prosecuted as required," and the supreme court dismissed it.<sup>163</sup> A little over two weeks later, Newsome was executed.<sup>164</sup> Less than ten months had passed from the discovery of the victim's body to the execution.

These three cases demonstrate not only the impact of race upon the death penalty in this period, but also its complexity. Gwyn and Newsome were quickly sentenced to death in trials pervaded by racial hostility unique to the trials of African Americans accused of crimes against whites.<sup>165</sup> The Supreme Court of North Carolina failed, at

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159. See *Newsome*, 195 N.C. at 565-66, 143 S.E. at 194. Two members of the court disagreed and would have held that the events in the courtroom required a new trial under the principle of *Moore v. Dempsey*, 261 U.S. 86 (1923), that a hurried conviction under mob domination requires the corrective action of new trial. *Id.* at 567-68, 143 S.E. at 194-95 (Stacy, J., concurring); *id.* at 568-75, 143 S.E. at 196-99 (Adams, J., concurring).

160. *Id.* at 564, 143 S.E. at 193-94 (majority opinion) (ruling that failure to submit this charge was error because it was supported by the evidence).

161. Affidavit for Removal at 1, *State v. Newsome* (N.C. Super. Ct. June 5, 1928) (on file with the North Carolina Law Review) (requesting removal to another county "to the end that a fair and impartial trial may be had"); Order at 1, *State v. Newsome* (N.C. Super. Ct. June 11, 1928) (on file with the North Carolina Law Review) (granting removal to Chatham County, North Carolina).

162. See *Larry Newsome Dies at Prison*, *supra* note 146; *Negro Scheduled for Death Today*, *supra* note 158.

163. *State v. Newsome*, 196 N.C. 16, 17, 144 S.E. 300, 300 (1928) (stating also that the Supreme Court found no error on the face of the record).

164. See *Espy File*, *supra* note 8; *North Carolina Negro Dies in Electric Chair*, ATLANTA CONST., Sept. 29, 1928, at 6 (noting the execution date as September 28, 1928). The opinion dismissing the appeal is dated September 12, 1928. See *Newsome*, 196 N.C. at 16, 144 S.E. at 300.

165. By current standards, trials in this period were conducted quickly, but a very different pattern appears in the cases of four executed white defendants: W.Y. Westmoreland; J.T. Harris; and Joe and Gardner Cain, see *Espy File*, *supra* note 8, than

least by any modern standards, to even consider the influence of racial discrimination in these trials. Mansel, first the subject of a rushed trial driven by racial animosity, became the beneficiary of an act of mercy inspired by support from the white community. Mansel's innocence, of course, was overlooked or ignored in the courtroom and continued to be overlooked even after it became evident: Governor O. Max Gardner declined to pardon him despite being "absolutely convinced" of his innocence.<sup>166</sup> Guilty and innocent, executed and spared, these African American men stood trial, received sentences, and mounted appeals in a death penalty system strongly influenced by race.

#### d. Speedy Trials and Death Sentences under the Threat of Lynching

Although cases proceeding from the date of the crime to execution at the pace of Gwyn's or Newsome's were not typical, neither were they unique.<sup>167</sup> Available records show that African

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for African Americans tried in an atmosphere influenced by the actions of a mob. Their trials and appeals were completed over a period of as much as sixteen months and as little as six months with the execution occurring at least a year and, in one case, close to two years after the crime occurred. See *State v. Westmoreland*, 181 N.C. 590, 590, 107 S.E. 438, 439 (1921); *State v. Harris*, 181 N.C. 600, 600-01, 107 S.E. 466, 466 (1921); *State v. Cain*, 178 N.C. 724, 724-25, 100 S.E. 884, 884 (1919); Transcript of Record at 64, *State v. Cain*, 178 N.C. 724, 100 S.E. 884 (1919) (No. 346) (on file with the North Carolina Law Review).

166. *Mansel and His Benefactor*, *supra* note 144, at 1. Mansel spent five years in prison for a crime he did not commit and left prison on parole, a convicted rapist.

167. See *State v. Caldwell*, 181 N.C. 519, 520, 523, 106 S.E. 139, 139, 141 (1921) (describing a speedy trial, with the crime occurring November 21, the trial starting December 2 in Goldsboro, North Carolina, a lynch mob attacking the courthouse that night, and the verdict being received the next evening); Espy File, *supra* note 8 (showing execution of Caldwell, an African American, on October 31); *Lee Washington Dies in Chair*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 29, 1923, at 2 (describing process lasting less than two months from arrest to execution). Even with his successful appeal and retrial, Newsome's execution was less than ten months from the date of the crime. In a number of other cases during this period, African Americans were tried and executed with great speed and in an atmosphere dominated by the threat of mob violence. *Bob Williams Will Die Today*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 1, 1923, at 11 (describing swift trial, under guard, of Bob Williams for murder); *Death Row Inmate Tells His Story of Life, Death*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 5, 1934, at 14 (describing mob pursuit and speedy trial and death sentence of a convicted murderer); *Goldsboro Quiet After Sentence of Five Negroes*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 4, 1920, at 1 (describing a crowd of thousands "clamoring for the blood" of five blacks on trial for the murder of a white man, two weeks after the murder); *His Life Forfeit for a Foul Crime*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 28, 1911, at 5 (describing electrocution of prisoner for rape forty-one days after his arrest); *Nathan Montague in Electric Chair*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 16, 1911, at 5 (describing trial in special term of court for rape and murder that took just four hours; Montague was executed just under two months after his arrest); *Two Executions Scheduled Today*, NEWS & OBSERVER

American men executed in North Carolina, particularly for rape, sometimes evaded lynch mobs or were saved from lynching by local law enforcement officers in order to receive a state-sanctioned execution.<sup>168</sup> These speedy trials, with the suggestion of judicial propriety but with outcomes determined by popular anger, are sometimes termed “legal lynchings.”<sup>169</sup>

Actual lynchings in the South occurred with some frequency in this period, persisting at least until the 1940s.<sup>170</sup> Many scholars view lynchings as a component of a punishment system that included the death penalty. Sociologist David Garland has observed that lynchings, like legal executions, were regularly occurring, scripted public events mounted in response to allegations of serious crime undertaken in the presence of a functioning justice system, and attended and defended

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(Raleigh, N.C.), Dec. 10, 1937, at 11 (describing guilty verdict and death sentence within seventy-two hours of the commission of the crime).

168. Between 1900 and 1941, at least ten of the African American men executed for rape of white women were saved from lynching before their trial. The absence of a description of a mob arrest or near lynching does not mean that such an event did not take place. See Brief for the Defendant at 15, *State v. Arthur Montague*, 190 N.C. 841, 130 S.E. 838 (1925) (describing captor of suspect declaring that he “ought to kill you right here.”); *Howard Craig Pays Penalty*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 5, 1914, at 2 (describing pursuit of suspect by “infuriated whites”); *John Goss Dies Admitting Crime*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 8, 1925, at 9 (noting the need for troops to keep order in the community where the crime took place); *Lee Washington Dies in Chair*, *supra* note 167, at 2 (describing suspect’s capture by posse and need for troops to keep him safe); *Mob Attempts to Lynch Negro Accused of Crime*, HICKORY DAILY REC., Apr. 30, 1919, at 1 (describing effort to lynch suspect); *Negro Boy Ends in Death Chair*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 11, 1931, at 2 (describing pursuit of suspect by a posse of 700); *The Wages of Sin Death by Rope*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 17, 1904, at 1 (describing “enraged” posse and efforts to keep suspect alive for trial); *Will Black Dies in Electric Chair*, NEWS & OBSERVER (Raleigh, N.C.), July 22, 1916, at 2 (noting that there was such anger over a rape that the suspect’s father was lynched); *Will Graham Goes to Death Coolly*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 19, 1906, at 4 (noting “hot pursuit” of suspects and effort to keep him safe after capture). Men suspected of other crimes might also be pursued by armed posses. See, e.g., *Negro West in Swamp Surrounded by Posse*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 8, 1911, at 1 (describing manhunt for murder suspect).

169. For some examples of legal lynchings, see Charles J. Ogletree, *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 55, 59–60 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006). See generally GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865–1940: LYNCHINGS, MOB RULE, AND “LEGAL LYNCHINGS” (1996) (exploring the relationship between “legal lynchings” and other forms of violence against African Americans).

170. See BRUCE E. BAKER, *supra* note 96, at 4. Many instances of mob murder of African Americans were not designated as lynchings. North Carolina’s total placed it above Virginia and Missouri, but it was not among the leaders in lynchings in the South. See S. COMM’N ON THE STUDY OF LYNCHING, LYNCHINGS AND WHAT THEY MEAN 29 (1931).

by respectable members of a community.<sup>171</sup> At the time, many supporters and opponents of lynchings alike saw executions and lynchings as complementary in punishing African Americans for crimes against white victims. Opponents of lynchings, hoping to persuade the mob to let formal justice run its course, argued that courtroom trials could yield the same result as mob killings. Supporters threatened lynching as they demanded death sentences for certain capital defendants.<sup>172</sup> The demand for a lethal result, regardless of how it was reached, undoubtedly affected jurors' decision-making process.<sup>173</sup> As one judge termed it, there was a right way and the wrong way to administer justice,<sup>174</sup> but the outcome was the same.

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171. See David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC'Y REV.* 793, 797–98 (2005) (describing six ways in which lynchings defied conventional wisdom that imagines them as violent acts of criminal deviance). For more on the relationship between these two forms of lethal punishment, see Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBBS TO THE KILLING STATE* 96, 99–106 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 *BRIT. J. POL. SCI.* 269 *passim* (1998); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 *OR. L. REV.* 15, 18 (2002). For more on this relationship in North Carolina, see E.M. Beck, James L. Massey & Stewart E. Tolnay, *The Gallows, the Mob, and the Vote: Lethal Sanctioning of Blacks in North Carolina and Georgia, 1882 to 1930*, 23 *LAW & SOC'Y REV.* 317 *passim* (1989); Charles David Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889–1918*, 21 *LAW & SOC'Y REV.* 361 *passim* (1987).

172. Columnist Nell Battle Lewis wrote that “the mob lynches, the State electrocutes.” Nell Battle Lewis, *Incidentally*, *NEWS & OBSERVER* (Raleigh, N.C.), Sept. 17, 1922, at 6.

173. At Harvey Lawrence's 1930 trial for first degree burglary, his attorney argued that the armed national guardsmen present only heightened a dangerous atmosphere in which Lawrence's fate was clear. Lawrence's attorney described jurors' mindsets thus:

[Lawrence] surely must be guilty of a capital offense, otherwise their demands could not be so pronounced. They want him killed; and if we do not find him guilty of a capital offense so that he may be legally executed, then we have made a gross miscarriage of justice, and the populace will hold us in contempt. To save our own reputations we must by our verdict take his life. Therefore we, for our verdict, find the accused guilty as charged, which finding carried with it a legal death sentence; and we have saved the State a lynching!

Brief for Appellant-Defendant at 4, *State v. Lawrence*, 199 N.C. 481, 154 S.E. 741 (1930) (No. 90) (on file with the North Carolina Law Review). The Supreme Court of North Carolina denied Lawrence's appeal, *Lawrence*, 199 N.C. at 483, 154 S.E. at 742, and he was executed on October 10, 1930, see Espy File, *supra* note 8. Lawrence's crime was first degree burglary and contained the component of sexual threat against a white female victim. See Transcript of Record at 9, *State v. Lawrence*, 199 N.C. 481, 154 S.E. 741 (1930) (No. 90) (on file with the North Carolina Law Review); *infra* Part I.B.2.

174. See *State v. Caldwell*, 181 N.C. 519, 522–26, 106 S.E. 139, 140–43 (1921) (quoting statement of trial judge celebrating the successful efforts to prevent the lynching of the

## 2. Race and Execution for Rape and First Degree Burglary

For two crimes, rape and burglary, the percentage of African American defendants executed was particularly high. The fact that rape was a capital crime at all and the racially disproportionate way in which execution for rape was applied were products of fear among many whites of black male sexual aggression against—or even social contact with<sup>175</sup>—white women.<sup>176</sup> Thus, execution for rape was reserved almost exclusively for black men with white victims. Sixty-seven of the seventy-eight men executed for rape during this period were African American, and among those executions, it is possible to confirm that the victims were white in fifty-eight cases.<sup>177</sup> White men were rarely punished for rape, whether their victims were white or black. No white man was executed for the rape of an African American woman in this period, and just ten whites were executed for

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defendant and adding the endorsement of the appellate court to the trial court's decision to try the defendant in such a charged atmosphere, which was within two weeks of the crime's commission); see also Woodrow Price, *Negro Facing Life Term Confesses Role in Crime*, NEWS & OBSERVER (Raleigh, N.C.), June 28, 1947, at 1.

175. See BOWERS, *supra* note 102, at 56 (suggesting the essential role of race in the death penalty for rape in the South).

176. See JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* 145–49 (rev. ed. 1993) (explaining the unique social role of black-on-white rape in the American South).

177. In the remaining nine cases, the victims were African American in six, Native American in one, and cannot be determined in two. See Espy file, *supra* note 8; *Death Chair Claims Two Confessed Negro Slayers*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 8, 1930, at 14 (identifying murder victim as a “Negress”); *Greensboro Slayer Dies*, NEWS & OBSERVER (Raleigh, N.C.), July 16, 1955, at 1 (noting execution of black defendant without identifying race of victim); *The First Electrocutation Ends Walter Morrison's Life*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 19, 1910, at 5 (identifying race of rape victim was Native American).

The lives of condemned African American men were sometimes spared when their white victims had defied social mores. In other words, in some contexts, the racial subjugation that most often denied blacks protection denied whites protection, too. For example, Governor Cherry in 1947 commuted the death sentences of four African American defendants who raped a white woman, explaining his decision arose from the victim's “failure to observe a sense of propriety.” *Cherry Commutes Terms of Four Robeson Rapists*, NEWS & OBSERVER (Raleigh, N.C.), May 3, 1947, at 1. For more on the complexities of race, rape, and gender in the American South and in North Carolina, see generally LISA LINDQUIST DORR, *WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA, 1900–1960* (2004) (revealing how class and gender could interrupt the standard narrative of white use of the legal system against African Americans in interracial rape cases); ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE AND CAPITAL PUNISHMENT* 51 (1995) (describing the complexities of a case of interracial rape wherein black defendants received consideration contrary to the traditional use of punishment to subordinate African Americans); Diane Miller Sommerville, *The Rape Myth in the Old South Reconsidered*, 61 J. S. HIST. 481 (1995) (revealing that postbellum whites were more fearful of black-on-white sexual violence than were antebellum whites).

particularly horrific crimes against exclusively white victims, most of them adolescents or young girls.<sup>178</sup>

Although the crime of burglary lacks the potent symbolism of rape, it provides a stark example of the racial character of the death penalty during this period, particularly the important impact of both the race of the defendant and the race of the victim. Noted University of North Carolina sociologist Guy B. Johnson explained that execution for first degree burglary represented a response to “a threat” of blacks entering white residences after dark.<sup>179</sup> The connection between burglary and sexual threat was so strong that one condemned burglar won a commutation after Governor Locke Craig determined that there was “no element of rape in this case.”<sup>180</sup> Indeed, of the twelve people who were executed for first degree burglary in North Carolina between 1910 and 1961, all were African Americans, and available reports of the crimes show that the homes they entered were likely exclusively occupied by whites.<sup>181</sup> It is difficult to contest the view widely held among scholars that the execution of African Americans for first degree burglary and rape—and the retention of these capital crimes into the twentieth century, unique to southern and border states—is attributable to race.<sup>182</sup>

These crimes, where race-of-the-defendant and race-of-the-victim effects occur in combination and are exacerbated by the

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178. No recorded case can be found in North Carolina of the execution of a white man for raping an African American woman. Five black men were executed for raping black women. Three of the victims in these cases were young, and one was a respected middle class woman. See Espy file, *supra* note 8.

179. Guy B. Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 95 (1941).

180. Reasons for Pardons, Commutations, and Reprieves, 1912–1917, Locke Craig Papers, G.O. 55, at 371, N.C. State Archives, Raleigh, N.C. North Carolina was among just a handful of states (Alabama, Kentucky, and Virginia) that maintained burglary as a capital crime. See HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 44–45 (rev. ed. 1967).

181. See Memorandum of Race of Victim Information for African Americans Executed from Assorted Newspapers Supplementing Espy Data (on file with the North Carolina Law Review); see also Espy File, *supra* note 8; *supra* note 173 (noting that the case of Harvey Lawrence fit this profile).

182. See, e.g., BOWERS, *supra* note 102, at 56 (attributing the persistence of capital rape in southern and border states to the influence of racial prejudice); see also *McCleskey v. Kemp*, 481 U.S. 279, 332 (1987) (Brennan, J., dissenting) (noting that, although it did not explicitly cite race in its opinion, the Court’s ruling in *Coker v. Georgia*, 433 U.S. 584 (1977), striking down the death penalty for rape was no doubt based on the fact that an extreme majority of those subject to capital punishment for rape were black men, particularly in cases where the victim was white, citing, inter alia, evidence that federally compiled statistics revealed that from 1930 to 1977 Georgia had executed sixty-two men for rape, fifty-eight of whom were black and four were white).

volatile element of sexual assault, present the strongest examples of the effect of race on the death penalty. However, the effect of race on the death penalty in North Carolina was not limited to cases of rape and burglary. Between 1910 and 1961, excluding executions for rape and first degree burglary, African Americans constituted nearly 74% (202 of the 272) of the defendants executed for murder, and in those cases in which it is possible to confirm the race of the murder victims, 62% of these victims were white.<sup>183</sup> Just one white person was executed for a crime, murder, committed against an African American, a result that the *News and Observer* reported was not only a rarity but also a “quirk of fate.”<sup>184</sup>

### 3. Racial Stereotypes of Black Criminality

The depiction of black capital suspects and criminals in North Carolina’s newspapers reveal the social context that made this kind of disparity possible. Newspaper coverage of executions during this period showcased stereotypes about African American criminality.<sup>185</sup> Throughout this period, journalists regularly represented black prisoners as subhuman, including in the *News and Observer*, which reported on nearly every execution conducted in Raleigh. For instance, the paper reported that John Goss “looked the part of the picture that ‘mean nigger’ conjures up.”<sup>186</sup> Goss was “short, squat,

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183. See Espy File, *supra* note 8. It is possible to confirm the race of 179 victims of murders by black defendants. *Id.* Of these, 107 had white victims. *Id.*

184. *Two White Men Face Gas Death Here Today*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 18, 1938, at 1 (reporting that the execution for murder was avoidable but for the “quirk of fate”).

On February 18, 1938, Milford Exum, a white man, was executed for the murder of an elderly, African American basket-maker while robbing him in his home. *Id.*; *State v. Exum*, 213 N.C. 16, 18, 195 S.E. 7, 8 (1938). Neither Exum nor his co-defendant testified, but they offered evidence that they had been drinking heavily and were incapable of the intent required for first degree murder. *Id.* at 21, 195 S.E. at 10. After the jury returned guilty verdicts against both men for first degree murder, with their automatic death sentences, Exum’s co-defendant avoided the mandatory death penalty when the trial judge set aside the verdict and accepted a guilty plea as an accessory, giving the man a life sentence. See *id.* at 18, 195 S.E. at 8. Exum later explained that his intoxication at the time of the murder meant he could remember little that might give the judge reason for mercy. See *Two White Men Face Gas Death Here Today*, *supra*. Instead, he may have missed his opportunity for mercy by gambling on his appeal of a substantial voluntariness issue regarding his incrimination statement without which he may have been acquitted on retrial. See *Exum*, 213 N.C. at 19–22, 195 S.E. at 9–11 (describing challenge to admission of Exum’s statement that was secured when the sheriff agreed to take him from jail in a secret location to meet with his family).

185. See also *infra* Part II.B.2.b (discussing influence of stereotypes and subconscious racism on death penalty decisions in the modern era).

186. *John Goss Dies Admitting Crime*, *supra* note 168, at 9.

thick-bodied, and with the face of a gorilla. Even the eyes were muddy with the diffusion of the color of his skin.”<sup>187</sup> After four shocks in the electric chair, no life remained “in the black carcass,” which was “dumped into a basket” to be taken to a local medical school for dissection.<sup>188</sup>

That men convicted of brutal crimes were described in vile terms would not be notable if not for the fact that white perpetrators received very different treatment. Rather than ascribing white perpetrators’ crimes to innate animal impulse, newspaper coverage of the executions of white criminals who committed similarly horrendous crimes against similar victims was characterized by a good deal more sobriety and even sympathy. For example, according to the *News and Observer*, Claude Shackelford, a white man sentenced to death for raping a ten-year-old girl sat “straight and calm” awaiting his asphyxiation. “He’s a nice-looking fellow,” one witness observed.<sup>189</sup>

#### 4. An African American Call for Equal Treatment of African American Defendants and Victims

The African American community reacted to discrimination in capital cases with demands for equal justice. For example, an editorial in Durham’s *Carolina Times* objected to the fact that African American women received scant protection from the law against sexual violence by white men.<sup>190</sup> The *Times* was a black newspaper, but its editors aimed its words equally at whites, arguing that tolerating white men’s attacks on black women bred general

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187. *Id.*

188. *Id.*; see also *Ed. Dill Groans Between Shocks*, NEWS & OBSERVER (Raleigh, N.C.), June 29, 1923, at 5 (reporting that Ed Dill entered the death chamber “[c]hanting a wildly incoherent incantation that must have echoed the savage death-madness of his tribal ancestors”); *Howard Craig Pays Penalty*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 5, 1914, at 2 (describing a “gorilla-like negro” who “crept like a wild beast upon his innocent, unsuspecting victim”); *Two More Pay Penalty of Death*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 4, 1920, at 1, 2 (describing a lower lip hiding “huge white tusks”). Other portrayals suggest additional stereotypical images. See, e.g., *Asheville Negro Is Electrocutted*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 27, 1918, at 1 (describing eighteen year-old Willie Williams as going to the electric chair “[s]inging happily”).

189. Charles Craven, *State Finally Claims Life of Guilford County Rapist*, NEWS & OBSERVER (Raleigh, N.C.), July 22, 1950, at 1. Murderers received even more generous treatment. See, e.g., *Boy Who Led His Class Dies in Lethal Chamber*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 23, 1939, at 14 (noting that the defendant calmly smoked a cigarette as he made his way to the death chamber and that “no trace of fear appeared in his clear, pale blue eyes”).

