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DEADLY BIAS: WHY NORTH CAROLINA'S LEGACY OF SYSTEMIC RACISM WITHIN CAPITAL SENTENCING NECESSITATES THE REINSTATEMENT OF THE RACIAL JUSTICE ACT

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* J.D. Candidate, 2021, Boston University School of Law. Tremendous gratitude to my PILJ editors for their tireless efforts in editing and contributing to this piece. Thank you to Professor David Rossman for introducing me to this powerful topic and for his guidance and advice as a seasoned public defender to one in the making. To my family, for everything. Black Lives Matter.

INTRODUCTION

In June 2020, the Supreme Court of North Carolina held that the retroactive repeal of the North Carolina Racial Justice Act ("the Act") of 2009 was an unconstitutional violation of the prohibition on ex post facto laws.[1] Originally, the purpose of the Act was to reduce discriminatory capital sentencing on the basis of race.[2] After the North Carolina Legislature ratified the Act in 2009, four defendants successfully proved that race was a "substantial factor" in their capital trials and had their sentences mitigated to life imprisonment without the possibility of parole.[3] The North Carolina Legislature repealed the Act in 2013 and the North Carolina Supreme Court reinstated the defendants' capital sentences, despite the court's previous finding that race was a substantial factor in their sentencing.[4] The trial court also decided that two other outstanding petitions for relief under the Act, filed and awaiting a decision while the Act was still in effect, were void.[5] After a lengthy appeal and hearing oral arguments in August 2019, the North Carolina Supreme Court held in summer 2020 the retroactive repeal was unconstitutional for these two defendants, among over

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[1] State v. Ramseur, 843 S.E.2d 106 (N.C. 2020); State v. Burke, 843 S.E.2d 246 (N.C. 2020); *see* Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES (June 5, 2013), https://www.nytimes.com/2013/06/06/us/racial-justice-act-repealed-in-north-carolina.html (detailing the ensuing effects of the retroactive repeal for defendants who filed petitions for relief under the Act).

[2] *See* Barbara O'Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. REV. 1997 (2016) (reporting on studies examining the influence of race on capital punishment in North Carolina).

[3] Order Granting Motion for Appropriate Relief at 167, State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) [hereinafter Robinson Order]; Order Granting Motions for Appropriate Relief at 210, State v. Golphin, Walters, & Augustine, No. 97 CRS 47314-15, No. 98 CRS 34832, 35044, No. 01 CRS 65079 (N.C. Super. Ct. Dec. 13, 2012) [hereinafter Golphin, Walters, & Augustine Order] (finding race played a role in the use of peremptory strikes by prosecutors).

[4] Act of June 19, 2013, N.C. Sess. Laws 2013-154, § 5(a) (eliminating the process by which defendant may use statistics to have a sentence of death reduced to life in prison without parole); *North Carolina Supreme Court Hears Argument on Retroactive Repeal of State's Racial Justice Act*, DEATH PENALTY INFO. CTR. (Sept. 3, 2019) [hereinafter *North Carolina Supreme Court*], https://deathpenaltyinfo.org/news/north-carolina-supreme-court-hears-argument-on-retroactive-repeal-of-states-racial-justice-act (describing how after the Act was repealed, the North Carolina Supreme Court vacated the lower decisions and remanded; however, the lower courts, finding that the Act no longer applied, reinstated the capital sentences for the defendants who now are appealing this decision).

[5] *In Landmark Decision, North Carolina Supreme Court Strikes Down Retroactive Application of Racial Justice Act Repeal*, AM. BAR ASS'N (July 24, 2020) [hereinafter *In Landmark Decision*], https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/north-carolina-strikes-retro-application-of-rja-repeal/.

one hundred other petitioners whose claims were outstanding before the repeal.[6] However, the 2020 court decision did not consider whether the repeal was unconstitutional for the four defendants placed back on death row and this appeal is still pending.[7]

This Note argues that every state, including North Carolina, has a constitutional obligation to review evidence of racial bias in criminal trials even if such bias does not violate the Equal Protection Clause's requirement of a "discriminatory purpose."[8] Furthermore, this Note argues that the repeal of the North Carolina Racial Justice Act in 2013 eliminated the safeguards intended to protect criminal defendants from racial bias in capital punishment. Without these safeguards, it is imperative for North Carolina to either reinstate the Racial Justice Act or draft amended legislation that includes the necessary safeguards for criminal defendants, like those described below.