190. See Editorial, *Attackers of Negro Women and the Law*, CAROLINA TIMES (Durham, N.C.), Apr. 15, 1939, at 4.



lawlessness in the white community and that fairness would benefit both whites and African Americans. The editor of *The Carolinian*, a Raleigh-based black newspaper, agreed. The paper condemned rape “as one of the most detestable and inexcusable of all felonies. [*The Carolinian*] agrees with the southern white man and any other man worth his salt in calling for severe treatment of every case of actual rape, but entirely regardless of the ramifications of racial lines.”<sup>191</sup> In these and similar statements, African Americans called for punishment that was racially fair to both defendants and victims.<sup>192</sup>

##### 5. The Death Penalty and Race in Pre-*Furman* North Carolina Empirical Research

Given the limited availability of some sources of information on the death penalty system in North Carolina, contemporary scholarship is a boon. This examination benefits from the work of two highly regarded researchers who focused on this basic issue during the 1930s and 1940s.

Sociologist Harold Garfinkel gathered data on homicide cases for an eleven-year period from 1930 through the end of 1940. His study, obtained from superior court records in ten North Carolina counties, covered 673 homicide cases involving 821 defendants.<sup>193</sup> He followed these cases from indictment through sentencing, grouping the results according to race of the defendant and race of the victim combinations. Starting with indicted first degree murder cases available in his data, the death sentences that result include the prosecutor’s decision to charge the case as a capital offense and the jury’s decision to convict for a capital crime.<sup>194</sup> Of course, such basic

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191. See Editorial, *Toward Straight Thinking*, CAROLINIAN (Raleigh, N.C.), Jan. 4, 1947, at 4.

192. See, e.g., *Asks Governor to Commute Sentence to Life*, CAROLINIAN (Raleigh, N.C.), Feb. 22, 1947, at 1; Editorial, *Avoid Hysteria*, CAROLINIAN (Raleigh, N.C.), June 14, 1947, at 4; Editorial, *Governor to Rescue Again*, CAROLINIAN (Raleigh, N.C.) May 17, 1947, at 4; Editorial, *Inviting More Trouble*, CAROLINIAN (Raleigh, N.C.), Aug. 23, 1947, at 4; Editorial, *Justice Not Yet Color Blind*, CAROLINIAN (Raleigh, N.C.), Nov. 2, 1946, at 4; Editorial, *“Miscarriage” Not Unexpected*, CAROLINIAN (Raleigh, N.C.), Aug. 16, 1947, at 4.

193. See Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369, 369 (1948).

194. Prosecutors’ decisions to seek and juries’ decisions to impose capital punishment are covered by the Racial Justice Act. See N.C. GEN. STAT. § 15A-2011(b) (2009) (focusing on whether race was “a significant factor in decisions to seek or impose the sentence of death”). In Garfinkel’s study, prosecutors’ decisions resulted in either the reduction of charges between indictment and trial or the acceptance of guilty pleas to lesser charges, and jury decisions to impose the death sentence were reflected in the

groupings do not control for other variables, but given the magnitude of the differences, they support the proposition that differences in results are the consequence of the groupings themselves.

*Garfinkel Data on North Carolina Homicides, 1930-40*<sup>195</sup>

	Black Defendant & White Victim	White Defendant & White Victim	Black Defendant & Black Victim	White Defendant & Black Victim
Total Cases	51	165	581	24
Indicted as First Degree Murder	48	138	530	17
# of Death Sentences	15	11	15	0
% of Indicted Cases	31.2%	7.9%	2.7%	0%

The data show a tenfold difference in the rate of conviction for capital murder resulting in an automatic death sentence between cases involving black defendants and white victims and those involving black defendants and black victims. White defendant/white victim cases are almost three times more likely to result in death sentences than black defendant/black victim cases. Combining Garfinkel's data to examine race of the defendant differences shows a pronounced difference that explains some of that variation. Black victim cases resulted in death sentences only 2.5% of the time whereas white victim cases did so at a rate of 12.0%.<sup>196</sup>

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verdict of guilty or not guilty of first degree murder, which carried an automatic death sentence. *See* Garfinkel, *supra* note 193, at 371 n.3.

195. These computations are obtained either directly or derived from Garfinkel, *supra* note 193, at 371 tbl.2. In his table, Garfinkel computes similar percentages from all homicide cases rather than from only those that were indicted for first degree murder. Similar analysis of data from the same period and from five of the ten counties that Garfinkel studied was performed in Johnson, *supra* note 179, at 99 tbl.1.

196. There are 216 white victim cases of which twenty-six were sentenced to death. There were 605 African American victim cases, of which fifteen resulted in death sentences. *See* Garfinkel, *supra* note 193, at 371 tbl.2 (presenting data from which these figures are computed).

Sociologist Guy B. Johnson examined the impact of race of the victim on decisions to execute in the years from 1933 through 1939. He found that, in cases with black defendants and white victims, 80.5% of cases resulted in execution as compared with 68.3% of cases with white defendants and white victims.<sup>197</sup> This difference in execution rates reveals the likely impact of the race of the victim in execution outcomes, whatever the race of the defendant. These detailed studies are consistent with the overall results in the data presented in this Part for the entire period.<sup>198</sup>

### 6. African American Jury Participation

The racially disproportionate results for defendants and victims occurred in trials conducted with few if any African Americans on the juries. The exclusion of African Americans from decisions about guilt and innocence began during slavery, when slaves were barred from service even if a slave was the defendant and charged with a crime against another slave.<sup>199</sup> The legal exclusion of newly freed African Americans was remedied as a formal matter by legal changes soon after the Civil War that gave freed slaves a right to sit on juries.<sup>200</sup> However, neither this change in the law nor other legal remedies removed the barriers to African American participation or resulted in actual change.<sup>201</sup> In the first half of the twentieth century, African Americans lacked a meaningful opportunity to serve on juries in North Carolina because they were not included in the jury pool in significant numbers, when not excluded entirely, and therefore had little chance to be drawn from the jury box as a potential juror to be questioned in *voir dire*.<sup>202</sup>

At the beginning of the twentieth century, the Supreme Court of North Carolina granted relief in one case where the defendant alleged

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197. See Johnson, *supra* note 179, at 100 tbl.2.

198. See *supra* notes 108–09 and accompanying text.

199. See *supra* notes 51–55 and accompanying text (noting that, even in the court system, the jury was to be comprised of slave owners).

200. Exclusion from jury service on account of race was eliminated as a legal matter by the enactment of the Fourteenth Amendment in 1868. In 1879, the United States Supreme Court in *Strauder v. West Virginia*, 100 U.S. 303 (1879), struck down a state law that excluded African Americans from jury service, and it declared under the Fourteenth Amendment a clear constitutional right, enforceable against the states, against *de jure* exclusion. See *id.* at 310–12 (ruling that Congress has the power, as it did, to authorize enforcement of this right by removal to federal court).

201. See *supra* note 44.

202. See *infra* notes 212–16 and accompanying text.

purposeful exclusion of African Americans from the venire and the state had no explanation.<sup>203</sup> The court's language was unequivocal:

It is incomprehensible that while all white persons entitled to jury trials have only white jurors selected by the authorities to pass upon their conduct and their rights, and the negro has no such privilege . . . . How can the forcing of a negro to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race purely and simply because of color, although possessed of the requisite qualifications prescribed by the law, be defended? Is not such a proceeding a denial to him of equal legal protection? There can be but one answer, and that is that it is an unlawful discrimination.<sup>204</sup>

However, inclusion of African Americans in the venire, and particularly participation in rough approximation to their proportion of the population of a jurisdiction, did not follow from this court ruling.<sup>205</sup>

Exclusion resulted from superficially neutral jury qualification provisions, combined with discretionary discriminatory practices. The statutory requirements for jury service during the first half of the century were simple, and on their face, they were not racially discriminatory: (1) payment of taxes for the preceding year; (2) good moral character; and (3) sufficient intelligence.<sup>206</sup> The first requirement had the effect of excluding a large percentage of African Americans from jury service.<sup>207</sup> The other two requirements permitted the exercise of virtually unlimited discretion through which officials could exclude African Americans without effective challenge,

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203. *See State v. Peoples*, 131 N.C. 784, 784–91, 42 S.E. 814, 814–16 (1902) (reversing conviction based on challenge to grand jury composition, alleging use of jury list that was revised with partiality to exclude African Americans in Mecklenburg County, which had a one-third African American population who were qualified to serve under statutory requirements); *see also State v. Perry*, 248 N.C. 334, 335–39, 103 S.E.2d 404, 405–08 (1958) (reversing conviction where defendant alleged and supported with an affidavit that African Americans had been systematically excluded from grand jury service and from the grand jury that indicted him in Union County and the claim was denied without sufficient time to investigate).

204. *Peoples*, 131 N.C. at 790, 42 S.E. at 816.

205. It was not until after World War II that the Court granted relief when those responsible for jury selection produced evidence of non-discriminatory application of procedures regardless of their substantial disparate impact on African American participation. *See supra* note 27 and accompanying text.

206. *See Peoples*, 131 N.C. at 788, 42 S.E. at 815.

207. *See, e.g., State v. Daniels*, 134 N.C. 641, 643–44, 46 S.E. 743, 744 (1904) (noting that there were only 528 African American males over the age of twenty-one in Jones County who had paid taxes the previous year out of a total African American population of 3,760).

unless the use of explicit racial grounds for exclusion was admitted.<sup>208</sup> Wide disparity between the proportion of African Americans in the county and the proportion in the venire generally resulted,<sup>209</sup> and “the well known fact” that a higher proportion of whites qualified for service constituted a satisfactory basis for accepting exclusion of African Americans from the venire.<sup>210</sup> Instead, courts focused on the neutrality of the final selection process by having a child pick names from a box.<sup>211</sup>

Reported cases where practices were challenged come from a number of counties and demonstrate the widespread and extreme underrepresentation of African Americans: few were included in most venires and those few might all have been deemed unqualified,<sup>212</sup> never being selected to be questioned on voir dire for potential jury service. However, by mid-century, aided by the elimination of payment of taxes as a prerequisite to service,<sup>213</sup> the

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208. *See id.* at 645, 46 S.E. at 745 (finding procedures valid where commissioners making eligibility decisions “discussed the qualifications of various negroes and white men and rejected their names when they decided they were not competent or fit” and did not “think of or discuss the race question”). When the commissioners responsible for producing the names of county residents from which the venire was selected denied the allegation of intentional discrimination and showed any inclusion of African Americans on the venire from which either the grand jury or the petit jury was picked, relief was denied. *See State v. Perry*, 250 N.C. 119, 129, 108 S.E.2d 447, 452 (1959) (finding no violation where two African Americans served on grand juries in Union County over the course of eight years); *State v. Henderson*, 216 N.C. 99, 104, 3 S.E.2d 357, 360 (1939) (finding it sufficient that a number of names were added to the jury box in New Hanover County two years earlier).

209. *See State v. Koritz*, 227 N.C. 552, 553–54, 43 S.E.2d 77, 79 (1947) (finding no violation despite the fact that only 255 names of African Americans were in the jury box out of 4,900 eligible African Americans in Forsyth County); *State v. Walls*, 211 N.C. 487, 493, 191 S.E. 232, 237 (1937) (finding no violation where the names of only 650 African American were included in the jury box as compared with 10,000 names of whites in Mecklenburg County when local officials denied intentional discrimination despite their use of different colors of ink to designate jurors by race, the explanation being accepted that the colors made it helpful if the name were selected to “know whether to look for a white man or a colored man”).

210. *See Speller v. Crawford*, 99 F. Supp. 92, 97 (E.D.N.C. 1951) (recognizing “the well known fact” that the proportion of African Americans qualifying for jury service in rejecting claim of purposeful discrimination based on proportion included in jury box).

211. *See Walls*, 211 N.C. at 494, 191 S.E. at 238 (“A more perfect system could hardly be devised to insure impartiality,” which was the statutorily mandated selection system specified in N.C. GEN. STAT. § 9-3 (1943)).

212. *See State v. Lord*, 225 N.C. 354, 355, 34 S.E.2d 205, 206 (1945) (rejecting defendant’s complaint that all African Americans in the venire were successfully challenged by the prosecutor for cause as not being “freeholders” in Cabarrus County where the trial was held).

213. *See Perry*, 250 N.C. at 125, 108 S.E.2d at 451–52 (describing changes in statutory requirements enacted in 1947 in response to a state constitutional amendment adopted in 1946 that made women eligible to serve on juries).

number of African Americans in the venire began to increase.<sup>214</sup> Thereafter, the reported cases began to reflect that some African Americans served on grand juries that indicted,<sup>215</sup> or on petit juries that convicted the defendant.<sup>216</sup>

Thus, by the middle of the twentieth century, the entry-way barrier to meaningful participation—inclusion of African Americans in the jury pool—was beginning to fall. In a series of subsequent cases, the United States Supreme Court demonstrated a sustained interest in enforcing equal protection at this point in the selection process.<sup>217</sup> Using statistical evidence on differences between identifiable groups in the jury pool and the population and burden shifting, along with other factors,<sup>218</sup> the Court's ruling had the effect

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214. See *State v. Speller*, 231 N.C. 549, 550, 57 S.E.2d 759, 759 (1950) (including seven African Americans in venire selected from Vance County); *State v. Reid*, 230 N.C. 561, 562, 53 S.E.2d 849, 850 (1949) (noting that four or five African Americans were summoned for the trial venire in Wilson County where the defendant was tried).

215. See *State v. Brown*, 233 N.C. 202, 205, 63 S.E.2d 99, 101 (1951) (noting that one African American served on the grand jury that indicted the defendant in Forsyth County); *Reid*, 230 N.C. at 562, 53 S.E.2d at 850 (noting that one African American served on the grand jury in Wilson County where the defendant was indicted and tried).

216. In *Miller v. State*, 237 N.C. 29, 74 S.E.2d 513 (1953), a case involving an African American executed in 1953 for murder, three African American jurors served on the jury. *Id.* at 40, 74 S.E.2d at 521. In *State v. Roman*, 235 N.C. 627, 70 S.E.2d 857 (1952), four African Americans served on the jury that convicted the defendant executed in 1953 for murder. *Id.* at 628, 70 S.E.2d at 857; *cf. Brown*, 233 N.C. at 205, 63 S.E.2d at 101 (noting that the defendant, who was executed in 1953, was tried by a jury containing no African Americans, but also noting that one African American was tendered to the defendant for service but excused by his counsel). Moreover, Clyde Brown, who was executed in 1953, was denied relief even though the statutory command was not followed and only names on the previous year's tax lists were used because intentional exclusion, which, the court required, was not shown. *Id.* at 206, 63 S.E.2d at 101 (stating that there was no right to relief in the absence of a showing of intentional exclusion and that the statute's provisions were "directory, and not mandatory, in the absence of proof of bad faith"); see also *Miller*, 237 N.C. at 46, 74 S.E.2d at 525 (stating there was no constitutional basis for a challenge based on disproportionate representation as to jury service).

217. See *Batson v. Kentucky*, 476 U.S. 79, 84 n.3 (1986) (listing some of the "numerous decisions of this Court" related to the issue).

218. A number of cases set the foundation for this body of law. See, e.g., *Sims v. Georgia*, 389 U.S. 404, 407–08 (1967) (per curiam) (ruling that procedures purportedly implementing neutral statutes are void when the results demonstrate substantial disparities between racial composition of the lists used and the resulting venire); *Whitus v. Georgia*, 385 U.S. 545, 548–49 (1967) (same); *Norris v. Alabama*, 294 U.S. 587, 598–99 (1935) (declaring a practice invalid that assumed members of the defendant's race were not qualified to serve). Others developed the operative standard that is generally applied in contemporary litigation. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (setting out three-factor test). Finally, the Court has explained the place of these cases in its framework for use of statistical evidence, disparate racial impact, and burden shifting. See *Batson*, 476 U.S. at 85–87 (basing justification for rigorous adherence to broad and equal inclusion on the requirement that the jury represent the broader society and its various

of requiring the use of broadly inclusive lists of the jurisdiction's eligible jurors to make up the jury pool from which venires are selected.<sup>219</sup> The result neither eliminated deviations between the African American percentage in the population and in the jury pool nor ended legal challenges on this issue,<sup>220</sup> but more African Americans began making their way into the jury pools as a result of changes in the law and practice. Nevertheless, progress in removing this previously critical legal barrier did not eliminate the effect of race in jury selection. Instead, as examined in the next Part, exclusion through peremptory challenges provided a new barrier to African American participation on juries.<sup>221</sup>

### 7. Race and the Death Penalty 1910–1961 and Implications for the Present

Between 1910 and 1961, race played a major role in the use of the death penalty in North Carolina. The influence of overt racially motivated community conduct, the disproportionate execution of African American defendants, and the equally disproportionate use of the death penalty in cases where the victim was white demonstrate the remarkable continuity in the racially prejudicial application of death sentences over the course of this period. Indeed, despite substantial changes in legal structures, not to mention enormous social and political changes, execution patterns remained largely unchanged between the colonial period and the dawn of the civil

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components); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (justifying this virtually automatic finding by the fact that “[i]t is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds”).

219. For example, counties in North Carolina have compiled their master list using lists of taxpayers, registered voters, and those with driver's licenses. See *State v. McCoy*, 320 N.C. 581, 584, 359 S.E.2d 764, 766 (1987) (noting that Rutherford County used voter registration and driver's license lists); *State v. Avery*, 299 N.C. 126, 129, 261 S.E.2d 803, 805 (1980) (noting use of tax and voter registration lists in Mecklenburg County).

220. See, e.g., *Avery*, 299 N.C. at 134–35, 261 S.E.2d at 808 (rejecting challenge where disparity between population percentage and inclusion in the jury pool approached but was less than 10%); see also *State v. Golphin*, 352 N.C. 364, 394, 533 S.E.2d 168, 192 (2000) (noting that claims had been rejected in the state with absolute disparities of over 10%).

221. See *infra* Part II.B.3. A similar discretionary selection issue also arose as to racial discrimination in selection of a grand jury foreman by the superior court judge who selects the foreman. See *State v. Cofield*, 320 N.C. 297, 309, 357 S.E.2d 622, 629 (1987) (finding discrimination in the selection of one African American foreman out of thirty-three chosen over an eighteen year period in a county that had a 61% African American population).

rights era, demonstrating the resilient, and indeed dominant, power of race on the death penalty.

Historical evidence unmistakably demonstrates the enduring influence of racial prejudice on the death penalty process and its persistent impact well into the twentieth century. This evidence includes the mandatory death penalty for rape and burglary, a punishment almost exclusively reserved for African American criminals with white victims; the imposition of death sentences for all crimes on African Americans in vast disproportion to their percentage of the population; and African Americans' consistent outsider status in the criminal justice process, maintained most effectively by their exclusion from jury service.<sup>222</sup> The endurance of race as a defining factor in the state's death penalty system suggests the tendency of the influence of racial prejudice to persist despite legal changes designed to eliminate it and social and political changes that diminish its acceptability.

This Article next turns to an examination of the changes that occurred in the death penalty structure and the judicial principles intended to guide discretion and limit discrimination after the Supreme Court's decision in *Furman*. It concludes with an examination of the RJA. The next Part does not reach a conclusion regarding the persistence of the influence of racial prejudice into the modern period. Instead, it examines not only the potential of legal changes to reduce the role of race in the death penalty, but also the clear opportunities for racial prejudice to continue to influence that process. The central question that this analysis poses is whether the powerful force of racial discrimination has finally been eliminated. The answer to that question will come through the operation of the RJA.

## II. THE DEATH PENALTY AND RACE

*Furman v. Georgia*<sup>223</sup> set aside the existing death penalty system and demanded the creation of a new system.<sup>224</sup> The changes were indeed substantial. However, as demonstrated below in Part II.A, the new legal framework did not eliminate the exercise of discretion and

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222. The one exception that proved the rule occurred when juries were briefly integrated under federal military rule. *See supra* note 44. As the period ended, some promise existed that under federal constitutional command African American participation on juries would increase. However, as seen in Part II.B, those promising developments were limited by the continued use of peremptory challenges.

223. 408 U.S. 238 (1972).

224. *Id.* at 240.



judgment by prosecutors and jurors. Instead, opportunities continued for racial motivation to operate through the expansive scope of death-eligible cases and the loose definition, multiplicity, and frequent presence of aggravating factors upon which a death sentence could be charged and imposed under North Carolina law.

Part II.B examines the results of the death penalty process after *Furman*, which, as of July 1, 2010, had placed 159 defendants on death row. It focuses in turn on issues of race as they affected which defendants were sentenced to death and how jurors were excluded through peremptory challenges. This examination reveals an intriguing pattern of some change or moderation but also substantial continuity.

### A. *The Legal Framework of the Modern Death Penalty*

In 1973, the year after the *Furman* decision, the Supreme Court of North Carolina ruled in *State v. Waddell*,<sup>225</sup> which involved a conviction for rape, that the portion of the rape statute that gave the jury discretion on the sentence was unconstitutional. However, with that provision eliminated, the statute survived as a constitutional mandatory death penalty statute for rape. The court applied the same rationale to recast the murder statute as similarly requiring a death sentence upon a conviction for first degree murder.<sup>226</sup> In 1974, the North Carolina General Assembly followed the court's lead and enacted a statute that made the death penalty mandatory for first degree murder,<sup>227</sup> which was invalidated as noted above<sup>228</sup> by the United States Supreme Court in *Woodson*.<sup>229</sup> The legislature then enacted a new death penalty statute that adopted aspects of the

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225. 282 N.C. 431, 194 S.E.2d 19 (1973).

226. *Id.* at 445, 194 S.E.2d at 28–29.

227. The murder statute, N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975), defined first degree murder and stated that it “shall be punished with death.” A similar statutory form was adopted for rape. *See* N.C. GEN. STAT. § 14-21 (Cum. Supp. 1975).

228. *See supra* notes 14, 29–31 and accompanying text (discussing North Carolina's mandatory death penalty provision and its subsequent invalidation).

229. *Woodson v. North Carolina*, 428 U.S. 280 (1976). A mandatory death penalty could theoretically reduce the impact of race on the death penalty. *See, e.g.,* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1434 (1988) (arguing that one potential remedy for the racial disparities found in *McCleskey* would be for the Court to revise its rejection of mandatory death penalties for specified crimes although questioning whether it would eliminate race-of-the-victim discrimination since juries would likely continue to extend greater leniency to killers of African Americans). *But see* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 160–61 (1996) (“Even a mandatory system does not eliminate prosecutorial and police discretion, jury nullification, or bias built into the definitions of the underlying crimes.”).

systems approved by the United States Supreme Court,<sup>230</sup> which, with some modifications, is the present-day law.<sup>231</sup>

The command of *Furman* combined with *Woodson* was to constrain discretion but not to do so woodenly. The result, as developed below, was the creation of a statutory structure that imposed some restrictions on discretion but permitted substantial leeway in interpretation and application, allowing the continuation of both substantial discretion and broad definitions of death eligible cases. However, in a way that was unusual among the states, North Carolina attempted to strictly restrain the prosecutor's discretion. In its interpretation of the state's death penalty statute, the Supreme Court of North Carolina sought to impose a different mandatory element requiring trial of death-eligible cases by restricting prosecutorial discretion in plea bargaining. The court prohibited plea agreements to first degree murder with a resulting sentence of life imprisonment in cases where the evidence established an aggravating factor because the plea agreement avoided a jury verdict on whether the death penalty should be imposed.<sup>232</sup> That restriction, which could be evaded at greater cost to the prosecution's interest to punish severely those who commit first degree murder,<sup>233</sup> was eliminated by

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230. See *State v. Barfield*, 298 N.C. 306, 343–55, 259 S.E.2d 510, 537–44 (1979) (comparing aspects of the North Carolina statute to various aspects of Georgia's, Texas's, and Florida's systems in finding it constitutional).

231. See N.C. GEN. STAT. § 15A-2000 (2009).

232. This restriction was either unique to North Carolina or quite uncommon. In *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979), Justice James Exum rejected the defendant's claim that the trial judge erred by refusing to approve a plea agreement whereby the defendant would plead guilty to first degree murder and the state would recommend a life sentence. *Id.* at 77–80, 257 S.E.2d at 619–20. The court ruled that the intention of the legislature, as manifested in the capital punishment statute's language, was to submit the question of sentencing to the jury whether guilt was determined after trial or upon a guilty plea and that the alternative sought by the defendant might make the statute unconstitutionally arbitrary or impose an unconstitutional additional burden on a defendant exercising the constitutional right to trial. *Id.*; see also *State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991) (finding reversible error where the State agreed not to submit an aggravating circumstance in return for the defendant's plea to felony murder because to permit such discretion would render the statute arbitrary and therefore unconstitutional).

233. Under the court's interpretation, a guilty plea that avoided a death penalty in a first degree murder case could only be imposed if the plea was to a reduced charge, such as second degree, or no statutory aggravating factor was found by the prosecutor. See *State v. Britt*, 320 N.C. 705, 710–11, 360 S.E.2d 660, 662–63 (1987) (ruling that, although not having the discretion to determine whether a first degree murder case was capital or not capital, the district attorney could declare the cases non-capital where the record showed no evidence of an aggravating factor). The alternative of a second degree murder plea was occasionally employed, although it had the cost of reducing the potential sentence and the severity of the crime too much to satisfy the prosecutor's interest in public safety, which

legislation in 2001.<sup>234</sup> The effect of limiting discretion appears to have been that many defendants were placed on death row unnecessarily since a death penalty trial often could not be avoided by a plea bargain acceptable to the prosecution.<sup>235</sup>

### 1. The Continued Operation of Discretion under Expansive Definitions of Death-Eligible Murders

*Furman*, on its face, appeared to demand a radical departure from the previous system that was characterized by a death penalty broadly applicable to murder and to some additional crimes, chiefly rape, and gave largely unfettered discretion to the jury as to its imposition.<sup>236</sup> Although the system has been changed to limit jury

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sometimes made a plea bargain unreachable even in a case without any real contest on the issue of guilt.

This mechanism of a prosecutor who failed to submit an aggravating fact when it was arguably, but not clearly, available reputedly occurred, although at some point it was not legally authorized, *see id.* at 711, 360 S.E.2d at 663 (stating that the failure to submit an aggravating factor must be based on a genuine lack of evidence), and in cases where an aggravating factor was clear, it was not an option. Using this mechanism could be justified by the public interest in not only the certainty of a conviction but a conviction for first degree murder with the ensuing heavy sentence while avoiding the cost of a trial. For the defendant, it had the disadvantage of a certain conviction by the plea of guilty, but it avoided any risk of a death penalty.

234. Title 15A, section 1004 of the General Statutes of North Carolina, which explicitly gave prosecutors the discretion to try a first degree murder capitally or noncapitally regardless of the presence of aggravating factors and to agree to accept a plea of guilty and a sentence of life imprisonment for such a capital felony, became effective on July 1, 2001. It has not been challenged successfully on constitutional grounds, and there is little reason to believe the argument meritorious.

235. How much this restriction did to limit arbitrariness in the entire system, particularly with the authorized and unauthorized mechanisms for avoidance, is unclear. A major indirect impact was apparently the large number of death sentences during the period this interpretation was operative among cases that might never have gone to trial if the alternative of a guilty plea had been available. The differences are dramatic, and the likely important impact of the legal change in reducing unnecessary death sentences is hard to discount. The change became effective on July 1, 2001, and for simplicity, that transition year (fourteen death sentences) is omitted. In the eight years from 2002 through 2009 after enactment of the law, defendants were sentenced to death in thirty-four cases for an average of 4.2 death sentences a year; in the eight years before 2001, defendants were sentenced to death in 194 cases, for an average of 24.2 a year. *See* DOC Offenders on Death Row, *supra* note 34; DOC Persons Removed from Death Row, *supra* note 34; *see also* Adcock, *supra* note 9, at 137-46 (describing reasons, including the statutory change noted above, for the decline in death penalties imposed in North Carolina beginning in 1997).

236. *See generally* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 364-66 (1995).

discretion to a narrower group of murder cases<sup>237</sup> and procedural regulations have been imposed, the overall general pattern nationally and in North Carolina is that death eligibility remains remarkably broad.<sup>238</sup> The broad reach of the death penalty statute is particularly important with respect to the potential impact of race because researchers have found race to have little impact on the “worst” murders and murderers. In such cases, a death sentence is regularly imposed irrespective of race, but on those that are in an intermediate or low range of aggravation and culpability, sentences are more variable and discretionary and race plays a potentially decisive role.<sup>239</sup>

In *Furman*, the United States Supreme Court commanded that theoretically the death penalty was to be limited to those most deserving of receiving it, which is termed a “just deserts” theory.<sup>240</sup> The narrowing of death eligible cases was intended to eliminate the problem of “over inclusion” and help ensure that the death penalty was only sought and imposed on those for whom the larger political community believed it was merited.<sup>241</sup> The Court ultimately authorized narrowing death eligible cases either through a restricted definition of capital murder, or by identifying aggravating factors beyond the definition of capital murder,<sup>242</sup> with North Carolina choosing the latter method.

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237. See *Kennedy v. Louisiana*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2641, 2650–51 (2008) (ruling that the death penalty could not be imposed under the Eighth Amendment for the aggravated rape of a child where death did not result and was not intended); *Coker v. Georgia*, 433 U.S. 584, 660 (1977) (eliminating the death penalty for the rape of an adult). The application of the death penalty to extraordinary crimes, such as terrorism, that do not actually involve death but threatened it on a massive scale has not been determined and may prove constitutional.

238. See Steiker & Steiker, *supra* note 236, at 373 (arguing this point and stating that “indeed, [eligibility is] nearly as broad as under the expansive statutes characteristic of the pre-*Furman* era”); see also Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2095–106 (2004) (describing the post-*Furman* death penalty system as characterized by four factors, which play central roles and permit the continued influence of racial discrimination: (1) broad application of the death penalty to non-negligent homicides; (2) decentralized decision-making by prosecutors and juries; (3) extreme deference by courts to prosecutors in charging and plea bargaining; and (4) expansive discretion afforded to capital sentencers).

239. See David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1456 n.166 (2004) (setting out studies); Howe, *supra* note 238, at 2098–99; *infra* note 318 and accompanying text (discussing how further narrowing can eliminate or substantially curtail racial discrimination).

240. See Howe, *supra* note 238, at 2139–43.

241. See Steiker & Steiker, *supra* note 236, at 364–66, 372.

242. As to the function of aggravating factors in narrowing, see *Zant v. Stephens*, 462 U.S. 862, 877 (1983), which found that requiring the jury to find an aggravating factor in

Two aspects of the system that the United States Supreme Court approved allow the definition of capital murder to broaden despite the intended effort to narrow it. This broad definition permits discretion to be exercised by the prosecutor in the charging decision and by the jury in its decision to impose the death penalty. The first is that some approved aggravating factors are vaguely defined, potentially expandable, and allow the exercise of largely undefined judgment.<sup>243</sup> The second is that the United States Supreme Court placed no limitation on the number of aggravating factors that could be authorized, some of which may be individually quite broad.<sup>244</sup>

## 2. The Broad Range of Circumstances that Permit Murder Cases to be Charged Capitally and Juries to Impose the Death Penalty

If only certain types of cases, objectively determined, could be submitted to the jury for its judgment as to whether death was the proper punishment, then prosecutorial discretion to charge inappropriate cases and juries to sentence in inappropriate cases could be eliminated, solving the problem of over-inclusion.<sup>245</sup>

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addition to guilt worked to “genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”

243. See Steiker & Steiker, *supra* note 236, at 373.

244. See *id.* at 373–74. The actual narrowing impact of the Court’s apparent restrictions was further diminished when it ruled that, if the jury reached a death verdict utilizing an invalid aggravating factor, the death sentence could still be affirmed upon an appellate court’s determination that the error was harmless. See *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990) (ruling that where error occurs in submission of an aggravating factor the result may be affirmed if the state appellate court engages in either harmless error analysis or reweighing of aggravating and mitigating factors); see, e.g., *State v. Anthony*, 354 N.C. 372, 433–34, 555 S.E.2d 557, 596 (2001) (utilizing harmless error review); *State v. Alston*, 341 N.C. 198, 255, 461 S.E.2d 687, 719 (1989) (same); *State v. Taylor*, 304 N.C. 249, 285–86, 283 S.E.2d 761, 784 (1981) (same). The finding of harmlessness can be made despite the impossibility of a reviewing court actually knowing what role the erroneously submitted aggravating factor played in the jury’s determination. This is because

[n]othing in the Sixth Amendment construed by our prior decisions indicates that a defendant’s right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

*Clemons*, 494 U.S. at 745.

245. This remedial measure would not eliminate the potential for racial discrimination, particularly race-of-the-victim discrimination, which could occur if prosecutors chose not

However, that is not the nature of post-*Furman* death penalty jurisprudence nationally or in North Carolina.

In particular, the aggravating factor that the murder is “especially heinous, atrocious, or cruel”<sup>246</sup> is potentially quite poor in meaningfully narrowing death eligible cases.<sup>247</sup> For the class of murders that lay observers would call brutal, this aggravating factor allows much the same discretionary judgment to be made in post-*Furman* days as existed pre-*Furman*.<sup>248</sup> The United States Supreme Court theoretically imposed an important limitation on that aggravating factor by requiring that it be limited to “core” cases,<sup>249</sup> but it subsequently removed most of the real impact of that ruling by approving lax enforcement of the requirement.<sup>250</sup>

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to prosecute capitally and/or jurors decided not to sentence to death defendants who committed crimes against African American victims.

246. N.C. GEN. STAT. § 15A-2000(e)(9) (2009) (“The capital felony was especially heinous, atrocious, or cruel.”).

247. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 367–68 (1998) (describing academic literature that shows this aggravating factor is both applied broadly and to virtually every type of capital murder); Richard A. Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Case—The Standardless Standard*, 64 N.C. L. REV. 941, 970–88 (1986) (describing the experience in eleven states in which either the effort to limit discretion has been defeated by inconsistent judicial interpretations or in which the aggravator operates effectively as a catch-all aggravating factor without any meaningful effort to limit its scope). See generally Michael Mello, *Florida’s “Heinous, Atrocious or Cruel” Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases without Making It Smaller*, 13 STETSON L. REV. 523 (1984) (examining the inadequacy of this aggravating factor in the specific context of the Florida death penalty statute).

248. See Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form Over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. REV. L. & SOC. CHANGE 641, 657–58 (1993–94) (describing how North Carolina’s aggravating factor gives the jury no guidance in distinguishing a murder that should be considered especially heinous, atrocious, or cruel from any other brutal murder).

249. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court, reviewing a statutory aggravating factor that the murder was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; or an aggravated battery to the victim,” *id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7)(1978)), held that this aggravating factor was constitutional but must be limited to “core” cases. *Id.* at 428–31; see also *Maynard v. Cartwright*, 486 U.S. 356, 359, 364–65 (1988) (reversing an Oklahoma death sentence that involved a statutory provision that the murder was “especially heinous, atrocious or cruel” (quoting OKLA. STAT. tit. 21, §§ 701.12(2), (4) (1981))).

250. See *Arave v. Creech*, 507 U.S. 463, 465, 471 (1993) (determining Idaho death sentence valid because of a judicial construction that interpreted its statute that defined an aggravating factor that “the defendant exhibited utter disregard for human life” to mean “cold-blooded, pitiless slayer” (quoting IDAHO CODE ANN. § 19-2515(g)(6) (1987)); *Walton v. Arizona*, 497 U.S. 639, 654–55 (1990) (finding an Arizona application of a similar statutory provision constitutional because of a construction that required “especially cruel” to mean infliction of mental anguish or physical abuse before death and

North Carolina adopted this aggravating factor, which the Supreme Court of North Carolina subsequently found constitutional under the limiting interpretation it provided.<sup>251</sup> The court's decisions, however, did not in fact impose significant restrictions on the use of this aggravating factor but rather allowed the factor to apply quite broadly, taking advantage of the laxity afforded by the United States Supreme Court's inconsistent rulings.<sup>252</sup>

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"mental anguish" to include the victim's uncertainty as to his ultimate fate). Even with these judicial interpretations, the statutes are substantively similar in operation to those ruled invalid in *Godfrey* and *Maynard* in that they do not genuinely narrow the class of death-eligible individuals, and they still apply potentially to a broad range of murders. See Steiker & Steiker, *supra* note 236, at 373-74.

251. The Supreme Court of North Carolina approved use of this statutory factor both before *Godfrey*, see *State v. Goodman*, 298 N.C. 1, 24-26, 257 S.E.2d 569, 585 (1979) (approving limits to the effect of this aggravating factor), and after the decision given its prior interpretations, see *State v. Rook*, 304 N.C. 201, 225-26, 283 S.E.2d 732, 747 (1981) (concluding that the problem identified by *Godfrey* had been avoided by requiring infliction of unusual suffering on the victim); see also Rosen, *supra* note 247, at 970-88 (arguing that despite stating that the factor is to be given a limiting effect, multiple and inconsistent rulings of the state courts have rendered this admirable intention effectively a nullity and that under approved instructions jurors are free to approve a death sentence merely by finding that the killing was evil, wicked, or fierce). California is one of a limited number of states that has found this aggravating factor to violate a constitutional guarantee. See *People v. Superior Court of Santa Clara County (Engert)*, 647 P.2d 76, 81 (Cal. 1982) (striking down the statute on vagueness grounds); see also Steven F. Shatz & Nina Rivkin, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1283, 1315-18 (1997) (noting that although other aggravating factors in California's death penalty statute give the appearance of narrowing the class of death eligible cases without meaningfully doing so, the state supreme court did find this particular aggravation factor invalid).

252. Although purporting to impose a narrowing interpretation, the Supreme Court of North Carolina has approved a broad construction of the factor. See, e.g., *State v. Brown*, 315 N.C. 40, 66-67, 337 S.E.2d 808, 827-28 (1985) (concluding that the aggravating factor was justified where the victim was kidnapped at gun point, therefore suffering terror before her death, and according to the medical examiner, may have lived as long as fifteen minutes after being shot); *State v. Oliver*, 302 N.C. 28, 61, 274 S.E.2d 183, 204 (1981) (approving an especially heinous finding where one of the defendants shot the victim after he opened the cash register and said, "Please don't shoot me. Go ahead and take the money," because the victim begged for his life). Moreover, rather than requiring a rigorous screening of the evidence presented to determine if it could satisfy the statutory language to narrow its potentially dangerous reach, the court has mandated a generous analysis of the facts:

In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was "especially heinous, atrocious, or cruel," the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

*Brown*, 315 N.C. at 66, 337 S.E.2d at 827 (citing *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984); *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984)).

Similarly, the felony murder element of the North Carolina death penalty statute opens the possibility of a death sentence for a broad array of murders beyond those that are intentionally committed. Within this range of murders, it allows discretionary decisions to be made on who will be sentenced to death by the jury when one of the statutory aggravating facts can be supported by a reasonable construction of the evidence. Among these cases, prosecutors have the ability to choose which to charge capitally. Thus, discretionary decisions and the operation of a racial element may enter the judgment to seek or impose the death penalty under current law.<sup>253</sup>

Finally, the North Carolina death penalty statute provides a broadly available aggravating factor for many felony murders through its “pecuniary gain” aggravating factor that, if charged by the prosecutor and found by the jury, makes a murder case “death eligible.”<sup>254</sup> This aggravating factor is a fruitful site for the exercise of discretion since a single aggravating factor will suffice. Unlike the narrow interpretation applied in some other states, which limit this aggravating factor to murders for hire or for murders targeted at obtaining known specific liquid assets, such as insurance proceeds or an inheritance,<sup>255</sup> this provision has been very broadly interpreted by

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253. See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1117–20, 1131–33 (1990) (discussing the dangers of a felony murder in connection with the constitutionally mandated task of constraining discretion in the imposition of the death penalty, specifically its potential racial impact and the dangers of a statutory framework that includes a broadly defined “pecuniary gain” aggravating factor to create an illusion, rather than a reality, of meaningfully and rationally narrowing the class of death-eligible cases).

254. See N.C. GEN. STAT. § 15A-2000(e)(6) (2009) (“The capital felony was committed for pecuniary gain.”). In *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), the Supreme Court of North Carolina concluded that there was a disproportionately higher possibility that a defendant convicted of a felony murder will be sentenced to death than a defendant convicted of premeditated murder “due to the ‘automatic’ aggravating circumstance dealing with the underlying felony.” *Id.* at 113, 257 S.E.2d at 568. Addressing this flaw, the court held that “when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.” *Id.* In *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), the Supreme Court of North Carolina held that pecuniary gain could be used as an aggravating factor, in addition to robbery being used as an element of felony murder, without violating its prohibition against using an essential element of felony murder again as an aggravating factor because it considered the motivation of pecuniary gain that constituted the aggravating factor as distinct from the role of robbery within felony murder. *Id.* at 62–63, 274 S.E.2d at 204–05. Accordingly, felony murder when committed to gain funds—e.g., an armed robbery—is automatically death eligible.

255. See Rosen, *supra* note 253, at 1132 (describing narrow “pecuniary gain” provisions in a number of states).



North Carolina courts.<sup>256</sup> It potentially makes the death penalty applicable to all murders committed with the apparent intention of monetary gain, including those committed during robberies, attempted robberies, and many, perhaps most, first degree burglaries.<sup>257</sup>

Thus, despite important changes in the post-*Furman* legal framework that were intended to constrain discretion and therefore might have had the effect of restricting or eliminating the impact of race, discretion continues to operate. As a result, opportunities continue to exist that allow race to significantly affect the prosecutor's decision to charge particular defendants with capital offenses and influence the jury's decision to impose death among those charged. For example, while aggravating factors must be charged by the prosecutor, reviewed by the court, and found by the jury for a crime to be charged as a capital offense and for the death penalty to be recommended by the jury, aggravating factors are not always clearly present in the facts of the case for charging purposes. The effort to develop marginal or non-obvious aggravators may be either vigorously or tepidly pursued in the investigation of the case and in making legal arguments to the court for their inclusion. Similarly, for the jury, proof of aggravation may not be clearly shown by the evidence, or it may be inherently a matter of judgment as to whether a murder is "especially heinous, atrocious, or cruel."

### B. *Race in the Modern Death Penalty System*

In the roughly fifty years of executions conducted by the state of North Carolina before *Furman*, primarily African American defendants were executed for crimes committed against primarily white victims. Part II.A examined the differences in death penalty procedures developed in the wake of *Furman*, showing substantial change in form and highlighting the potential for continuity in the effect of race on the death penalty. This Part examines the operation of the modern system, which has resulted in a death row population of 159 and forty-three executions as of mid-year 2010. It analyzes the

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256. See, e.g., *State v. Irwin*, 304 N.C. 93, 96, 106-07, 282 S.E.2d 439, 442, 448 (1981) (finding killing that occurred during the robbery of a drug store for drugs established the aggravating factor of pecuniary gain).

257. See *Rosen*, *supra* note 253, at 1132. Albeit in a more subtle way, the effect can be the same as existed at an earlier time when first degree burglary was a capital crime and had a strong racial identification with the threat of sexual violence by African American males against white females when the house burglarized at night was occupied by a white female. See *infra* Part I.B.2.

process by focusing on issues of race and defendants, then victims, and finally jurors. As in earlier periods, more African Americans than whites were sentenced to death after *Furman*,<sup>258</sup> but the degree of disparity has moderated.<sup>259</sup> However, with regard to victims, the picture remains much as it was in the earlier period, with the death

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258. The significance of the race-of-the-defendant figures must await careful statistical analysis. Only 21.6% of the state's population in 2000 was African American. See U.S. Census Bureau, North Carolina—County, Census 2000 Summary File, available at [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US37&-\\_box\\_head\\_nbr=GCT-P6&-ds\\_name=DEC\\_2000\\_SF1\\_U&-redoLog=false&-format=ST-2&mt\\_name=DEC\\_2000\\_PL\\_U\\_GCTPL\\_ST2](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US37&-_box_head_nbr=GCT-P6&-ds_name=DEC_2000_SF1_U&-redoLog=false&-format=ST-2&mt_name=DEC_2000_PL_U_GCTPL_ST2) (last visited July 1, 2010) [hereinafter 2000 Census]. The much larger figure of African Americans sentenced to death does not necessarily indicate discrimination. This is because a much larger percentage of murders that qualify under the death penalty statute are generally committed by African Americans than by whites. See Baldus & Woodworth, *supra* note 239, at 1432 (noting that, in many areas of the country, African Americans constitute over 50% of those arrested for death-eligible homicides).