Section I.A of this Note details the history of racial inequalities within the United States criminal legal system[9] and, prior to the enactment of the Racial Justice Act, the Equal Protection Clause's requirement of "Purposeful Discrimination." In Section I.B, this Note will explain the Equal Protection Clause's standard within the specific history of North Carolina's death penalty system and litigation. Section I.C analyzes the North Carolina Racial Justice Act, cases that the North Carolina courts heard under the Act, and the consequences of the repeal of the Act. Section II.A argues that the Equal Protection Clause does not fulfill its purpose of eliminating racial discrimination due to its extremely high threshold. Section II.B details the policy rationale for North Carolina's need to take action to reduce racial bias in capital punishment due to the weight of the state's legacy of racial prejudice. Finally, in Section II.C, this Note argues that the North Carolina legislature has no justification for refusing to enact more legislation, as they have done just that in another context: to combat lenient federal precedent in the realm of reproductive rights to further the state's interest.

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[6] *Ramseur*, 843 S.E.2d at 106; *Burke*, 843 S.E.2d at 246; *In Landmark Decision*, *supra* note 5; *see also North Carolina Supreme Court*, *supra* note 4.

[7] *In Landmark Decision*, *supra* note 5.

[8] McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (requiring proof of a discriminatory purpose in order to obtain relief under the Equal Protection Clause).

[9] In this article, the terms "criminal legal system" and "criminal system" will be used instead of "criminal justice system." This is done to refrain from labeling this system as "just" due to its constant discrimination and penalization of poor Black and brown bodies.

I. THE LEGACY OF RACIAL DISCRIMINATION IN CAPITAL SENTENCING

A. *The Equal Protection Clause and the Requirement of Purposeful Discrimination*

Since the first enslaved African people arrived in the United States in 1619, the institutions of American society have been laden with racial discrimination.[10] At the inception of the United States' criminal legal system, white Americans enslaved Black people.[11] The legacies of slavery and Jim Crow are long-lasting and still contribute to the systemic racism within our American institutions.[12] Congress enacted the Equal Protection Clause of the Fourteenth Amendment to prohibit states from depriving "any person of life, liberty, or property, without due process of law."[13] The Supreme Court held in *Hunt v. Cromartie* that all laws that make facially race-based classifications are "suspect," regardless of their declared purpose, and must be analyzed under strict scrutiny.[14] However, a law that is facially neutral in terms of race is only examined under strict scrutiny if the law has a racially discriminatory purpose that violates the Equal Protection Clause.[15] In *Strauder v. West Virginia*, the United States Supreme Court found that purposefully excluding Black members of society from serving on a jury in criminal trials violates the Equal Protection Clause.[16] This case did not analyze "disparate impact," but only the *purposeful* exclusion of Black jurors.[17] *Washington v. Davis* affirmed this proposition, but limited the holding by stating "the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an

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[10] *See* Nikole Hannah-Jones, *The 1619 Project*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [https://nyti.ms/37JLWkZ] (reframing America's history by placing the consequences of slavery and the contributions of Black Americans at the center of the narrative); *see also* Robinson Order, *supra* note 3, at 2 (affecting every aspect of private and public life, including but not limited to: education, housing, employment, and criminal justice).

[11] *See* Golphin, Walters, & Augustine Order, *supra* note 3, at 2–3 (emphasizing the history of racism that lingers in the United States' criminal system and how the Act is attempting to address these lingering effects).

[12] *Id.*

[13] U.S. CONST. amend. XIV, § 1.

[14] Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (holding such laws must be analyzed with strict scrutiny); *see* Ann K. Wooster, *Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases*, 172 A.L.R. FED. 1, § 6[a] (2001) (detailing the holding of *Hunt v. Cromartie*).

[15] *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *see generally* Wooster, *supra* note 14, §§ 1[a]–42 (analyzing the United States Supreme Court cases that have discussed Equal Protection and Due Process Clause challenges based on racial discrimination).