Race-of-the-defendant discrimination has been most frequently found post-*Furman* in cases where the defendant is African American and the victim is white. See David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of Empirical Evidence with Special Emphasis on Post-1990 Research*, 39 CRIM. L. BULL. 194, 213 (2003) (noting that in relatively recent post-*Furman* studies in Kentucky and Maryland researchers documented that African American defendants whose victims were white were at particular risk of more punitive treatment); cf. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006) (finding stereotypical image of African American defendants most powerful in cases where the victim was white). Of the 159 defendants on North Carolina's death row, thirty-eight of them are African Americans convicted of killing a white person (three of these also killed one or more African Americans during the same crime), and an additional seven are Native Americans convicted of killing whites. See DOC Offenders on Death Row, *supra* note 34; Memorandum Detailing Race of Victim of Death Row Defendants (on file with the North Carolina Law Review).

259. Professor David Baldus summarizes post-*Furman* studies as a group showing that, although it continues in some localities, the death penalty is no longer generally characterized by systemic discrimination against African American defendants that existed in many states before *Furman*. See Baldus & Woodworth, *supra* note 239, at 1412; see also *id.* at 1419–22 (describing equivocal results from many studies regarding race-of-the-victim discrimination but a strong “main effect” for race-of-the-defendant in Philadelphia, Pennsylvania and in occasional other studies). See generally Heather T. Keenan et al., *Race Matters in the Prosecution of Perpetrators of Inflicted Traumatic Brain Injury*, 121 PEDIATRICS 1174 (2008), available at <http://www.pediatrics.org/cgi/content/full/121/6/1174> (reporting the results of an empirical study showing that in North Carolina, when children died as a result of traumatic brain injury, the initial charges and the final charges were principally related to the death of the child, but that the sentencing decision, even after controlling aggravating and mitigating factors, was best predicted by the defendant's minority status). But see David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1675–79 (1998) (detailing analysis that shows racial discrimination against African American defendants in Philadelphia death penalty prosecutions based on jury decision making).

penalty largely reserved for crimes against white victims.<sup>260</sup> African American participation on juries has clearly increased over earlier periods but remains limited, the analysis giving particular emphasis to the role of peremptory challenges by the prosecution in limiting that participation. For a substantial number of defendants on death row, no African Americans sat on their juries.<sup>261</sup>

### 1. The Continuing Predominance of African American Defendants Sentenced to Death

The results of the death penalty sentencing process in North Carolina since it was reinstated after the *Furman* decision show substantial continuity with the past in the predominance of African Americans sentenced to death but significant diminution in the percentage of African Americans executed. Since the death penalty was reinstated in North Carolina after *Furman* and *Woodson*, 391 defendants have been sent to death row.<sup>262</sup> Of these, 49% are African American (55% are minority<sup>263</sup>), and 44% are white.<sup>264</sup> As of the July 1, 2010, the death row population was 159.<sup>265</sup> Of these, 54% are African American (62% are minority), and 38% are white.<sup>266</sup> A

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260. In contrast to the mixed picture with race-of-the-defendant discrimination, post-*Furman* analysis in other jurisdictions has continued to find relatively consistent race-of-the-victim discrimination. See Baldus & Woodworth, *supra* note 239, at 1413; see also *id.* at 1419–22 (detailing strong evidence in many jurisdictions that, after controlling for a number of alternative explanations, cases with white victims are substantially more likely to result in death sentences and that the most common source of the effect is the prosecutor's charging decision).

261. See *infra* note 356 (listing thirty such cases).

262. See DOC Offenders on Death Row, *supra* note 34; DOC Persons Removed from Death Row, *supra* note 34.

263. "Minorities" include defendants who are African American, Native American, and Latino.

264. The numbers are 193 African Americans, 171 whites, 18 Native Americans, 6 Latinos, 2 Asians and 1 of Middle Eastern origin. The Department of Corrections lists Latinos, Asians, and those of Middle Eastern origin as "other." DOC Persons Removed from Death Row, *supra* note 34.

265. DOC Offenders on Death Row, *supra* note 34. The group of defendants who left death row because of reversals and clemencies and those remaining on death row are roughly the same size. Among all defendants sentenced to death nationally from 1973 until 2004, these groups are also roughly the same size. See Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little and New Data on Capital Cases*, 5 J. EMPIRICAL L. STUD. 927, 944 (2008) (showing that 41% were removed from death row because their sentences or convictions were reversed and 42% remain on death row).

266. The numbers are eighty-seven African American, sixty white, eight Native American, three Latino, and one Asian; of the four listed as "other" by the Department of Corrections, three are Latino (Fernando Garcia, Ryan Garcell, and Angel Guevara), and one is Asian (Clifford Miller). See DOC Offenders on Death Row, *supra* note 34.

slightly larger group of 163 were either granted executive clemency or won reversal of either their conviction or death sentence.<sup>267</sup> Among this group, 51% are African American (58% are minority) and 42% are white.<sup>268</sup>

Twenty-six prisoners have left death row because they died of natural causes or committed suicide.<sup>269</sup> A majority of this group was white, principally the result of a higher suicide rate among white defendants on death row.<sup>270</sup> Forty-three defendants have been executed.<sup>271</sup> Among those executed, 30% were African American (33% are minority) and 65% were white.<sup>272</sup>

Executive clemency and judicial action reversing convictions and/or death sentences removed 163 from death row. Most defendants were either automatically excluded from eligibility for execution or sent back into the process where they were either sentenced to a prison term or granted their freedom, although a few still face resentencing.<sup>273</sup> The examination of these cases begins with clemency exercised by the governor.

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267. See DOC Persons Removed from Death Row, *supra* note 34.

268. The numbers are eighty-three African American, sixty-nine white, seven Native American, three Latino, and one Asian. Of the four listed as “other” by the Department of Corrections, three are Latinos (Frederick Camacho, Francisco Tirado, and Bernardino Zuniga), and one is Asian (Johnny Benson). See *id.*

269. *Id.*

270. *Id.* Nineteen died of natural causes: Elwell Barnes, Gary Greene, George Heathwole, David Huffstetler, Caesar Johnson, John Jones, George Kelly, Daniel Lee, Edward Lemons, Thurman Martin, Doc McKoy, Jr., LeRoy McNeill, General Miller, Charles Munsey, George Page, William Porter, James Roper, Norris Taylor, James Vereen, and Robert Wall. *Id.* Nine were white, nine were African American, and two were Native American. *Id.* Nine of the total spent more than ten years on death row before their deaths. See *id.* Some avoided an earlier execution by winning a new trial or sentencing hearing through a successful legal claim under due process (*Brady v. Maryland*, 373 U.S. 83, 86 (1963); see *infra* note 279), ineffective assistance of counsel (*Strickland v. Washington*, 466 U.S. 668, 694 (1984); see *infra* note 280), or a violation of the Eighth Amendment (*McKoy v. North Carolina*, 494 U.S. 433, 442–43 (1990); see *infra* note 285). Six committed suicide: Eddie Howell, Randy Payne, Rayford Piver, Ricky Price, Eric Queen, and Daniel Webster. DOC Persons Removed from Death Row, *supra* note 34. Five of the six were white, the other was African American. Roughly half of those who died of natural causes and suicide spent more than ten years on death row before they took their own lives. *Id.*

271. *Id.*

272. See *id.* One other defendant, Elias Syriani, was of Middle Eastern origin. *Id.* He is listed under the category of “other” by the Department of Corrections and was executed on November 18, 2005, for murdering his wife, who, like him, was Jordanian. *Id.*; see also Facing Controversy: Struggling with Capital Punishment in North Carolina, Biographies, Elias Syriani, <http://www.lib.unc.edu/mss/exhibits/penalty/syriani.html> (last visited July 1, 2010).

273. Reversal rates by the Supreme Court of North Carolina were higher in the period before the mid-1990s than they have been since that time. See Adcock, *supra* note 9, at

While clemency was used quite broadly in the earlier period,<sup>274</sup> it has been used only sparingly by North Carolina governors since the resumption of executions in the wake of the *Furman* decision.<sup>275</sup> Five defendants were granted clemency by Governors James Martin, James Hunt, and Michael Easley after all avenues of relief available under the legal system had apparently been fully exhausted.<sup>276</sup> Four of these defendants were African Americans and one was Native American.<sup>277</sup> The fact that all of these defendants were minorities poses an intriguing question: are the most serious abuses of the death penalty that escape all legal mechanisms linked to race?<sup>278</sup> If so,

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131–32 (noting that some of the difference can be explained by the *McKoy* case in the earlier period that resulted in a large number of reversals and perhaps can be explained in the later period by the law becoming more settled). The information provided by the Department of Corrections for approximately a dozen persons lacks indication that resentencing is pending. See DOC Offenders on Death Row, *supra* note 34.

274. As noted earlier, in pre-*Furman* days, clemency was a major way in which the rigidity and harshness of the death penalty law was moderated. See *supra* note 9 and accompanying text. Those who note that the current death row population is out of step with the apparent lack of contemporary enthusiasm for the death penalty have argued that clemency should be reinvigorated. See, e.g., Adcock, *supra* note 9, at 148–52, 155 (describing various ways in which clemency powers should be used).

275. *Id.* Had this group, which was approaching imminent execution when clemency was granted, been executed, the total number of executions would have increased to forty-eight and the racial composition of the executed group would have changed slightly, with twenty-eight (58.3%) whites, seventeen (35.4%) African Americans, two (4.2%) Native Americans, and one (2.1%) “other.” These modest changes in percentages would not have meaningfully altered the unusual racial composition of the group of those executed.

276. *Id.* at 133, 141–43, 148.

277. See *id.*

278. The first was Anson Maynard, a Native American, who was granted clemency by Governor James Martin in 1992. *Id.* at 133. Governor Jim Hunt granted clemency to Wendell Flowers in 1999 and Marcus Carter in 2000, both of whom were African American. *Id.* at 141–42. Governor Mike Easley granted clemency to Robert Bacon, Jr. in 2001 and Charles Alston in 2002, who were also both African American. *Id.* at 142–43, 148.

In granting clemency to Anson Maynard, Governor Martin explicitly cited his uncertainty about Maynard’s guilt. Although he was not convinced that Maynard was “totally innocent,” he was also “not convinced that Anson Maynard pulled the trigger to kill [the victim].” *Anson Maynard: Governor Commutes Death Sentence*, WILMINGTON MORNING STAR, Jan. 11, 1992, at A4. The basis for Charles Alston’s successful clemency presentation was also based on his innocence. See Clemency Petition for Charles M. Alston (on file with the North Carolina Law Review). The centerpiece of Robert Bacon’s petition, supported by an affidavit of one of the jurors who described overtly racial discussions among jurors during deliberations, was that race played a critical role in the jury’s decision to impose the death sentence, which was supported circumstantially by the disparity between Bacon’s death sentence and the life sentences for the arguably more culpable white co-defendant. See Adcock, *supra* note 9, at 148 (describing racial influences in the Bacon case and clemency); Eric Frazier, *Juror: Race Tainted Decision on Execution*, CHARLOTTE OBSERVER, May 13, 2001, at 1A; Clemency Petition of Robert Bacon, Jr. and Affidavit of Pamela Bloom Smith (on file with the North Carolina Law Review).

should we be worried that the limitations of review in the clemency process means that other problematic cases have escaped correction?

In addition to disproportionate removal by clemency, African Americans were disproportionately removed from death row because they were denied rights going to the basic fairness of the trial process or to values fundamental to the integrity of the death penalty. Denials of basic fairness include violations of due process by prosecutors or criminal investigators in failing to turn over potentially exculpatory evidence that is material to guilt or punishment<sup>279</sup> and ineffective assistance of counsel.<sup>280</sup> Both require a finding that the error likely had an impact on the outcome of the trial, which means that the fundamental issue of guilt and innocence should have been placed in doubt.<sup>281</sup> Denials of values fundamental to the integrity of capital punishment include the prohibition against executing the mentally

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279. Rights flowing from *Brady v. Maryland*, 373 U.S. 83, 86 (1963), which require the government to provide helpful evidence to the defense that is material to guilt or punishment, and corresponding denials of this right produced reversals in at least eleven cases. Those removed from death row on this basis include: Steven Bishop, Glenn Chapman (also ineffective assistance of counsel found and case ultimately dismissed), Jamey Cheeks, Alan Gell (acquitted on retrial), Stephan Goode (also ineffective assistance found), Jerry Hamilton, Jonathan Hoffman (case dismissed), Robert McDowell, Charles Munsey (natural death), John Oliver, Michael Pinch, Charles Walker, and Curtis Womble. See Opinions and Orders in Specific Cases (July 1, 2010) (on file with the North Carolina Law Review) [hereinafter Opinions & Orders]. Seven of these are African American, and six are white. See DOC Persons Removed from Death Row, *supra* note 34.

280. In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Court held that a new trial must be granted only when evidence not introduced or actions taken because of the incompetence of counsel create “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.*, stating that to grant relief, the judgment should be that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” *id.* at 686. Violations of the right to effective assistance of counsel resulted in the reversal of at least twelve death penalties. Those who were granted relief on this ground include: Kyle Berry, Thomas Brown, Glenn Chapman (also *Brady* violation found and case dismissed), Willie Gladden, Stephan Goode (also *Napue/Brady* violation), William Gray, Melvin Hardy, Levon Jones (case dismissed), Elmer McNeill, LeRoy McNeill (natural death), Michael Pinch, Phillip Robbins, James Roper (natural death), and Donald Scanlon. See Opinions & Orders, *supra* note 279. Seven of these defendants are African American, and seven are white. DOC Persons Removed from Death Row, *supra* note 34.

281. As described in the preceding note, the Court in *Strickland* set out the requirement of “a reasonable probability” that, except for counsel’s unprofessional errors, “the result of the proceeding would have been different.” In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Supreme Court adopted the *Strickland* standard for *Brady* violations. A reversal on either ineffective assistance or *Brady* grounds does not prove that the defendant was innocent, but the required finding means that these are cases where, but for the error, the jury could find reasonable doubt, which are the types of cases where innocent defendants would be located, and absent rarely available dispositive evidence reasonable doubt is likely all that many innocent defendants can demonstrate.

retarded and juveniles. Executing the mentally retarded violates the Eighth Amendment's ban on cruel and unusual punishment.<sup>282</sup> A similar pattern of differential treatment of defendants based on race is found for the expansion of the prohibition against executing defendants who were minors at the time of their crimes.<sup>283</sup> The statistics suggest that the defendant's mental retardation and youth, which could on their own produce a jury judgment of life imprisonment, have had less significance as mitigating factors to predominantly or exclusively white jurors when the defendant is African American. Almost two-thirds of the forty-four defendants denied these fundamental rights were racial and ethnic minorities, with all but two being African American; including clemencies, 69% were minority defendants.<sup>284</sup> The actions of governors and reviewing

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282. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In apparent anticipation of the United States Supreme Court's ruling, the North Carolina General Assembly enacted Act of July 25, 2001, ch. 346, § 4, 2001 N.C. Sess. Laws 1038, 1041, effective October 1, 2001, banning execution of the mentally retarded as a matter of state law and defined the proof required at trial to warrant relief. *See id.* The next year, in *Atkins*, the United States Supreme Court ruled that executing the mentally retarded violated the Eighth Amendment's ban on "cruel and unusual punishment." *Atkins*, 536 U.S. at 321. In combination, the effect of the statutory and constitutional remedies removed approximately fourteen cases from death row and, for appropriately decided cases, required the substitution of a life sentence for the previously imposed death sentence without further litigation. At least fourteen of those on death row were removed as a consequence of either the statutory or the constitutional development. *See Opinions & Orders, supra* note 279. Those granted relief on this ground include: Melanie Anderson, Anthony Bone, Renwick Gibbs, Anthony Hipps, Russell Holden, Jonathan Leeper, Robert McClain, Elton McLaughlin, Lorenza Norwood, Dwight Robinson, Sherman Skipper, Clinton Smith, Johnnie Spruill, and Larry Williams. *Id.* Twelve of these defendants are African American, and two are white. *See DOC Persons Removed from Death Row, supra* note 34.

283. In *Roper v. Simmons*, 543 U.S. 551, 568 (2005), the United States Supreme Court declared capital punishment unconstitutional for defendants under eighteen. Thus, a final group whose death sentences were converted automatically to life imprisonment consists of those who committed their crimes before they became adults. These defendants include: Thomas Adams, LeMorris Chapman, Kevin Golphin, Francisco Tirado, and Travis Walters. *Opinions & Orders, supra* note 279. Of these five, three are African Americans, one is Latino, and one is white. *See DOC Persons Removed from Death Row, supra* note 34.

284. A total of at least forty-nine cases were removed from death row by clemency or these four types of claims. *See id.*; *Opinions & Orders, supra* note 279. Of those, thirty-two involved African American defendants, with one Latino defendant, and one Native American defendant for a total of thirty-four defendants who are minority group members (69.4%). *See DOC Persons Removed from Death Row, supra* note 34. Fifteen members of the group are white (30.6%). *Id.* The African Americans are: Charles Alston (clemency), Robert Bacon, Jr. (clemency), Anthony Bone (mental retardation), Marcus Carter (clemency), Glenn Chapman (*Brady* and ineffective assistance and dismissal of charges), LeMorris Chapman (juvenile status), Wendell Flowers (clemency), Renwick Gibbs (mental retardation), Willie Gladden (ineffective assistance), Stephan Goode (*Napue/Brady* violation and ineffective assistance), Kevin Golphin (juvenile status),

courts may have moderated the unfairness to minority defendants, but they also suggest the operation of a pernicious impact of race on the initial process of reaching a death sentence.<sup>285</sup>

One set of figures is anomalous—the racial makeup of those executed since the reinstatement of the death penalty. Prior to *Furman*, the vast majority of those executed were African American.<sup>286</sup> Among the forty-three defendants executed after *Furman*, only 30.2% (thirteen) were African American, while 65.1%

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Melvin Hardy (ineffective assistance), Anthony Hipps (mental retardation), Jonathan Hoffman (*Brady*), Russell Holden (mental retardation), Levon Jones (ineffective assistance and dismissal of charges), Jonathan Leeper (mental retardation), Robert McClain (mental retardation), Robert McDowell (*Brady*), Elton McLaughlin (mental retardation), Elmer McNeill (ineffective assistance), LeRoy McNeill (ineffective assistance and natural death), Lorenza Norwood (mental retardation), John Oliver (*Brady*), Phillip Robbins (ineffective assistance), Dwight Robinson (mental retardation), Clinton Smith (mental retardation), Johnnie Spruill, (mental retardation), Charles Walker (*Brady*), Travis Walters (juvenile status), Larry Williams (mental retardation), and Curtis Womble (*Brady*). See *id.*; Opinions & Orders, *supra* note 279. Two additional African American defendants, Francis Anthony and Andrew Craig, might appropriately be included in this list, but the orders in their cases do not specify the grounds upon which relief was granted, although the court in each case had previously ordered an evidentiary hearing on what were apparently among the defendants' strongest claims, *Brady* and ineffective assistance of counsel. See Opinions & Orders, *supra* note 279. One Latino, Francisco Tirado (juvenile status), and one Native American, Anson Maynard (clemency), are in the group. See *id.* The white defendants are Thomas Adams (juvenile status), Melanie Anderson (mental retardation), Kyle Berry (ineffective assistance), Steven Bishop (*Brady*), Thomas Brown (ineffective assistance), Alan Gell (*Brady* and acquittal on retrial), Jamey Cheeks (*Brady*), William Gray (ineffective assistance), Jerry Hamilton (*Brady*), Elmer McNeill (ineffective assistance), Charles Munsey (*Brady* and natural death), Michael Pinch (*Brady* and ineffective assistance), James Roper (ineffective assistance and natural death), and Donald Scanlon (ineffective assistance), and Sherman Skipper (mental retardation). See DOC Persons Removed from Death Row, *supra* note 34; Opinions & Orders, *supra* note 279.

285. The decision of the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 442–44 (1990), had the greatest impact on North Carolina's death row population. *McKoy* concluded that the North Carolina death penalty statute improperly restricted individual jurors in considering a mitigating factor, supported by the evidence, in violation of the Eighth Amendment. *Id.* at 435. Forty-five defendants received new sentencing hearings as a result of *McKoy*, of which five were executed after being sentenced to death at a subsequent sentencing hearing (Kenneth Boyd, Harvey Green, William Jones, Ricky Sanderson, and Pierre Simpson), and five are currently on death row (Jerry Cummings, Roland Hedgepeth, Jeffrey Meyer, Eddie Robinson, and James Thomas). See Memorandum of *McKoy* Litigation Outcomes (on file with the North Carolina Law Review). The remaining thirty-five either received life sentences or died while on death row or are pending resentencing. *Id.* The cumulative impact of all judicial rulings is that eighty-nine minority defendants (56.3%) and sixty-nine whites (43.7%) were removed from death row. See DOC Persons Removed from Death Row, *supra* note 34.

286. See *supra* text accompanying note 108.



(twenty-eight) were white.<sup>287</sup> Of course, the African American majority among those removed by judicial action from death row and the white majority among those executed are not independent of each other. Executions occur when legal processes, review of compliance with legal standards, and clemency review have been completed. This suggests that more white defendants were executed in the initial years after the death penalty was resumed because reviewing courts found errors in a lower percentage of their cases. The compliance with death penalty law and procedure was higher in the cases of white defendants than of minorities.

Anyone who might be tempted to conclude from this initial execution pattern that the historical connection between race and the death penalty has been eliminated should delay judgment.<sup>288</sup> The percentage of minority group members, African Americans in particular, among those executed is likely to increase substantially in future executions as documented below.<sup>289</sup>

Those most likely to be executed in the next cohort can be roughly identified, and, unlike those executed, they are predominately African American and other minorities. The further a case has proceeded through the review process without relief being granted, the more likely the defendant will be executed. A particularly significant point in the process is reached when state court review has been completed, and the case enters the stage where federal court review begins. The Anti-Terrorism and Effective Death

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287. See DOC Post-Furman N.C. Executions, *supra* note 31. In addition, one Native American, Henry Hunt, and one defendant of Middle Eastern origin, Elias Syriani, were executed. See *id.* Thus, minorities constituted 32.6% (fourteen) of those executed since 1984. See *id.*

288. Cf. Joint Caucus Press Release, Phil Berger, North Carolina Senator, and Paul Stam, North Carolina Representative, Legislature Must Not Interfere With Resumption of Death Penalty 3 (May 5, 2009) (on file with the North Carolina Law Review) (“Sixty-five percent of those actually executed have been white, which puts a new light on the claim most were minorities.”); Written Statement of Special Deputy Attorney General Barry S. McNeill, The Death Penalty in North Carolina: Case Law & Statutory Protections 7 (Dec. 13, 2006) (on file with the North Carolina Law Review) (presenting these figures on race of the defendant to the N.C. House of Representatives Capital Punishment Study Committee as part of the “Overview of North Carolina’s Death Row Population”).

289. Another reason for concern about the upcoming executions is that more than one hundred of those facing execution were sentenced before 2001 and would likely not have been sentenced to death currently because of both changed attitudes and enhanced procedural protections. See Thomas K. Maher, *Worst of Times, and Best of Times: The Eighth Amendment Implication of Increased Procedural Reliability on Existing Death Sentences*, 1 ELON L. REV. 95, 96, 99–102 (2009) (listing a number of reforms including: expanded discovery, post-conviction DNA testing, creation of Indigent Defense Services and its efforts to remedy problems of inadequate appointed counsel, authorization of life without parole, and allowance of plea bargaining covering first degree murder).

Penalty Act of 1996 (“AEDPA”) commands deference to the results of state-court review at this point,<sup>290</sup> and although relief can be granted at this stage or in the clemency process, based on past experiences, this group of cases comprises the probable cohort of those next executed. The racial composition of the defendants who have reached or completed federal court review is quite different from the forty-three who have been executed. The group numbers fifty-five.<sup>291</sup> African Americans and Native Americans constitute a majority, 58.1% (thirty-two), and the white percentage is 41.9% (twenty-three).<sup>292</sup>

The execution pattern, with regard to the race of defendants for the first forty-three executed since 1977, appears largely inexplicable. This change in racial makeup of North Carolina’s post-*Furman* executions follows the general trend nationally and in the South, but it is more extreme.<sup>293</sup> The most striking fact is that the execution pattern started with an even more dramatic break from past history—the first twelve inmates executed were all white.<sup>294</sup> As detailed in

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290. See Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.). In *Uttecht v. Brown*, 551 U.S. 1, 10 (2007), the Supreme Court stated: “The requirements of the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] . . . create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings.” In addition, the federal courts overseeing North Carolina cases, particularly the Fourth Circuit, have not shown an eagerness to overturn death sentence cases. See Adcock, *supra* note 9, at 132 n.100 (noting that no relief was granted to a North Carolina capital defendant by the Fourth Circuit between 1992 and 2000).

291. See Memorandum of Death Row Defendants with Federal Court Filings (on file with the North Carolina Law Review).

292. See *id.* The majority, twenty-nine (52.7%), are African American, and three (5.5%) are Native American. See *id.* One defendant who abandoned his appeals after an initial federal court filing is also included. *Id.*

293. Nationally, 34.6% (421 of 1,217) of those executed between 1976 and June 30, 2010 were African American, and 56.0% (682 of 1,217) of those executed were white. Death Penalty Information Center, Searchable Execution Database, <http://deathpenaltyinfo.org/executions> (last visited July 1, 2010). The 34.6% figure for African Americans in the post-*Furman* period compares to 53.5% (2,066 of 3,859) African Americans for all offenses and 48.9% (1,630 of 3,334) African Americans of those executed for murder from 1930 through 1968 nationally. See U.S. BUREAU OF PRISONS, CAPITAL PUNISHMENT: 1930–1968, NAT’L PRISONER STAT. BULL. NO. 45, at 10 tbl.3 (Aug. 1969). In the South, in the post-*Furman* period, 36.6% (367 of 1,003) of those executed were African American, 53.2% (534 of 1,003) were white, 8.5% (85 of 1,003) were Latino, 1.1% (11 of 1,003) were Native American, and 0.7% (7 of 1,003) were of other races. See Death Penalty Information Center, *supra*. This percentage is substantially lower than the 71.9% (1,659 of 2,306) figure for African Americans for all offenses and 67.4% for murder in the South from 1930 to 1968. See U.S. BUREAU OF PRISONS, *supra*, at 11 tbl.3.

294. Three of these men self-selected by dropping their legal challenges: Phillip Ingle, Ricky Sanderson, and James Rich. See Information on Persons Executed Since 1976 and

earlier figures, the executed group does not resemble in racial composition those sent to death row from 1977–2009, those removed from death row by legal action of the courts, or those on the present death row. It resembles only the group that died on death row, a majority of who were white because of those who committed suicide.<sup>295</sup>

In broad sweep, more African Americans and other minorities than whites entered North Carolina's death row after *Furman*. Among those removed from death row because errors were made in

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Designated as "Volunteers," Death Penalty Information Center, <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers> (last visited July 1, 2010). Charles Roache, who was executed in 2004, was also a "volunteer." *Id.*

Timing issues do play a role in defendants leaving death row other than through execution, but timing and case selection may have played a role in who has been executed. The first three executed, who were white, moved through the entire process in less than six years, which has not been equaled since that time except with those who abandoned their appeals. *See* DOC Removed from Death Row, *supra* note 34 (showing less than six years on death row for James Hutchins, Margie Barfield, and John Rook, the first three executed, and less than five years for Ingle, Sanderson, and Rich).

Also, in the North Carolina system, prosecutors largely control the selection of cases to be advanced and somewhat control the pace that cases move. Defense counsel generally do not seek a speedy resolution of cases once a death sentence has been affirmed by the Supreme Court of North Carolina since those cases have a presumption of finality and the movement forward is toward the ultimate punishment, so the passage of time while the client is confined in prison is not to be avoided but is often the entire goal of the litigation—the passage of time until the defendant dies a natural death in prison at the end of a life sentence.

Avoiding a quick execution can also mean more than a slight extension of life before execution. For many of those who died a natural death, won a new sentencing hearing, or automatic life sentence when courts recognized the legal significance of the issues their cases presented (such as *McKoy* error, mental retardation, or the prohibition against executing minors), remaining alive for a longer period meant not being executed at all. For example, half of the fourteen who received life sentences because they were mentally retarded were on death row for more than ten years before their claims were granted because of a developing societal recognition that mental retardation was an important limitation on the death penalty, which was not recognized at the time their sentence were imposed or during much of the period they awaited execution. *See supra* note 282. These defendants are Renwick Gibbs, Elton McLaughlin, Dwight Robinson, Sherman Skipper, Clinton Smith, Johnnie Spruill, and Larry Williams. *Id.*

295. White defendants comprise 44% of all those sent to death row during this period. *See supra* note 264 and accompanying text. However, that percentage jumps to 65% of those executed, *see supra* text accompanying note 272, and it falls to 38% of those on death row, *supra* text accompanying note 266. Thus, racial and ethnic minorities comprise a majority of the 391 defendants sent to death row since 1977 but only approximately one-third of those executed. By contrast, these figures show that racial and ethnic minorities then increase to represent over three-fifths of those awaiting execution. Specifically, of the 159 inmates on death row, only sixty (37.7%) are white, eighty-seven (54.7%) are African American, eight (5.0%) are Native American, and three (1.9%) are Latino. *See* DOC Offenders on Death Row, *supra* note 34.

the death penalty proceedings, more were members of minority groups than whites. Many more whites than African Americans left death row through executions. As a result of these processes, the current death row population is weighted more toward minorities than the entering population, as is the group most likely to face execution next. Therefore, African Americans are likely soon to predominate among those executed. Also, perhaps more significantly, the race-of-the-victim pattern among those executed has remained virtually constant even when race-of-the-defendant percentages have changed.<sup>296</sup>

## 2. The Continuing Heavy Predominance of White Victims in Death Sentences

Since slightly more than 70% of the state's population is white, the fact that a heavy majority of victims are white among those sentenced to death and executed in North Carolina should not come as a surprise.<sup>297</sup> In addition, the vast majority of murders occur between members of the same race (intra-racial crime) rather than with victims and defendants from different racial groups (inter-racial).<sup>298</sup> Thus, one would normally expect that most white

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296. Both with respect to the race of the defendants executed after *Furman* and with regard to the race of the defendants on the current death row, North Carolina's percentages move in a common direction with the South as a region. However, North Carolina's percentage deviations are somewhat more exaggerated, with a larger percentage of whites among those executed post-*Furman* and a higher percentage of African Americans among those currently on death row awaiting execution than in the region generally. In the South, 53.2% of those executed post-*Furman* were white and 36.6% African American, *see supra* note 293, whereas in North Carolina 65.1% were white and 30.2% were African American, *see DOC Post-Furman N.C. Executions, supra* note 31. At the end of September 2009, a plurality, 45.3%, of the defendants currently on death row in the South were white and 43.7% were African American. *See NAACP LEGAL DEFENSE & EDUCATION FUND, INC., DEATH ROW U.S.A. 32-33 (Fall 2009), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Fall\\_2009.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2009.pdf)* (giving state data from which statistics for those in the South under U.S. Census definition were computed). In North Carolina, the majority, 54.7%, is African American and a minority, 37.7%, is white. *See DOC Offenders on Death Row, supra* note 34.

297. In 2000, 72.1% of the population was white, 21.6% was African American, and 1.2% was Native American. *See 2000 Census, supra* note 258.

298. According to the most recent national data from the Bureau of Justice Statistics, over 85% of homicides in 2005 were intra-racial with 44.6% (4,755) of the cases having white victims and perpetrators and 42.2% (4,497) involving African American victims and perpetrators. Inter-racial homicides constituted less than 15% of murders in that year, with African American victims and white perpetrators involved in only 3.2% (337) of the cases and white victims and African American perpetrators in 8.8% (934) of the cases. A total of 1.3% (137) involved defendants and/or victims of other racial groups. Where African Americans are the perpetrators, the victims are white in only 17.1% (934) of the cases, African American in 82.4% (4,497) of the cases, and other in 0.5% (25) of the cases.

defendants would have murdered white victims, and most African American defendants murdered other African Americans and not whites. However, since African American and other minority defendants predominate on death row, the overall heavy majority of white victims suggests a disparate impact based on race.<sup>299</sup>

When race of the victim is examined, similar patterns emerge in executions conducted during the first fifty years of the period examined and those carried out since executions resumed in 1984 after the *Furman* decision. In the 1910 to 1961 period, despite the high percentage of African American defendants, 75% of the victims were white.<sup>300</sup> In the forty-three post-*Furman* executions, 76.8% (thirty-three) were executed for the murder of white victims.<sup>301</sup> In only 18.6% (eight) of those cases were the victims African

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See Bureau of Justice Statistics, Dep't of Justice, available at <http://bjs.ojp.usdoj.gov/content/homicide/race.cfm>.

These basic racial characteristics of inter-racial and intra-racial crime statistics are largely stable over time and are reflected generally in state data around the country, including North Carolina. States differ in the main, varying principally and in predictable directions as the percentages of African Americans and other minorities increase in the state's population. From 1993–1997 in North Carolina, for example, racial data is available for 3,592 of the 3,990 homicides that occurred in the state. See ISAAC UNAH & JOHN C. BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA—AN EMPIRICAL ANALYSIS: 1993–1997 (Initial Findings) 18, 23 (2001), available at <http://www.deathpenaltyinfo.org/race-and-death-penalty-north-carolina> (providing data for the period 1993–1997 in North Carolina). Of the total, cases involving white defendants and white victims constitute 35.9% (1291), those involving non-white defendants and victims constitute 46.5% (1670), those with white defendants and non-white victims constitute 3.2% (116), and finally, those involving non-white defendants and white victims constitute 14.3% (515). See *id.*

299. Although these figures are suggestive of race-of-the-victim discrimination, their significance must await careful statistical analysis. This is because of factors involving the nature of the crimes involved and the characteristics of the defendants and victims, which, in other statistical studies, have been shown to reduce the apparent significance of these figures. See Baldus & Woodworth, *supra* note 239, at 1447–48. However, they have generally not eliminated that significance. *Id.*

300. Although complete data on victim race cannot be found and is sometimes a bit uncertain, of the 325 cases where race can be determined, the victim was white in 244 (75%) of the cases, African American in 78 (24%) of the cases, and Native American in 3 (1%) cases. See *supra* note 109 and accompanying text.

301. See DOC Post-*Furman* N.C. Executions, *supra* note 31; *supra* note 272 (showing Elias Syriani's victim as Middle Eastern rather than white). This percentage is consistent with figures for executions in the South generally in the post-*Furman* period with 77.0% (772 of 1,003) having at least one white victim. See Death Penalty Information Center, *supra* note 293. Nationally, since executions were resumed, 78.3% of the defendants executed (953 of 1,217) had at least one white victim. *Id.* Only 13.6% (165 of 1,217) were executed when exclusively African Americans were the victims. *Id.*; see also DEATH ROW U.S.A., *supra* note 296, at 7 (showing that through the end of September 2009, in cases where the defendant was executed, 78.0% of victims (1357) were white and 14.5% (252) were African American).

American.<sup>302</sup> Only one of the twenty-eight white defendants, Kermit Smith, was executed for killing a non-white victim.<sup>303</sup> Of the thirteen African Americans executed, six were executed for murdering white victims, and seven were executed for murdering African American victims.<sup>304</sup>

The murder victims of those on death row were also predominately white with little change from earlier eras. In 67.3% of the cases (107), at least one victim was white, and in 64.2% of the cases (102), the victim(s) were exclusively white,<sup>305</sup> with the other five involving multiple victims of whom one or more were white.<sup>306</sup> Thus, two-thirds of the defendants on death row (67.3%) are there for murders that involved at least one white victim. Only 30.8% of the cases (forty-nine) involved exclusively African American victims.<sup>307</sup>

In contrast to the situation with white victims, who predominate with most defendant racial groups,<sup>308</sup> when African Americans are exclusively the victims and the defendant is on death row, the

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302. In one case (2.3%), the victim was Native American. *See* DOC Post-*Furman* N.C. Executions, *supra* note 31.

303. *Id.* (showing Smith as alone among white defendants executed in having a non-white victim).

304. The six African American defendants executed for murdering white victims are David Brown, Desmond Carter, Harvey Green, Robbie Lyons, Michael Sexton, and Perrie Simpson. The seven executed for murdering African American victims are Willie Brown, John Daniels, Willie Fisher, William Jones, Sammy Perkins, Earl Richmond, and David Ward. *See* DOC Post-*Furman* N.C. Executions, *supra* note 31.

The victim of the one Native American executed was Native American, *id.*, and the lone victim of Middle Eastern descent was also killed by a defendant who was Middle Eastern. Henry Hunt, who was Native American, was executed for the murders of two Native Americans. Both Elias Syriani and his victim were Jordanian. *See id.*; *supra* note 272.

305. *See* Memorandum Detailing Race of Victim of Death Row Defendants, *supra* note 258. The medical examiner's racial identification is followed where available. Two of the victims identified as white, Robert Buitrago and Macidonio Gervacio, have an added notation, "hispanic." *Id.*

306. Four of the cases involved either one or two additional African American victims (Linwood Forte, Mitchell Marcos, Abner Nicholson, and Davy Stephens), and one involved an additional victim who was Asian (Jerry Connor). *Id.*

307. In the three remaining cases, the victims were Native American in two and Latino in one. *Id.*

308. Among the sixty whites on death row, fifty-four were sentenced to death for killing exclusively white victims and two more cases involved a white victim along with victims who were Asian and African American. *Id.* One white defendant on death row currently was sentenced to death for killing an African American (female) and one for killing two Native Americans. *Id.* Among the eleven Native Americans and Latino defendants on death row, their victims were white in nine cases (81.8%), and one was an African American and one Native American. *Id.* Only among African American defendants do white victims not form the majority, but even there a substantial percentage, 43.6% (38) of the cases, involved white victims. *Id.*

defendant is almost always African American. Of the forty-nine cases in this group where African Americans were exclusively victims (no additional white victims), forty-seven of the defendants are African Americans.<sup>309</sup> Cumulatively, examination of the victim's race shows great continuity in the predominance of white victims across changes in legal structures and defendant groups. The next section examines the developing recognition of the frequency and the theoretical and practical importance of race-of-the-victim discrimination in death penalty decisions. One potential explanation of unconscious motivation among prosecutors and jurors, a majority of whom are white, is then explored in Part II.B.2.b.

a. The Significance of Race-of-the-Victim Discrimination

Race-of-the-victim discrimination violates the ordinary demands of the law by basing the decision as to whom is executed on an irrelevant characteristic: the race of the victim. When the victim's race determines the result of a capital trial, it is just as irrelevant to the principles that justify execution as would be the race of the defendant.<sup>310</sup> Moreover, the race of the victim can be decisive; it can constitute the but-for cause of the charging decision of the prosecutor or the decision of the jury to impose the sentence.<sup>311</sup>

This type of racial discrimination does not ground the death penalty decision in animus toward African American defendants. However, it shares the moral opprobrium of race-based distinctions that cause them to be rejected by society. The major moral failing of race-of-the-victim discrimination can be seen in the long history of the governing white society diminishing the importance of African American crimes and African American victims, both specifically in North Carolina and generally on a national level.<sup>312</sup>

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309. Of the other two, one defendant is white (Eric Lane) and the other is Native American (Darrell Strickland). *Id.*

310. See Baldus & Woodworth, *supra* note 239, at 1446.

311. See *id.* at 1450–51.

312. These attitudes reveal themselves occasionally in the words of even some of the state's most accomplished leaders. Then-Judge Susie Marshall Sharp, who later served as Chief Justice of the Supreme Court of North Carolina, wrote in private correspondence the following: "In Greensboro last week I put a colored woman who was guilty of murder in the first degree on probation and a colored man who was guilty of rape got off with a suspended sentence after a week in jail. You simply cannot judge animals by human standards." ANNA R. HAYES, *WITHOUT PRECEDENT: THE LIFE OF SUSIE MARSHALL SHARP* 198 (2008). The race of the victims is not given but cannot be understood to have been anything other than African American in this context of racial stereotype and diminishment. See also *supra* note 77 and accompany text (discussing the much diminished status of African American victims during slavery); *supra* Part I.B.2 (describing the failure

Race-of-the-victim discrimination has a real impact upon African Americans in three ways. First, the losses suffered by African American murder victims and their families are undervalued because they are treated less seriously than the losses to white victims and their families.<sup>313</sup> Second, this discrimination results in unfair treatment of the African American community because it undermines the goals of retribution and deterrence that justify the use of capital punishment.<sup>314</sup> Third, this discrimination sends the unacceptable message that the overriding objective of capital punishment is the protection of white victims.<sup>315</sup>

Although apparently widespread in post-*Furman* death penalty decisions, race-of-the-victim discrimination can be vastly reduced. This is because racial factors have been shown to have little impact on sentencing of the most culpable defendants.<sup>316</sup> Limiting death sentences to such cases generally reduces arbitrariness while preserving the retributive goal of capital punishment for the most deserving crimes.<sup>317</sup> Moreover, such cases are generally the ones that reviewing courts affirm and that actually result in execution.<sup>318</sup>

b. The Importance of Unconscious Racial Motivation in Contemporary Death Penalty Sentencing

Conscious, intentional, or purposeful racism is sometimes still seen in contemporary death penalty cases. For example, apparently conscious racial animus appeared in Robert Bacon's clemency

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to punish whites for rape of African American women and the exclusive execution of blacks for burglary of white occupied homes); *supra* Part I.B.4 (discussing the call of African American newspapers for equal justice for African American victims of rape).

313. *See* Baldus & Woodworth, *supra* note 239, at 1446.

314. *See id.* at 1451.

315. *See id.* at 1450.

316. *See id.* at 1456–57, 1484.

317. *See id.*

318. *See id.* Professor Baldus finds evidence in the experience of several states using different procedural mechanisms that such limitation is also feasible. *See id.* at 1458–66; *see also supra* note 239 and accompanying text (discussing the general impact of narrowing death eligibility on reducing arbitrariness articulated generally in *Furman*).

Another way to theoretically eliminate racial disparities would be to increase the number of executions among those who kill African American defendants; however the “remedy” is likely unworkable as a constitutional matter because it would require either suspect racial consciousness by the prosecution or an increase in the likelihood of arbitrariness by expansion of death eligibility. Moreover, this “remedy” is at odds with the societal trend to reduce, rather than expand, executions. *See* Howe, *supra* note 238, at 2132–35; Kennedy, *supra* note 229, at 1436–39. A further, even more substantial problem is that this “remedy” could only work for future death sentences and executions and cannot cure the effects of past race-of-the-victim discrimination where it existed.



motion, which described the racially discriminatory statements and conduct of jurors against this African American defendant.<sup>319</sup> Similar allegations of purposeful racial motivation are found in the case of Kenneth Rouse, an African American. In that case, a juror expressed racial animus against African Americans and purposefully failed to disclose his mother's murder under very similar circumstances to those in Rouse's case in order to avoid being dismissed for cause during jury selection.<sup>320</sup> Racially motivated conduct is unfortunately not a relic of the past,<sup>321</sup> but it is rarely displayed openly in contemporary death penalty cases. Instead, racial prejudice more often operates covertly rather than openly, and it often goes unrecognized even by the individual who responds unconsciously to such motivation.<sup>322</sup> One of the important features of the RJA is that it does not require proof of intentional racial motivation and instead authorizes proof by use of statistical and disparate impact evidence. The result is that relief is to be granted when race was a significant factor in the decision on death both if the evidence of racial

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319. For a discussion of the basis of Bacon's successful clemency petition, see *supra* note 278.