[16] Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

[17] *Id.* at 303–12.

invidious discrimination forbidden by the Clause."[18] The Court held that there must be a purpose to discriminate or proof of intentional discrimination to reach the threshold level of an Equal Protection violation.[19]

In *Batson v. Kentucky*, the Supreme Court specifically questioned prosecutorial discretion in death penalty litigation.[20] *Batson* concluded that a court could reverse a capital sentence if the defendant proved intentional discrimination on the part of the prosecutor when using peremptory challenges during voir dire.[21] The defendant can establish a showing of intentional discrimination if "they are a member of a recognized racial or minority group, the prosecutor exercised peremptory challenges to remove members of that race [from the jury], and the facts and circumstances raise an inference that minorities were removed due to race."[22] However, a prosecutor could rebut a defendant's evidence of discrimination by offering a neutral explanation for the use of peremptory strikes.[23] Thus, it is easy for prosecutors to provide another explanation for the use of peremptory strikes and rebut the defense's discrimination argument.[24]

In *McCleskey v. Kemp*, which was decided a year after *Batson*, the Supreme Court addressed the question of whether statistical evidence of racial discrimination was enough to prove that a capital sentence was unconstitutional.[25] In *McCleskey*, a statistical study illustrated that in Georgia, Black defendants whose victims were white were sentenced to the Death Penalty

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[18] Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

[19] *Id.* (quoting Akins v. Texas, 325 U.S. 398, 403–04 (1945)).

[20] Batson v. Kentucky, 476 U.S. 79, 79–84 (1986) (finding Fourteenth and Sixth Amendment violations where a prosecutor used peremptory strikes to intentionally strike all of the Black potential jurors).

[21] *Id.* at 100.

[22] John M. Powers, *State v. Robinson and the Racial Justice Act: Statistical Evidence of Racial Discrimination in Capital Proceedings*, 29 HARV. J. ON RACIAL & ETHNIC JUST. 117, 121 (2013) (citing *Batson*, 476 U.S. at 96).

[23] *Id.* (arguing that the Court set a low evidentiary burden for the prosecution to rebut an inference of discrimination); *see* Jack Brook, *Racism Tainted Their Trials. Should They Still be Executed?*, MARSHALL PROJECT (Aug. 7, 2019, 6:00 AM), https://www.themarshallproject.org/2019/08/07/racism-tainted-their-trials-should-they-still-be-executed (concluding state trainings for prosecutors on how to give race-neutral explanations for their race based strikes were not found to be proof of racial decision-making tactics).

[24] Powers, *supra* note 22, at 128 (detailing how Justice Blackmun's dissent differed from the majority opinion in *McCleskey* in that he believed a defendant could still prevail even with a neutral explanation).

[25] McCleskey v. Kemp, 481 U.S. 279, 284–88 (1987) (citing David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 674 n.56 (1983)) (evaluating the Baldus study).

significantly more often than white defendants whose victims were Black.[26] Despite the statistical evidence, the Court held that the study showed a mere correlation and that there was no concrete, evidentiary proof that Georgia's death penalty statute had a discriminatory purpose.[27] The Court concluded that demonstrating a statute's discriminatory impact was insufficient to prove a violation of the Equal Protection Clause.[28] In a 5-4 split decision, the Court determined that statistical evidence did not establish a constitutional violation in the capital sentencing process.[29] The opinion essentially discarded the issue and invited state legislatures to create their own resolutions instead.[30] The *McCleskey* decision prompted a wave of legislative discussion regarding race-based discrimination in capital sentencing and resulted in the enactment of anti-discrimination state statutes, such as the North Carolina Racial Justice Act.[31]

B. *The History of Capital Punishment in North Carolina and Its Lasting Legacy*

North Carolina's death penalty policies were the subject of contentious debate between political groups even before the American Revolution.[32] The earliest recorded execution in North Carolina was in 1726 when the state was just a colony.[33] This execution prompted a wave of capital punishment within the state, which amounted to around 784 known executions before 1961.[34] North Carolina had the sixth most executions in the nation from 1910–1961.[35] Mandatory executions for crimes before 1837 included, *inter alia*, murder, rape, arson, burglary, slave-stealing, concealing a slave with intent to free him, and circulating seditious literature among slaves.[36] The people executed on death row during this time, nation-wide, were disproportionately people of color, specifically incarcerated Black people; this trend still remains consistent in

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[26] McCleskey v. Kemp, 481 U.S. 279, 325 (1987); Wooster, *supra* note 14, § 25.