320. See *Rouse v. Lee*, 339 F.3d 238, 266 (4th Cir. 2003) (Motz, J., dissenting) ("Kenneth Rouse faces his death with reason to believe that one of the twelve citizens entrusted with doing impartial justice in his case sought so eagerly to condemn him that the juror deliberately misled the court, hiding basic facts as to his particular bias against Rouse and his contempt for all African Americans."); see also Affidavit of Joseph Scott Baynard, *State v. Rouse*, No. 91 CRS 3316-17, No. 92 CRS 2 (N.C. Super. Ct. Aug. 2, 1996) (on file with the North Carolina Law Review) (containing juror's own description of his conduct and attitudes); Affidavit of Renee Wathall, *State v. Rouse*, 91 CRS 3316-17, 92 CRS 2 (N.C. Super. Ct. Apr. 17, 1996) (on file with the North Carolina Law Review) (providing investigator's conversations with juror).

321. Former District Attorney Kenneth Honeycutt wore a gold lapel pin shaped like a noose and awarded similar pins to assistant prosecutors who won death penalty cases. See John Stevenson, *Condemned Man "Delusional": Lawyers Trying to Save His Life Say He Won't Talk to Them*, HERALD-SUN (Durham, N.C.), Nov. 23, 2006, at A1. The use of this symbol is obviously more ambiguous than the other examples given, but it is suggestive of attitudes that were at one time common and openly expressed but are more infrequently encountered currently. The decisions made by superior court judges in the discretionary decision of selecting grand jury foreman resulted in one of thirty-three grand jury foremen being African American over an eighteen year period in a county with a 61% African American population. See *State v. Cofield*, 320 N.C. 297, 308-09, 357 S.E.2d 622, 629 (1987). Even if based solely on inference from statistics, the decisions seem unlikely to have been unconscious.

322. See generally Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (seminal article criticizing the requirement in much constitutional litigation that requires proof of intentional motivation because it ignores much of what is understood about the working of the human mind and its disregard for both the irrationality of racism and the profound effect of the history of American race relations on individual and collective unconsciousness).

discrimination was effectively hidden from view and even if its operation was unconscious.<sup>323</sup>

As described in Part II.A, both the prosecutor and the jury retain broad discretion under the current structure. This discretion provides opportunities for racial considerations to affect those decisions. This may occur through racially stereotypical thinking, which is generally experienced by the individual as a factual perception rather than a biased stereotype and thus operates unconsciously.<sup>324</sup> Unconscious racial motivation may be observed in fears of the threat posed by African American defendants or in judgments regarding the heinousness of crimes that differ when the crime is committed against a white victim rather one who is African American.<sup>325</sup> These unconscious racial reactions can operate against a defendant who may be perceived as an unfamiliar outsider or feared. Conversely, unconscious motivation in the form of empathy is more likely experienced by prosecutors or jurors of the majority race on behalf of victims of that same race.<sup>326</sup>

Unconscious racial motivation can operate in a number of ways. Prosecutors may seek and jurors may impose the death penalty in response to their perception that community sentiment supports more punitive action when the victim is white than when African American.<sup>327</sup> If the defendant is African American, prosecutors may

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323. See *infra* Part III.A–D.

324. See generally Lawrence, *supra* note 322 (describing theoretical basis and operation of unconscious racial motivation).

325. See Baldus et al., *supra* note 259, at 1652.

326. To be powerful, racial influences need not be intentional and explicitly entertained or even perceived by the individual subject to those influences. Unconscious racial bias, known in the psychological field as implicit bias or implicit social cognition, operates “without conscious awareness or conscious control but nevertheless influences fundamental evaluations of individuals and groups.” Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1064 (2006). A substantial body of scholarship and research document these effects in a variety of settings, including the death penalty. See, e.g., Eberhardt et al., *supra* note 258, at 383, 385 (concluding that stereotypes regarding African Americans can affect jury evaluation of blameworthiness and was a significant predictor of death sentences where the victim was white, rendering race and stereotyping especially salient); Kang & Banaji, *supra*, at 1073–75 (reviewing studies that document implicit bias in hiring behavior and medical diagnosis); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–1535 (2005) (describing recent social cognition research that provides evidence of the existence of the operation of implicit racial bias and describing how it alters behavior). See generally Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (describing the process of unconscious bias and jury misremembering of facts because of racial stereotyping).

327. See Baldus et al., *supra* note 259, at 1653. Lack of public pressure from the black community for capital punishment could account for reduced pressure on prosecutors and

be influenced to seek the death penalty more frequently in cases where the victim is white because of a belief of the likely higher jury support for execution in such cases. If an African American commits a crime against another African American, the prosecutor may conclude that it must be highly aggravated to actually receive the death penalty.<sup>328</sup> All of these are situations in which racial motivation can enter the decision without conscious intention to discriminate. Whether a decision, driven by unconscious racial motivation, to treat an African American defendant more punitively than a white defendant, constitutes purposeful discrimination under the Equal Protection Clause of the Fourteenth Amendment may be open to question. However, the use of statistical proof under the RJA makes those judgments relevant when the result is that death penalty decisions are more frequently sought against or imposed on members of one race than another race.<sup>329</sup>

The very heavy predominance of white victims described in Part II.B.2 strongly suggests that race-of-the-defendant discrimination has continued in contemporary death penalty cases. Unless it is explained by non-racial factors in a careful statistical analysis, then this result should be considered the product of racial motivation of a prosecutor to seek the death penalty or jurors to impose it. While race-of-the-defendant discrimination is often explained as a result of conscious racial animus directed against the defendant, generally termed intentional or purposeful discrimination, it can also result from unconscious motivation such as stereotypical assumptions about the dangerousness of an African American defendant. On the other hand, race-of-the-victim discrimination is usually not based on racial antipathy and is therefore not on conscious racial motivation.

Empirical results show that race-of-the-victim discrimination results most frequently from decisions by the prosecutor at the time of charging.<sup>330</sup> For example, prosecutors may sincerely—but erroneously—perceive that families of white victims more strongly support the imposition of a death penalty or that such families have expressed their views of support more strongly to the prosecutor.<sup>331</sup>

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jurors to seek the death penalty. *See* Howe, *supra* note 238, at 2121 (citing Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 467 (1981)).

328. *See* Baldus & Woodworth, *supra* note 239, at 1422.

329. *See* N.C. GEN. STAT. §15A-2011(b)(1)–(2) (2009) (defining evidence relevant to find race as a significant factor in death penalty decisions).

330. *See* Baldus & Woodworth, *supra* note 239 at 1426.

331. *See id.* at 1449–50.

However, such perceptions may result not from actual differences in the families' actions but instead from factors associated with social standing, notoriety of the offense, and assumptions correlated with race.<sup>332</sup> Elected prosecutors may pursue the death penalty more vigorously for murderers of whites, not because of the personal inclinations of these prosecutors, but because of their understanding of the likely reactions of the electorate.<sup>333</sup> While observed less frequently in past studies, discrimination may also be the result of jury decision making when jurors view white victims more sympathetically than African American victims.<sup>334</sup> As noted above, the roots of such results are not in race-based hostility but rather in race-based empathy.<sup>335</sup> Both racial antipathy and empathy violate the RJA's command to remove the effects of racial motivation from the operation of North Carolina's death penalty.<sup>336</sup>

The greater participation of members of all races in the criminal justice system and better representation of defendants are clearly having a positive effect in reducing the operation of racial motivation. However, the influences of race have not necessarily been eliminated. Most prosecutors nationally and in North Carolina, despite changes in the electorate, remain white.<sup>337</sup> Also, for demographic and other

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332. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 452-54 (1995) (describing evidence from cases in Georgia, particularly one county, where the prosecutor did not contact most of the families in cases involving African American victims to determine the sentence preferred while in cases involving prominent white victims family contact was prompt).

333. See Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Cases*, 1998 SUP. CT. REV. 145, 155.

334. See Baldus & Woodworth, *supra* note 239, at 1448.

335. See *id.* at 1438.

336. See *id.* at 1482. This race-related motivation may be unconscious or conscious. *Id.*

337. During much of the relevant period, there were at most two African American District Attorneys in North Carolina (Carl Fox and Belinda Foster in an earlier period and currently Tracey Cline and Robert Evans), sometimes one, see Amanda S. Hitchcock, Recent Development, "Deference Does Not by Definition Preclude Relief": *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328, 1344 & n.106 (2006) (noting that thirty-eight of thirty-nine prosecutors in the state were white in 2006), and for a brief period none (from the departure of Belinda Evans until the election of Tracey Cline). See Mike Hixenbaugh, *Perdue Chooses New DA*, ROCKY MOUNT TELEGRAM (Rocky Mount, N.C.), Apr. 30, 2009, at 1A (describing appointment of Robert Evans in April 2009); cf. Matt Saldana, *District Attorneys Differ on Racial Justice Act*, INDEP. WKLY. (Durham, N.C.), June 10, 2009, at 9 (describing support for the Racial Justice Act by Durham County District Attorney Tracey Cline in contrast to opposition of the N.C. Conference of District Attorneys).

reasons,<sup>338</sup> most jurors in North Carolina are white. Greater media attention may accompany the murder of a white victim than one who is African American and may result in greater pressure on the prosecutor to charge the case capitally.<sup>339</sup> Differences in sentencing policies between jurisdictions may be the consequence of differences in policy or in racial motivation in the form of differing views regarding the worth of victims or defendants related to race.<sup>340</sup> The key point is that the continued role of discretionary judgments by prosecutors and jurors permits the operation of unconscious racial motivation to affect death penalty decisions, and the RJA includes consideration of that motivation, whether it is founded on racial animus or racial empathy, when it affects the frequency that members of one race are prosecuted capitally or sentenced to death in comparison with members of another race.

### 3. The Continuing Exclusion of African Americans from Jury Selection

Undeniably, North Carolina and the nation have moved a considerable distance in guaranteeing African Americans the right to serve on juries and defendants of all races to have juries drawn from a fair cross-section of their communities since *Strauder v. West Virginia*.<sup>341</sup> However, its declaration that de jure exclusion was unconstitutional had little effect on practices in many jurisdictions. In a series of cases, the Court focused on discrimination largely with regard to selection of the jury pool from which jury venires are selected, effectively demanding broad inclusion of citizens of all races, thereby doing much to bring about a meaningful African American presence and a chance for jury service.<sup>342</sup>

However, until its decision in *Batson v. Kentucky*<sup>343</sup> in 1986, the Supreme Court had given relatively weak protection against racially

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338. See *infra* Part II.B.3 (discussing apparent failure of *Batson v. Kentucky*, 476 U.S. 79 (1986), effectively to police peremptory strikes).

339. See Baldus & Woodworth, *supra* note 239, at 1449.

340. See Baldus & Woodworth, *supra* note 258, at 213–14 (describing results from Nebraska where urban jurisdictions were the harshest, which produced a substantial disparity in race-of-the-defendant sentencing, and New Jersey where suburban jurisdictions had the harshest policies that produced race-of-the-defendant disparities).

341. 100 U.S. 303 (1879); see *supra* Part I.B.6.

342. See, e.g., *Duren v. Missouri*, 439 U.S. 357 (1979); *Simms v. Georgia*, 389 U.S. 404 (1967) (per curiam); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Norris v. Alabama*, 294 U.S. 587 (1935); *supra* note 218.

343. 476 U.S. 79 (1986).

motivated selection of the trial jury from the venire.<sup>344</sup> Until *Batson*, although discrimination by the prosecutor in selecting a trial jury, which would principally occur by use of peremptory challenges, was unconstitutional, showing a pattern of striking African American jurors in the present case was not sufficient to warrant relief or even require judicial inquiry. Previously, the Court in *Swain v. Alabama*,<sup>345</sup> recognizing that historically peremptory challenges are exercised without statement of reason or need for justification, had required proof of discrimination. This requirement could be satisfied only through direct evidence of racial motivation or proof of a systemic pattern of removal of African Americans by the prosecutor in the particular jurisdiction.<sup>346</sup> As *Batson* recognized, this was a crippling burden that made prosecutors' peremptory challenges largely immune from constitutional scrutiny.<sup>347</sup>

*Batson* altered the picture somewhat by recognizing that a prima facie showing of discrimination could be established in the peremptory challenges made in an individual case, but it required only a reasonable, non-racial explanation for the prosecutor to overcome the challenge.<sup>348</sup> The *Batson* decision certainly made it easier to establish a claim that peremptory challenges were racially motivated, and conceptually it should also have made those challenges easier to win. However, while the prosecution is frequently

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344. *Id.* at 88 (acknowledging its focus on the venire and relative lack of attention to the selection process for the petit jury despite the fact that racial discrimination in the trial jury's selection was also clearly prohibited).

345. 380 U.S. 202 (1965).

346. *See id.* at 202–12.

347. *See Batson*, 476 U.S. at 92–93. *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988), provides an example of the type of broad justification that can excuse racial discrimination. The prosecution defended the exercise of its peremptory strike against “one black woman because she was unemployed [and] . . . the prosecution did not feel that an unemployed person had as significant a stake in an orderly society as an employed person.” *Id.* at 253, 368 S.E.2d at 839. The supreme court affirmed the trial court's ruling that the justification was racially neutral. *Id.* at 258–59, 368 S.E.2d at 841–42. It was part of the prosecutor's stated criteria for selecting jurors who were “‘stable, government oriented, employed and had sufficient ties to the community, and a mind-set . . . that would pay more attention to the needs of law enforcement than the fine points of individual rights.’” *Id.* at 255, 368 S.E.2d at 840. In his concurring opinion, Justice Frye protested that accepting such profiles could have the effect of systematically excluding African Americans, thwart the purpose of *Batson*, and turn the equal protection clause in this context into a right without a remedy. *Id.* at 259–61, 368 S.E.2d at 842–43 (Frye, J., concurring).

348. *See Batson*, 476 U.S. at 96–98 (“Once the defendant makes a prima facie showing [of racial discrimination through the use of peremptory challenges in his or her case], the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.”).

required to provide a non-racial explanation, rarely does the defense prevail as long as the response includes any of a substantial number of accepted justifications.<sup>349</sup> The result is a relatively ineffective framework established by federal constitutional law. Indeed, some knowledgeable commentators argue that, in modern death penalty practice, race discrimination is most deeply embedded and most often manifest in jury selection practices that are designed to reduce or hold African American participation as jurors to a minimum.<sup>350</sup>

Racially motivated peremptory challenges are often particularly effective because the number of minorities in the original panel is small. Minorities can be removed from the panel by “for cause” challenges for a number of predictable reasons.<sup>351</sup> Typically, the most

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349. See Hitchcock, *supra* note 337, at 1345, 1351–55 (cataloging some of the justifications approved by the Supreme Court of North Carolina in capital cases); State v. Wright, 189 N.C. App. 346, 353–54, 658 S.E.2d 60, 64–65 (2008) (granting a new trial on *Batson* grounds where the prosecutor failed to provide any justifications for several peremptory strikes and the trial court did not make findings as to each strike as required by precedent); see also Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 123 (2001) (observing in empirical research on Philadelphia, Pennsylvania, trials that *Batson* and its progeny have had only marginal effect).

350. See, e.g., Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 515–27 (1994) (detailing prosecution practices that despite *Batson* continue to produce juries in which all or most African Americans have been excluded).

351. See State v. Noell, 284 N.C. 670, 701, 202 S.E.2d 750, 770 (1974) (upholding conviction and death sentence and rejecting challenge to them based on the prosecutor’s use of peremptory strikes to remove all African Americans from the jury); Brief for Defendant Appellant at 21–22, State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974) (No. 10) (challenging exclusion of jurors of defendant’s race because of their knowledge of the defendant) (on file with the North Carolina Law Review); see also State v. Cole, 343 N.C. 399, 412–14, 471 S.E.2d 362, 367–69 (1996) (recounting defendant’s request for change of venue, *inter alia*, because so many of the potential African American jurors in the rural county were likely to know the victims or the defendant that it would be difficult to seat any African American jurors, which proved true in that thirteen of the sixteen jurors who were questioned during *voir dire* indicated such knowledge, nine of them being stricken for cause, and ultimately no African American serving).

Litigation in the Motion for Appropriate Relief (MAR) in the challenge to the death sentence of John Oliver in Robeson County illustrates some of the ways in which African American jurors can be excluded during jury selection. A combination of processes resulted in the exclusion of all African Americans in a jurisdiction where approximately one-fourth of the population was African American from a jury that in 1982 recommended death sentences for two African American defendants charged with murdering two white men. See Motion for Appropriate Relief, Exhibit VIII, State v. Oliver, No. 78 CRS 25575 (N.C. Super. Ct. Nov. 12, 1986) (on file with the North Carolina Law Review) (recounting racial characteristics of defendants, victims, members of the venire, and the voting age population, 23% of whom were African American at that time). The death sentence was vacated on the basis of a violation of the defendant’s due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). See Order at 56–62, State v. Oliver,

significant is the “death qualifying” of the panel members for service on a capital jury,<sup>352</sup> which precedes the peremptory strike process and excludes a disproportionate number of minorities with “for cause” challenges.<sup>353</sup> As demonstrated in research in Philadelphia, Pennsylvania, by Professor Baldus, the limited number of African Americans in the typical jury pool magnifies the impact of any discriminatory pattern of strikes by the prosecution that cannot be offset by a compensating strategy of defense counsel.<sup>354</sup> Moreover,

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No. 78 CRS 25575 (N.C. Super. Ct. Jan. 25, 1994) (on file with the North Carolina Law Review).

In the death qualifying process, sixty-eight jurors were questioned, and thirty-three of them were excused for cause, many with only three highly leading questions from the prosecutor and no allowance of clarification. *See* Motion for Appropriate Relief at 41–45, *State v. Oliver*, No. 78 CRS 25575 (N.C. Super. Ct. Apr. 27, 1988). This high percentage of jurors unable to impose a death sentence appeared unlikely given the attitudes of the public and according to interviews with jurors by counsel during development of the Motion for Appropriate Relief and was more likely attributable to the opportunity the procedure provided to simply avoid jury service. *Id.* at 45–46. That process eliminated seven of the fourteen African American jurors who were questioned during voir dire. One additional juror was eliminated by a challenge for cause for another purpose. The prosecutor used five of his nine peremptory challenges against African Americans. The final African American juror was excused on a peremptory challenge by the co-defendant’s attorney. *See id.* at 53–55. Despite the expenditure of weeks of work amassing the data on the race of jurors, which is usually not available or noted in any fashion in criminal case records, and its presentation in the MAR supported by affidavits, the issue was never addressed by the trial court judge who heard the motion because they were dismissed on the State’s motion on procedural grounds. *See* Order at 6, *State v. Oliver*, No. 78 CRS 25575 (N.C. Super. Ct. Jan. 25, 1994) (on file with the North Carolina Law Review) (affirming earlier rulings of another superior court judge who ruled on the pleadings to bar the majority of claims on grounds of procedural bar).

352. A venire member is considered “death-qualified” if the prospective juror is not incapable of fairly imposing a death sentence under appropriate facts. In *Witherspoon v. Illinois*, 391 U.S. 510, 521–22 (1968), the Court set out the standards for striking venire members for cause because of their opposition to, and reservations about, capital punishment. *See also* *Wainwright v. Witt*, 469 U.S. 412, 416–26 (1984) (more recent discussion of same issue). In *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), the Court established standards for the less frequently encountered situation of striking venire members for cause because they would automatically sentence a defendant to death upon his conviction for capital murder.

353. Although the United States Supreme Court has rejected the challenge to death qualification that it denies the defendant the right to a fair cross section of the community, *see* *Lockhart v. McCree*, 476 U.S. 162, 174–77 (1986), researchers demonstrate that the process of death qualification predictably removes a larger percentage of African Americans than whites because of the relatively greater opposition to capital punishment among African Americans. *See, e.g.,* *Lockhart v. McCree*, 476 U.S. 162, 187 (1986) (Marshall, J., dissenting) (noting the findings of researchers that death qualification removes a disproportionate percentage of African Americans and women); Frank P. Williams III & Marilyn D. McShane, *Inclinations of Prospective Jurors in Capital Cases*, 74 SOC. SCI. REV. 85, 87–89 (1990).

354. *See* Baldus et al., *supra* note 349, at 125 (noting that the “cancelling out” hypothesis of prosecution strikes and defense strikes, which appeared to be happening,



social psychologists have demonstrated that to affect the outcome of a typical jury of twelve, more than one person espousing a minority position must be on the jury, for when voiced by just one person, the minority argument does not receive significant consideration. As a result, the inclusion of a single minority member will generally have only limited effect.<sup>355</sup>

Despite changes in the laws and practices governing jury selection, those who exercise discretion in imposing the death sentence—jurors—remain disproportionately white, and African American service on juries is often limited. Indeed, in a number of the cases of defendants presently on death row, the jury was all white even though a number of these cases were tried in counties with substantial African American populations.<sup>356</sup>

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favored the prosecution because “the prime targets of the Commonwealth typically were substantially smaller in number than were defense counsel’s prime targets”).

355. According to social science research, the presence of one or more allies, in other words at least two and perhaps three jurors who share a minority position, is usually critical to a minority effectively voicing its position in the deliberation process.

[F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally.

HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 463 (1966); see also Baldus et al., *supra* note 349, at 124 (finding that, in Philadelphia, Pennsylvania, juries with five or more African American jurors were significantly less likely to impose death sentences than those with four or fewer African American members); John J. Francis, *Peremptory Challenges, Gutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297, 327–36 (2005) (describing the benefits of multiracial juries for resisting stereotypical reasoning and the importance of a critical mass of minority jurors). Also, social science research and theory indicate another potential impact of minority presence. A single juror espousing a minority position is quite unlikely to prevail in either holding out against the majority’s position in the determination of the case, but even a lone juror of a minority race can have the effect of sensitizing majority jurors to different perspectives that might otherwise be ignored, often because it is not articulated or perceived. See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias*, 7 PSYCHOL. PUB. POL’Y & L. 201, 221 (2001).

356. Among defendants currently on death row, at least thirty were tried by juries that had no African American members. The defendants are listed alphabetically by race with the county where the case originated shown in parentheses. The cases include: African American defendants—Quintel Augustine (Cumberland), Roger Blakeney (Union), Paul Brown (Wayne), Rayford Burke (Iredell), Wade Cole (Camden), Phillip Davis (Buncombe), Keith East (Surry), Andre Fletcher (Rutherford), Mitchell Holmes (Johnston), Cerron Hooks (Forsyth), Guy LeGrande (Stanly), Thomas Larry (Forsyth), Terry Moore (Davie), Andrew Ramseur (Iredell), Martin Richardson (Union), Kenneth Rouse (Randolph), and Russell Tucker (Forsyth); Native American defendants—

In addition to inviting a broad examination of statistical evidence regarding race-of-the-defendant and race-of-the-victim discrimination, the RJA authorizes a systemic examination of the use of race in the examination of peremptory challenges during jury selection. This cumulative examination within relevant geographical areas for prosecution should address the apparent ineffectiveness of *Batson* in individual case litigation to eliminate the racial exclusionary effects of the prosecution's use of peremptory challenges. This Article now turns to analysis and interpretation of the RJA as it implements the task of ensuring that racial motivation does not affect the operation of the death penalty in North Carolina with regard to significant differences in the race of defendants and victims and the prosecution's exercise of prosecutorial peremptory challenges.

### III. THE RACIAL JUSTICE ACT

A number of important issues must be addressed by courts in interpreting the RJA. Its key features and their role in ensuring that race is eliminated from decisions affecting defendants, victims, and jurors in the operation of the North Carolina death penalty system are examined below. The analysis relies on legislative intent, placement within the context of other remedial legislation employing statistical evidence, and clear distinctions between the RJA and the Kentucky statute.

#### A. *Accepting McCleskey's Invitation to Legislatures to Receive Statistical Evidence in Addition to Proof of Intentional Discrimination*

In enacting the Racial Justice Act, North Carolina determined that its inquiry would not be limited by *McCleskey v. Kemp*<sup>357</sup> and its rejection of statistical evidence when examining constitutional claims

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Alexander Polke (Randolph) and Darryl Strickland (Union); white defendants—Eric Call (Ashe), Chris Goss (Ashe), James Jaynes (Polk), Wayne Laws (Davidson), Carl Moseley (Forsyth & Stokes), Ted Prevatte (Stanly), William Raines (Henderson), Tony Sidden (Alexander), Gary Trull (Randolph), George Wilkerson (Randolph), and James Williams (Randolph). See Jury Information Memorandum (on file with the North Carolina Law Review).

According to 2000 census data, the African American percentage in Cumberland, Forsyth, and Wayne Counties exceeded the state-wide average of 21.6%, and Wake County, with 19.7% of its population African American, was close to the state-wide percentage. Camden, Iredell, Johnston, Rutherford, and Stanly Counties all had African American populations that exceeded 10% but were less than 20%. In the remaining counties listed above, the African American population was less than 10%. See 2000 Census, *supra* note 258.

357. 481 U.S. 279 (1987).

under the Equal Protection Clause. In *McCleskey*, the Court ruled that “to prevail under the Equal Protection Clause, [the defendant] must prove that the decisionmakers in *his* case acted with discriminatory propose.”<sup>358</sup> The legislature understood that it was creating a different system of proof than that prescribed by *McCleskey*, explicitly accepting the Court’s invitation to legislatures to act because they, rather than the United States Supreme Court, are best able to judge how statistical studies should be used in regulating the death penalty.<sup>359</sup>

In the debate on May 14, 2009, the day when the North Carolina Senate first approved Senate Bill 461, which became the RJA, Senator Doug Berger set out how it differs from *McCleskey*:

[W]ithout this legislation, previous attempts to raise this issue would have been to no avail because of the *McCleskey* decision. . . . The *McCleskey* decision . . . said that while statistics may show race discrimination, it doesn’t rise to the level of being a constitutional violation of the equal protection clause and specifically directed that if states wanted to provide this additional protection and making it a means by which someone could prove racial discrimination, then they could do it. And that’s what we’re doing here today. I want to step back and explain, very quickly, where this idea of using statistics to prove race discrimination comes from and why it’s needed. Race discrimination is very hard to prove. Rarely, particularly in today’s time, do people outright say, “I am doing this because of the color of your skin.” Imagine if our civil rights act that was passed in ‘64 said that the only way that you can prove race discrimination is that kind of evidence—an admission by the person engaging in racial discrimination. We would have had very little change in our society and culture in terms of the hiring practices. What we did in the civil rights act in ‘64 is said, “In addition to using direct evidence in proving discrimination,

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358. *Id.* at 292. The *McCleskey* decision’s insistence on proof of purposeful racial discrimination for proof of constitutional claims under the Equal Protection doctrine in death penalty cases, drastically limited the use of statistical evidence and the significance of proof of disparate racial impact, and because of the virtual impossibility of meeting the burden imposed, effectively ended federal court scrutiny of such claims. See Baldus & Woodworth, *supra* note 239, at 1466; see also John H. Blume et al., *Post-McCleskey Racial Discrimination in Capital Cases*, 83 CORNELL L. REV. 1771, 1778–79 (1998) (noting that the limitation in *McCleskey* to proof regarding the defendant’s particular case effectively limits proof to the individual prosecutor or office).

359. See *McCleskey*, 481 U.S. at 319.

you could use statistics.” And, in fact, what we did, and there’s a parallel to what we’re doing in this bill.<sup>360</sup>

By contrast to *McCleskey*, the RJA explicitly authorizes proof by “statistical evidence” that race was a significant factor in decisions to seek or impose death sentences in the county, the prosecutorial district, the judicial division, or the State at the relevant time.<sup>361</sup> It also declares that based on the process set out and the proof admitted, including statistical evidence, if the court finds that race was a significant factor in such decisions in any one of the four relevant geographical areas, relief is to be granted.<sup>362</sup> The death sentence is to be vacated, and the defendant is to be resentenced to life without parole.<sup>363</sup>

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360. See Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009) (transcript on file with the North Carolina Law Review) (responding in opposition to an amendment offered by Senator Phil Berger to limit the use of statistical evidence as set out in *McCleskey*). His statement that the model being used was that of statistical evidence in employment cases was echoed in the House by Rep. Rick Glazier during the debate in the North Carolina House on July 14, 2009, when it adopted Senate Bill 461. See Rep. Rick Glazier, House Floor Debate on Racial Justice Act (July 14, 2009) (transcript on file with the North Carolina Law Review) (“Well, I’m here to tell you, at least from my perspective, that unstated motivation is extraordinarily difficult to ferret out. That is why we use statistical evidence in employment discrimination cases, and if we are using statistical evidence in employment cases to protect property rights, I fail to see why credible statistical evidence ought not be a legislative reason or a legislative priority to allow people to use to fight for their life.”). Sen. Doug Berger’s explicit acceptance of *McCleskey*’s invitation to legislatures to determine the appropriate use of statistical evidence regarding racial discrimination was echoed in that same debate by Rep. Deborah Ross. See Rep. Deborah Ross, House Floor Debate on Racial Justice Act (July 14, 2009) (transcript on file with the North Carolina Law Review) (“In a 5-4 decision, the US Supreme Court said that you don’t have the *constitutional right* to present statistical evidence . . . [t]hrough at the end of his opinion for the five judge majority, Justice Lewis Powell said ‘these arguments are best presented to legislative bodies. It is the Legislatures, the elected representatives of the people that are constituted to respond to the will and consequently the moral values of the people. Legislatures are also better qualified to weigh and evaluate the results of statistical studies in terms of their local conditions and with a flexibility of approach that is not available to the court.’”) (quoting *McCleskey*, 481 U.S. at 319).

361. See N.C. GEN. STAT. § 15A-2010(b) (2009).

362. See *id.* § 15A-2012(a)(3).

363. See *id.*

*B. Proof of Discrimination through Statistical Evidence and Burden Shifting*

The legislature set out in the RJA a statutory test for “[p]roof of racial discrimination,<sup>364</sup> which replaces *McCleskey*’s almost impossible-to-establish constitutional requirement of direct proof of intention to discriminate. The statute states that the “finding that race was *the* basis of the decision to seek or impose a death sentence *may* be established if the court finds that race was *a significant factor* in decisions to seek or impose the sentence” in one of four designated areas at the time the decision was made.<sup>365</sup>

The RJA sets out the framework of relevant concerns. The two decisions of interest are the decision to seek the death penalty, which is made by the prosecutor, and the decision to impose the death penalty, which is made by the jury.<sup>366</sup> Proof regarding the effect of race on these decisions “may include statistical evidence,” direct testimony, or other evidence.<sup>367</sup> Statistical evidence may show disproportionate racial impact and therefore that race was the “significant factor” in the decisions regarding whether to seek or impose the death penalty. First, the RJA authorizes proof by introducing evidence that “[d]eath sentences were sought or imposed significantly more frequently upon persons of one race,” which makes the race of the defendant critical.<sup>368</sup> Second, it authorizes proof that “[d]eath sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as capital offenses against persons of another race,” which focuses on the race of the victim.<sup>369</sup> Third, it recognizes that “[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection,” which directs examination of the race of jurors who were excused.<sup>370</sup> As long as made at the time of the decision to seek or impose the death sentence, this statistical showing may be

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364. *See id.* § 15A-2011 (using “racial discrimination” in the statutory title as the only use of that term in the RJA); *see id.* § 15A-2010 (prohibiting a death sentence that “was sought or obtained on the basis of race”).

365. *See* § 15A-2011(a) (emphasis added).

366. *Id.*

367. *See* § 15A-2011(b). In addition to statistical evidence, the statute permits sworn testimony from witnesses drawn from the criminal justice system. *See id.*

368. *See* § 15A-2011(b)(1).

369. *See* § 15A-2011(b)(2).

370. *See* § 15A-2011(b)(3). In combination with section 15A-2012(b), which gives the defendant the right to raise claims under the RJA “[n]otwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A,” this provision allows defendants to litigate racial discrimination regarding peremptory strikes even if objections were not made at trial or might be subject to other procedural bars in Article 89.

made in “the county, the prosecutorial district, the judicial division, or the State.”<sup>371</sup>

In one section, the statute describes a finding that race was “the basis” of a decision to seek or impose a death sentence, which “may” be established if the court finds that race was a significant factor in the decision in one of the four identified geographical areas.<sup>372</sup> Elsewhere, the statute states more directly the connection between the requirement of relief and proof of disparate impact:

If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time death was sought or imposed, the court shall order that the death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.<sup>373</sup>

In combination with others, these provisions set out a burden shifting process. The defendant has the burden to prove “race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time death was sought or imposed.”<sup>374</sup> If he or she does so, then the state may rebut the defendant’s proof, again using either statistical or other evidence.<sup>375</sup> However, if the state does not refute the defendant’s proof, the language of the statute commands that “the judgment *shall* be vacated and the defendant resentenced to life without the possibility of parole.”<sup>376</sup>

Thus, the RJA follows the familiar pattern of the use of statistical evidence in civil rights law.<sup>377</sup> However, in setting out the remedy, it

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371. See N.C. GEN. STAT. § 15A-2012(b) (2009).

372. See § 15A-2011(a).

373. See § 15A-2012(a)(3) (emphasis added).

374. See § 15A-2012(c).

375. See *id.*

376. See § 15A-2012(a)(3) (emphasis added).

377. Statistical evidence is used to satisfy the claimant’s burden and to shift the burden to the opponent to rebut the inference established by the statistical evidence in voting rights and employment discrimination cases and in criminal law as to fair representation of the community in jury venires and the use of peremptory strikes in jury selection. See Alex Lesman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court’s Proportionality Review Project*, 13 J. L. & POL’Y 359, 371–72 (2005); Baldus & Woodworth, *supra* note 239, at 1467 (noting the Kentucky Racial Justice Act is modeled on the Federal Racial Justice Act, which was based on the model of proof used in challenging a pattern of apparent race-based peremptory strikes in *Batson*). This was the model used as well in the

does more than permit use of statistical evidence to establish a “prima facie” case. A “prima facie” case under North Carolina law permits the finder of fact to grant relief.<sup>378</sup> The RJA at least does that much. It also appears to go further and not only permits but compels relief if the defendant’s proof is not refuted that race was a significant factor in the decision to seek or impose the death penalty in one of the four geographical areas identified by the statute.

*C. Requirement of Particularity Regarding Race as a Significant Factor in Decisions in a Relevant Geographical Area, Not in the Individual Case*

The key limitation in *McCleskey*—proof of intentional or purposeful discrimination in the defendant’s case—is not required under the RJA, although it would be permitted.<sup>379</sup> Moreover, differences between the North Carolina RJA and the Kentucky legislation of the same name reveal how the North Carolina RJA avoids indirectly limiting the defendant’s use of statistical proof. The Kentucky statute indirectly limits the defendant’s use of statistical proof by its requirement of particularity in proof linking the statistical evidence to the defendant’s specific case.<sup>380</sup> By contrast, the North

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proposed federal Racial Justice Act as developed in the United States House of Representatives. See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986) (authorizing use of a pattern of peremptory strikes against members of a racial group by the prosecutor to establish an inference of discrimination that shifts the burden to the state to explain with neutral reasons to avoid a finding of discriminatory action); H.R. REP. NO. 103-458, at 3–5 (1994) (noting that because few people readily admit to an intent to discriminate, illegal discrimination can be established in a number of areas of federal law by showing that the results of the process have a discriminatory impact); Don Edwards & John Conyers, Jr., *The Racial Justice Act—A Simple Matter of Justice*, 20 U. DAYTON L. REV. 699, 704–06, 708–09 (1995) (describing the mechanism of the proposed federal Racial Justice Act, which follows the pattern of civil rights statutes where statistical evidence produces an inference of racial discrimination that establishes a prima facie case, shifting the burden to the state to rebut the inference if it is to avoid relief); Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 57–58 (2007) (describing the operation of the statistical evidence of disparate impact to create an inference of discrimination that the state could then rebut, which it must do to avoid invalidation of the death sentence).

378. Under North Carolina terminology, establishing a prima facie case may result in the party prevailing in the absence of rebuttal evidence, but it does not formally shift the burden of proof. See 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 32, at 120–21 (6th ed. 2004) (noting that establishing a prima facie case does not truly shift the burden).

379. The recognition in the statute of the propriety of use of testimony from various witnesses in the criminal justice system is appropriate to such proof. See N.C. GEN. STAT. § 15A-2011(b).

380. See KY. REV. STAT. ANN. § 532-300(4) (2008). This provision has apparently had the effect of limiting the use of statistical evidence in Kentucky. Although the Kentucky

Carolina RJA focuses the particularity of proof on how statistical evidence supports “a claim that race was a significant factor in decisions . . . in the county, the prosecutorial district, the judicial division, or the State.”<sup>381</sup> It requires the defendant “to state with particularity how the evidence supports” the claim that race was a significant factor in decisions of the prosecutor or jury in any of these

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racial justice act authorizes use of statistical evidence on a state-wide basis to establish a finding that race was the basis of the decision to seek death, *see id.* § 532-300(2), the force of that authorization to meet the defendant’s burden was undercut by the statute’s requirement that the defendant state “with particularity” how racial considerations played a significant part in the decision to seek death “in his or her case,” *id.* § 532-300(4). The phrasing of the latter requirement has the ring of *McCleskey*’s requirement of proof that “the decisionmakers in *his* case acted with discriminatory propose.” *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). Some observers believe the effect of this provision has been to focus proof by statistical evidence in the specific prosecutorial district. *See* Baldus & Woodworth, *supra* note 239, at 1468 & n.218 (quoting an observation of a defender); *see also* Gerald Neal, *Not Soft on Crime, but Strong on Justice: The Kentucky Racial Justice Act*, 26 THE ADVOCATE (Frankfurt, KY), Mar. 2004, at 9, 19, available at <http://apps.dpa.ky.gov/library/advocate/pdf/2004/adv032004.pdf> (analyzing defender responses to the Kentucky act). North Carolina’s differently directed “particularity requirement” does not invite that effect.

381. *See* N.C. GEN. STAT. § 15A-2012(a). Earlier versions of the North Carolina Racial Justice Act introduced in the North Carolina House of Representatives bore strong resemblance to the Kentucky statute, and thus changes in the legislation before enactment to modify those provisions that limited its effectiveness are significant indicators of legislative intent. H.B. 1291, which was introduced in 2007 but not adopted, tracked the major provisions of the Kentucky act and contained the major limitations described in *supra* note 380 and discussed below.

The North Carolina statute also differs from the Kentucky Racial Justice Act, *see* KY. REV. STAT. ANN. §§ 532-300 to -309 (1998), in a number of significant ways. First, the Kentucky act applies only to the decision “to seek the sentence of death.” *Id.* § 532-300(2). The North Carolina statute applies to death sentences “sought or obtained on the basis of race” and where “race was a significant factor in decisions to seek or impose a death penalty.” N.C. GEN. STAT. § 15A-2010; § 15A-2011(a). The effect of the Kentucky statute is to limit the impact of its legislation to the charging decision while the North Carolina act clearly covers decisions by the jury to impose the sentence. Indeed, the North Carolina statute specifically permits proof of race as a significant factor in the exercise of peremptory challenges, *see id.* § 15A-2011(b)(3), which are applicable only to jurors. It also explicitly authorizes testimony from jurors. *See id.* § 15A-2011(b). The North Carolina act also potentially covers other official action that goes to how the death sentence was “obtained,” which is not otherwise defined. Also, the Kentucky Act places the burden of proof on the defendant by “clear and convincing evidence.” KY. REV. STAT. ANN. § 532-300(5). The North Carolina Act places the burden of proof on the defendant but does not impose any higher burden than the normal preponderance of evidence standard. *See* N.C. GEN. STAT. § 15A-2011(c). Both the Kentucky Act and the North Carolina Act permit proof that both the race of the defendant and the race of the victim provided the basis of decisions regarding the death sentence. *See* KY. REV. STAT. ANN. § 532-300(3)(a) (race of the defendant— “[u]pon persons of one race”); § 532-300(3)(b) (race of the victim— “offenses against persons of one race”); N.C. GEN. STAT. § 15A-2011(b)(1) (race of the defendant— “upon persons of one race”); § 15A-2011(b)(2) (race of the victim— “offenses against persons of one race”).



geographical areas at the time of decision, focusing the particularity requirement on proof of the impact of race in one of those areas.<sup>382</sup> Thus, compared to the Kentucky statute, the North Carolina RJA imposes a particularity requirement regarding proof as to the four relevant geographical areas and not the individual defendant's case.<sup>383</sup>

The administration of the death penalty in North Carolina is best understood as a state-wide system with a combination of local and centralized authority. The state legislature has passed laws establishing the death penalty and setting out broad rules for its operation.<sup>384</sup> Local prosecutors, who are elected from and serve in districts, are given significant discretion in applying the state laws to prosecution of particular cases. Resident superior court judges, who are also elected locally, serve within a judicial division and have a home district. They preside over hearings and trials in capital cases where they interpret and apply the law. Jurors, who render the verdicts in capital cases, are drawn from the county where the capital crime occurred, unless the court moves the trial to another county. The Supreme Court of North Carolina reviews cases where the death penalty has been imposed and establishes rules supplemental to state law regarding trial and appellate procedure in capital cases.<sup>385</sup>

This system has changed significantly since its initial adoption. Few, if any, government actors remain from the beginning of our modern death penalty. The laws and the application of the laws have changed significantly. Racial attitudes of the public and public officials have likewise changed over the last thirty years. Thus, the examination of the impact of race called for by the RJA is an examination of this multi-level system of death penalty administration at the time relevant to each case. If the system, when examined at the state-wide level, reveals the systemic improper influence of race at a relevant time, then the death verdicts that are a product of that system at that time period cannot stand. If, however, no state-wide systemic problem is found, then the capital defendant may press his

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382. N.C. GEN. STAT. § 15A-2011(a).

383. *Id.* § 15A-2012(a); *see also supra* note 358 (discussing the significant limitation imposed on proof where, instead of the jurisdiction-wide focus of the RJA, the claim is a constitutional action under the Equal Protection Clause and *McCleskey*, which results almost inevitably in a very narrow focus on prosecutorial practices).

The only point at which the statute relates a showing to the particular case involves rebuttal evidence from the state where the statute authorizes receiving evidence that any program established by the state for the purpose of eliminating race as a factor in death sentence decisions had an "impact upon the defendant's trial." § 15A-2011(c).

384. *See, e.g.*, N.C. GEN. STAT. § 15A-2000 (2009).

385. *See* N.C. GEN. STAT. § 7A-33 (2009); § 7A-34.

case based on an examination of the data by judicial division, judicial district, or county.

*D. Rebuttal by the State*

Statistical proof that meets the defendant's initial burden entitles and likely compels relief unless rebutted by the state. The statute recognizes that such rebuttal evidence may include, but is not limited to, statistical evidence.<sup>386</sup> The statute also recognizes that rebuttal evidence may be offered in the form of programs designed to eliminate race as a factor, but only as to its "impact upon the defendant's trial."<sup>387</sup>

In rebutting the defendant's statistical evidence, the prosecution may demonstrate that the disparate impact resulted from any statutorily authorized factor, some of which may correlate with race and thereby eliminate significance of the apparent impact of race in producing that disparate impact.<sup>388</sup> The structure developed in the RJA is a straightforward but important application of the burden shifting pattern followed in other remedial civil rights legislation, which gives the defense the opportunity and in many situations the obligation to rebut the moving party's statistically based proof if relief is to be avoided.

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386. See § 15A-2011(c). Because the RJA grants relief upon a finding that "race was a significant factor in decisions to seek or impose" the death penalty in either "the county, the prosecutorial district, the judicial division, or the State," § 15A-2012(a)(3) (emphasis added), with treatment of the geographical units written in the disjunctive, statistical evidence offered by the prosecution in rebuttal as a matter of logic must respond at the same geographical level as the defendant's proof to avoid relief. For example, the defendant's proof that disparate impact occurred in the county level where the case was tried would generally not be rebutted by the prosecution's state-wide evidence of no significant disparate impact at that geographic level when all individual units are cumulated. Similarly, the defendant's proof of state-wide disparate impact cannot logically be rebutted by the prosecution's evidence that there was no discrimination in a particular county since that would not show that cumulatively the decisions showed such disparate impact.

387. § 15A-2011(c). As noted earlier, this linking of the impact of the program to the defendant's case is in distinction to the linkage of defendant's statistical showing to one of the relevant jurisdictions within which his or her case was handled. See *supra* notes 379-83 and accompanying text (contrasting the North Carolina RJA to both the requirements of *McCleskey* regarding proof of discrimination under the Equal Protection Clause and the Kentucky Racial Justice Act).

388. The RJA's only reference that relates to this obvious point is a limitation on evidence relevant to the defendant's showing, which allows proof "irrespective of statutory factors." § 15A-2011(b). Such evidence is logically relevant as well to refute the defendant's statistical proof.

*E. Standing to Raise the Claim*

The RJA, which is explicitly retroactive, applies to claims by all defendants, whether sentenced in the past or facing trial on capital charges.<sup>389</sup> As long as the defendant produces disparate impact evidence tending to show that race was a significant factor in decisions to seek or impose the death sentence in the relevant county, prosecutorial district, or judicial division or in the state at the time of the decision to seek or impose his or her death sentence, the statute provides grounds for relief.<sup>390</sup> Disparate impact of race is relevant if it relates to the defendant, the victim, or jurors excused by peremptory strikes.<sup>391</sup> Because the defendant would be entitled to relief, any defendant facing a death sentence who can provide evidence on these issues obviously has standing to seek such relief. Therefore, if a defendant produces disparate impact evidence on any of these issues as to any of these geographic units at the relevant time, he or she has standing under the statute to challenge his or her death sentence.

The RJA does not, on its face or even theoretically, limit standing based on race of the defendant or victim. Under established jury selection law, defendants of any race may challenge discriminatory exercise of peremptory challenges. Indeed, even as to more restrictive procedural requirements for federal constitutional claims, standing and “cognizable injury” does not require that the defendant and the excluded juror be of the same race.<sup>392</sup> As a result, defendants regardless of their race have standing under the RJA to

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389 See Racial Justice Act, ch. 464, § 2, 2009 N.C. Legis. Serv. 1193, 1194 (West) (requiring claims of those presently under a death sentence to be filed within a year of the effective date of the RJA). It became effective August 11, 2009, *id.*, establishing a deadline for filing of August 10, 2010. As noted earlier, *see supra* note 370, claims regarding jury selection are not precluded by failure to previously raise them as long as the RJA challenge is timely filed.

390. See § 15A-2012(a)(3).

391. See § 15A-2011(b)(1)–(b)(3).

392. See *Powers v. Ohio*, 499 U.S. 400, 410–16 (1991). In *Powers*, the Court stated:

The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice . . . . This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors “casts doubt on the integrity of the judicial process,” . . . and places the fairness of a criminal proceeding in doubt.

*Id.* at 411 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). The result in *Powers* is consistent with an earlier ruling regarding exclusion of African Americans from the grand jury, which the Court found unconstitutional in *Peters v. Kiff*, 407 U.S. 492 (1972), a challenge brought by a white defendant.

challenge their death sentence if they produce evidence of disparate racial impact regarding peremptory strikes against any race by the prosecution.

Two different types of disparate impact are clear bases both for standing and for relief. First, the defendant may have been harmed by the operation of race; his or her prospects of a death sentence may have been increased by the irrationality that race introduced into the operation of the death penalty. That harm could arise from decisions based either on the defendant's race or the race of the victim. In the first situation, the defendant would be the object of discrimination in the decision to seek a death sentence or by the jury to impose a death sentence. It could also occur when the race of the victim had an effect on the decision of the prosecutor to seek a death sentence or the jury to impose it, which occurs typically through racial empathy.<sup>393</sup>

Another rationale for invalidation of the death sentence where there is disparate impact regarding victims is the undervaluation of African American lives and the unfairness visited on the African American community when the murder of one of its members is denigrated, a result of lesser punishment based on the victim's race. The history of capital punishment in North Carolina shows that executions have been far less common when the victim was African American regardless of the race of the defendant, and very rare if the defendant also was white.<sup>394</sup> Disparate execution rates based on the race of the defendant could justify removing defendants from death row on two rationales. One is that such discrimination devalues African American lives and thereby has a negative impact on that community. The second is that, although not designed to serve this end, a death penalty system that in practice operates to punish primarily those who take the lives of white citizens is incompatible with North Carolina's egalitarian values.<sup>395</sup> Whether it is discrimination against defendants based on their race and/or race-of-the-victim discrimination that helps produce a death sentence against the defendant, not only is standing clear, but so is "injury in fact." This is because, as to both types of discrimination, disparate racial

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393. See *supra* Part II.B.2.b (discussing unconscious motivation and race-of-the-defendant discrimination through empathy between predominately white prosecutors and jurors and white victims).

394. See *supra* notes 65–77, 109, 300–04 and accompanying text (describing strong predominance of white victims among cases where executions occurred) and *supra* notes 18, 23, 36, 88, 303 and accompanying text (showing that only four whites have been executed for crimes against African Americans in North Carolina's history).

395. See Baldus & Woodworth, *supra* note 239, at 1453.

impact supports the operation of race as a “but for” cause of the death penalty.<sup>396</sup>

Thus, assuming appropriate evidence of disparate impact, standing should not be an issue. Indeed, standing is likely to exist in multiple ways for all those sentenced to death under the RJA if the requisite statistical showing is produced. That is the intention of the statute according to the judgment of the North Carolina Department of Justice, as indicated in its Fiscal Research Division memorandum.<sup>397</sup>

#### F. Systemic Relief and “Injury in Fact”

The availability of relief might ordinarily be in doubt in a situation where the defendant cannot as a matter of theory claim that race-of-the-defendant or race-of-the-victim discrimination increased the likelihood of a death sentence for the defendant, but it is arguably called for under the RJA.<sup>398</sup> The RJA is broadly animated by an

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396. Even under the restrictive reading of constitutional challenges to use of statistical evidence in *McCleskey*, the Supreme Court ruled that the defendant had standing to base a claim for relief on the race of the victim, which the Court treated the same as allegations regarding the race of the defendant. *McCleskey v. Kemp*, 481 U.S. 279, 291–92 (1987). It stated that race infected the administration of the death penalty statute as to victims by making it more likely that defendants who murdered whites would be sentenced to death than defendants who murdered African Americans. The defendant is not, the Court observed, asserting the rights of third persons. Instead, he is arguing that

application of the State’s statute has created a classification that is “an irrational exercise of governmental power,” . . . because it is not “necessary to the accomplishment of some permissible state objective.” . . . It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on “an unjustifiable standard such as race, religion, or other arbitrary classification.”

*Id.* at 291 n.8 (quoting Brief of Petitioner at 41, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) and *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). On that basis, it found *McCleskey* had standing.

397. See Memorandum from Danielle Seale & Denise Thomas, N.C. Gen. Assembly Fiscal Research Div. to N.C. Gen. Assembly (July 14, 2009) (on file with the North Carolina Law Review) (“As presently written, the bill allows all current death row inmates regardless of race to file a motion alleging that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, or the judicial division at the time the death sentence was sought or imposed.”). As noted earlier, when a disparity is shown in the jurisdiction at the relevant time on the basis of the race of the victim, the rationale for relief can also relate to the undervaluation of African American lives and the unfairness visited to the African American community in addition to the irrationality of the system’s operation.

398. The question of entitlement to relief sometimes arises under a challenge to standing because ordinarily standing requires a showing of cognizable injury to the defendant, which could incorporate an inquiry into standing. However, the linkage between standing and injury to the defendant has been eliminated for the issue of peremptory challenges, see *Powers v. Ohio*, 499 U.S. 400, 411 (1991), which is one of the

effort to remove the irrational impact of race from the death penalty, and it may render the death penalty illegal when it significantly affects decisions to seek or impose the death sentence in the state or one of the relevant judicial or prosecutorial units recognized by the RJA.<sup>399</sup> *Furman* declared all the death penalty statutes of that era unconstitutional on such a theory of general irrationality in imposition of the death penalty; one opinion compared it to the capriciousness of being struck by lightning, which could not justify the extraordinary punishment of death.<sup>400</sup> None of the defendants who were removed from death row when their sentences were invalidated by *Furman* were required to show that the random quality of the system made their sentence more likely than under a properly designed system, and, indeed, as to those defendants with the worst personal histories who committed the most horrific crimes, their best chance of avoiding execution was under a system that replicated the chance event of being hit by lightning.

The RJA may be read to recognize a similar basis for invalidating death sentences if the process is shown to have been infected by the irrationality of race upon the finding of the court “that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial

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inquiries under the statute. Moreover, without resolving issues regarding the substantive purpose of the RJA, whether cognizable injury has occurred to any defendant cannot be determined. This is because the statute, *see* N.C. GEN. STAT. § 15A-2011(c) (2009), directs that procedural issues, such as establishing the defendant’s case, the nature of the burden of proof, and the meaning of prejudice are to be found in section 15A-1420(c)(6). Under that statute, “prejudice” consists, not only of outcome determinative actions, but also errors “as a matter of law.” *Id.* § 15A-1443(a). The RJA may create an entitlement to relief as a matter of law in requiring relief upon the court’s finding “that race was a significant factor in decisions to seek or impose” death in one of the relevant geographical units. *See id.* § 15A-2012(a)(3). Thus, the standing issue is not separable from the substantive issue in the small number of cases where standing might ordinarily be challenged because of the lack of impact on the outcome in the defendant’s case.

399. *Cf.* Paul Schoeman, Note, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 552 (1995) (concluding that the federal racial justice act, which has similar language, would have barred all sentences in the jurisdiction where the discriminatory pattern is found). If this were strictly a constitutional adjudication rather than adjudication under the RJA that was designed to remedy the limitations of such litigation, the failure to be able to show causation would likely be a significant argument against standing. *See Lee & Bhagwat, supra* note 333, at 184–85.

400. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. [From among] many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”).

division, or the State at the time the death sentence was sought or imposed.”<sup>401</sup> In North Carolina law, an analogy exists in the treatment of the prohibition in the North Carolina Constitution regarding discrimination in jury service.<sup>402</sup> To prevail, defendants need not show that exclusion affected the prospects in their case; instead, the case is reversed because the challenged practice damaged the integrity of the system.<sup>403</sup>

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401. § 15A-2011(c). Moreover, the statute grants this relief in any one of four geographic units, using the term “or,” which on its face would appear to mean that the death penalty is invalid if race was a significant factor state-wide even if not in the county or prosecutorial district where the case was decided. *Id.*

402. In construing the RJA, courts may find an analogy in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987), which requires reversal upon a showing of discrimination in selection of the grand jury foreman without any showing of harm to the defendant. It stated:

Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice. [The constitutional provision] is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case. The question, therefore, is not whether discrimination in the foreman selection process affected the outcome of the grand jury proceedings; rather, the question is whether there was racial discrimination in the selection of this officer at all.

*Id.* at 304, 357 S.E.2d at 626.

403. Divorced from even the above-described theoretical justification, those who opposed the passage of the RJA construed the legislation in their final statements as having basically exactly this type of broad impact, and assuming statistical proof of disparate impact was produced at the state-wide level, argued the RJA would effectively end the death penalty in the state. *See, e.g.*, Statement of Rep. N. Leo Daughtry, House Floor Debate on Racial Justice Act (July 15, 2009) (transcript on file with the North Carolina Law Review). Representative Daughtry stated:

It is my opinion, after reading the bill that if you keep that part in the bill that was put in by the House that was not in it when the Senate went through it that the State or the State at the time the death sentence was sought or imposed, if you use the statistics of the state, then those advocate for the death penalty are going to lose because there is complete evidence of racial discrimination from the state. So, I don't see any way that this bill will ever allow us to use the death penalty again until this is straightened out it's simply a way to stop executions. I hope you'll vote against the bill.

*Id.*; *see also* Statement of Sen. Phil Berger, Senate Floor Debate on Racial Justice Act (Aug. 5, 2009) (transcript on file with the North Carolina Law Review) (“It’s just a matter of the statistics and a matter of making a statistical determination in an area that may not have or probably has no particular relevance to the particular case at hand. . . . It will make it so that imposition of the death penalty in North Carolina probably will not occur any longer.”). *But see* Statement of Rep. Rick Glazier, House Floor Debate on Racial Justice Act (July 15, 2009) (transcript on file with the North Carolina Law Review) (disputing in opposing Rep. Daughtry’s argument that invalid statistical evidence would be used but not the broad application of the RJA, focusing on the requirement of

The above analysis does not answer all the interpretative questions posed by this new legislation, but it does resolve many of the most important ones regarding the basic structure of this burden shifting statute using statistical evidence. The statute creates a powerful tool for the examination and elimination of discriminatory racial motivation whether exercised intentionally and openly or covertly and unconsciously. Its interpretation in individual cases will require care and reasoned judgment, but it should be done against a clear background of legislative intent that courts examine carefully the prospect that racial discrimination skews death penalty outcomes and substantially reduces minority jury participation and that any death sentence be vacated and life imprisonment without parole be imposed if race has played a significant role in prosecution or jury decision making or a prosecutor's peremptory challenges.

#### CONCLUSION

The RJA opens a new chapter in North Carolina's history. Many factors made its enactment possible,<sup>404</sup> including a heightened concern for innocence inspired by exonerations of death row prisoners in North Carolina and around the nation,<sup>405</sup> a concern that has also

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"particularity as to how the evidence supports the claim that race was a significant factor in the decision to seek or impose the sentence of death"). The RJA was nevertheless passed in the face of that construction of it by its opponents.

404. The new forces include growing concern among criminal justice experts about the inherent flaw in the capital punishment system, *see* Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11 (describing decision of the American Law Institute, which in 1962 created the intellectual framework for the modern capital justice system of guided discretion to abandon its involvement with the death penalty and disavow the structure it had created "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment"), and recognition of its excessive financial cost, *see* Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. ECON. REV. 498, 499, 525–26 (2009) (estimating based on 2005 and 2006 fiscal year data that North Carolina's criminal justice system would have saved almost \$11 million per year if it had abolished the death penalty); Mandy Locke, *Study: End Death Cases, Save Money*, NEWS AND OBSERVER (Raleigh, N.C.) Dec. 28, 2009, at B1 (describing the major points of the study).

405. One can never firmly know what motivates broad public trends, but the exoneration of hundreds of defendants, many of whom faced execution, based on DNA technology strongly appears to have been a major factor in changes in attitudes toward the death penalty. *See generally* FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE IN AMERICA* (2008) (describing how the stories of exonerations of those on death row through DNA transformed American attitudes toward the death penalty). In North Carolina, the stories of three African American defendants—Glenn Chapman, Jonathan Hoffman, and Levon Jones—whose cases were dismissed outright after fundamental errors were found, served as powerful symbols. *See* Shalia Dewan, *Releases from Death Row Raise Doubts over Quality*



played an important role in the decline of death penalties in the state in recent years.<sup>406</sup> Another factor was quite important. Throughout the state's history, many politicians, judges, prosecutors, and jurors have worked sincerely on behalf of all the state's citizens to fairly dispense justice. Nevertheless, throughout much of the state's history, African Americans were not involved in making important criminal justice system decisions. For example, until well into the twentieth century, almost exclusively white jurors determined death penalty decisions for victims and defendants of all races, and whether African Americans have been effectively included in the modern period is subject to debate. In contrast, African Americans played a major role in fashioning and enacting the RJA, which mandates that the effects of race be removed from the death penalty process. Standing behind Governor Perdue when she signed the RJA into law were leaders of all races, including prominent members of the state's African American political and civil rights leadership.<sup>407</sup>

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*of Defense*, N.Y. TIMES, May 7, 2008, at A1. They combine the innocence movement's concern that innocent defendants have been sentenced to death with the danger that the defendant's race may have influenced their death sentences.

406. In 2009, only a total of eight cases were tried capitally in the entire state of North Carolina (Mark Andrews, Hasson Bacote, Myron Britt, Lawrence Flood, John Hester, Anthony McMillan, Louis Scates, and Michael Sherrill), and only two death sentences were returned (Bacote and Sherrill). See Memorandum from M.R. Hunter, Ctr. for Death Penalty Litig., to Professor Robert Mosteller (Mar. 8, 2010) (on file with the North Carolina Law Review); DOC Offenders on Death Row, *supra* note 34. In 2008, only twelve cases were tried capitally (James Blue, Charles Dickerson, Kenneth Hartley, Asian Johnson, James Little, Jonte McLaurin, Eric Oakes, Pliney Purser, John Ross, Neil Sargeant, James Stitt, and Jakiem Wilson, and one (Little) was sentenced to death. Memorandum from M.R. Hunter, *supra*; DOC Offenders on Death Row, *supra* note 34. In the first half of 2010, two defendants have been added to North Carolina's death row (Michael Ryan and Andrew Ramseur). See DOC Offenders on Death Row, *supra* note 34. Nationally, only 106 were added to death rows in 2009, the lowest number since the death penalty was reinstated in 1976. See DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2009: YEAR END REPORT, DEATH PENALTY, available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>. Also only fifty-two individuals were executed in the United States in 2009 and thirty-seven in 2008, down from a high of ninety-eight executions in 1999. See DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY, available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

407. Two leaders were given special praise for their work to win passage of the RJA at the ceremony where Governor Perdue signed it into law. One was Rev. William Barber, President of the North Carolina NAACP and the other was Charmaine Fuller Cooper, executive director of the nonprofit Carolina Justice Policy Center. See Cash Michaels, *Racist Justice Act Now NC Law*, WILMINGTON J., Aug. 23, 2009, at 1. Both Barber and Cooper are prominent African American leaders in the state. The RJA was co-sponsored by Senator Floyd McKissick and Representatives Larry Womble, Earline Parmon, Paul Luebke, and Pricey Harrison. *Id.* McKissick, Womble, and Parmon are African Americans. The RJA, for many in the African American community, became a civil rights

This Article has detailed the strong, pernicious, and persistent influence of race upon the death penalty in North Carolina from the state's first execution well into the twentieth century. It has found that race and the death penalty have been constant companions throughout history, with racial discrimination exerting a profound and discriminatory impact on the imposition and disposition of death sentences. In short, the race of defendants and victims played a crucial role in determining who died and who did not.

The RJA creates a testing ground to evaluate whether the set of changes that were in process in the middle and latter part of the twentieth century, symbolized by the United States Supreme Court's decision in *Furman*, broke the link between race and the death penalty in North Carolina. The legal analysis in Part II.A shows that post-*Furman* changes in structure that restricted discretion but maintained numerous judgment determinations for both the prosecution and the jury. Nothing about those particular legal changes necessarily curbed the powerful effect of race, although data regarding the race of defendants sentenced to death shows some reduction in the degree of disparity. However, the frequency of judicial reversals for fundamental failures of justice and grants of clemency for minority defendants suggests that during trials the effects of race may override justice. Moreover, jury service information shows minimal change in African American participation in many cases, and data on the race of victims of defendants on death row demonstrates remarkable continuity with earlier eras. Thus, the answer to the question of the persistence of racial discrimination in operation of North Carolina's death penalty demands the careful and sophisticated analysis that the RJA provides.

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issue. *Id.* (noting that the national NAACP organization embraced passage of the North Carolina Racial Justice Act as one of its concerns).

Those who supported the RJA viewed it as an effort to eliminate inequities in death sentences, reflecting the desire of multiple groups to provide fairness to all defendants and victims by ensuring that justice is dispensed without the distorting effect of race. *See, e.g.*, Statement of Rep. Kelly Alexander, Jr., House Floor Debate on Racial Justice Act (July 14, 2009) (transcript on file with the North Carolina Law Review) ("This bill is not about statistics; this bill is about trying to eliminate and end bias in our system."). Similar arguments about the need for racial fairness if the state is to maintain a death penalty have been made at earlier times. *See supra* Part I.B.4 (describing calls for equal justice by African American newspapers in the 1930s and 1940s). Those who opposed passage viewed it as badly misguided legislation that threatened the continued operation of the death penalty. *See, e.g.*, Statement of Rep. Paul Stam, House Floor Debate on Racial Justice Act (July 14, 2009) (transcript on file with the North Carolina Law Review) (stating "[t]his bill is really not about race, it's about the death penalty" and listing some of major flaws in the reasoning of the RJA and its strong negative impact on the operation of the death penalty in the state).

North Carolina's willingness to undertake this examination reflects the state's tradition of self-examination and its citizens' interest in its fair administration of the death penalty. With the RJA the legislature has instructed the courts to address directly and openly the factor that was always somewhere in the process—the potential of racial prejudice to deny both fairness and justice. While supporters and opponents of the RJA may never fully resolve their disagreement,<sup>408</sup> the judgment of history regarding the RJA will rest upon the results of the studies, examination, and litigation conducted under its authorization. This part of history is yet to be written. It will not only reveal a great deal about the degree to which race has influenced the operation of the death penalty in North Carolina in the past, but will also determine whether the unfairness and injustice introduced long ago into the state's death penalty system by racial prejudice is finally at an end.<sup>409</sup>

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408. Speaker of the North Carolina House Joe Hackney, a lawyer and supporter of the RJA, stated, "I've spent my life in courtrooms across North Carolina, and I have seen the subtle impact of race in our courtrooms." Editorial, *NC Racial Justice Act Aims at Fairness*, CHARLOTTE OBSERVER, Aug. 17, 2009, at 10A. By contrast, Senate Minority Leader Phil Berger stated, "Make no mistake, this law has little to do with justice and nothing to do with guilt or innocence." *Id.*

409. In its editorial supporting passage of the RJA, the *Winston-Salem Journal* quoted Matthew Robinson, a criminologist at Appalachian State University, as follows:

The Racial Justice Act won't fix the myriad problems with the administration of capital punishment in North Carolina. But it would encourage the court system to tackle questions of bias in these cases and attempt to resolve, once and for all, whether there is a widespread pattern of bias. Before this state returns to executions, it should do whatever it can to answer all the questions tied to them.

Editorial, *Death Penalty Bias*, WINSTON-SALEM J., July 23, 2009, at A12. He sets out both its challenge and its promise.

## APPENDIX. NORTH CAROLINA RACIAL JUSTICE ACT

N.C. GEN. STAT. § 15A-2010.

No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.

N.C. GEN. STAT. § 15A-2011. Proof of racial discrimination.

(a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.

(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.

(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S.8C-1.

(c) The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider

evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.

N.C. GEN. STAT. § 15A-2012. Hearing procedure.

(a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.

(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.

(3) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

(b) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.

(c) Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief from a death sentence upon the ground that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed shall follow and comply with G.S.15A-14 20, 15A-1421, and 15A-1422.

Section 2 of Session Law 2009-464.

This act is effective when it becomes law [August 11, 2009] and applies retroactively. For persons under a death sentence imposed before the effective date of this act, motions under this act shall be

filled within one year of the effective date of this act; for persons whose death sentence is imposed on or after the effective date of this act, motions shall be filled as provided in this act.