[27] *McCleskey*, 481 U.S. at 312–13; Wooster, *supra* note 14, § 25.

[28] *McCleskey*, 481 U.S. at 298.

[29] *See id.* at 308–20.

[30] *Id.* at 319.

[31] *See* Powers, *supra* note 22, at 129–32 (stating that this legislation was an attempt to increase the evidentiary burden for the prosecution to rebut an inference of discrimination).

[32] Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2124 (2011).

[33] Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2038, 2054 n.98 (2010); Radelet & Pierce, *supra* note 32, at 2124.

[34] Kotch & Mosteller, *supra* note 33, at 2039, 2044, 2053.

[35] *Id.* at 2055.

[36] *Id.* at 2035, 2055 (listing a few examples).

present day.[37] Since 1984, North Carolina has executed forty-two men and one woman.[38] North Carolina has the fourth largest death row population in the entire country; as of September 2020, there were 137 men and two women serving death sentences in the state.[39]

The decisions regarding capital punishment sentencing in North Carolina have been infused with racial bias due to the history of deep-seated racism in the state's criminal system.[40] The death penalty played a substantial role in subjugating the enslaved population within the state once it gained statehood.[41] The state's slave code controlled punishment for crimes and used a special tribunal to try enslaved people—a tribunal whose membership was limited to slave owners.[42] Although this tribunal eventually merged with the regular courts within North Carolina, the legacy of the slave tribunal lingered in the newly formed courts where many juries were still predominantly composed of slave owners.[43]

Although slave owners were not allowed to execute enslaved people in the 1800s, slave owners could not be punished by the criminal courts for any physical assault by the slave owner against their own enslaved people.[44] Thus, slave masters would discipline the people they enslaved to the brink of death without having to answer to the court system for punishment.[45]

The first death sentence issued for killing a slave was affirmed by the North Carolina Supreme Court in 1820,[46] followed by only four more prior to

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[37] *See id.* at 2088 ("Since the death penalty was reinstated in North Carolina after *Furman and Woodson*, 391 defendants have been sent to death row. Of these, 49% are African American (55% are minority), and 44% are white. As of the [sic] July 1, 2010, the death row population was 159. Of these, 54% are African American (62% are minority), and 38% are white.").

[38] *Id.* at 2041. For an explanation of the disparities between genders within death penalty sentences and executions, *see* Elizabeth Marie Reza, *Gender Bias in North Carolina's Death Penalty*, 12 DUKE J. GENDER L. & POL'Y 179 (2005); Christina Sterbenz, *Why the Death Penalty in America is Sexist*, INSIDER (Mar. 26, 2015), https://www.businessinsider.com/the-death-penalty-is-sexist-2015-3.

[39] *N.C. Death Penalty Fast Facts*, N.C. COAL. FOR ALTS. TO DEATH PENALTY, https://nccadp.org/nc-death-penalty-facts/ (last updated Sept. 25, 2020) ("African Americans make up more than half of NC's death row prisoners but less than a quarter of the state's population.").

[40] Kotch & Mosteller, *supra* note 33, at 2031.

[41] *See id.* at 2038.

[42] *See id.* at 2045.

[43] *See id.* at 2045–46; Center for Death Penalty Litigation, *Slavery, Lynching, and the Era of Public Hangings (1619-1910)*, RACIST ROOTS, https://racistroots.org/section-1/ (last visited Feb. 11, 2021).

[44] *See* Kotch & Mosteller, *supra* note 33, at 2047.

[45] *See id.*

[46] State v. Scott, 8 N.C. 24, 35 (1820).

emancipation.[47] However, only one out of five of these white men was actually executed—the one who murdered a slave belonging to another man, as that was seen as injuring the other slave owner by killing his "property."[48]

Unlike owners of slaves, the courts yielded the power to execute enslaved people. The courts executed enslaved people in far greater numbers than any other members of the population, commonly in a public spectacle meant to deter other enslaved people from misbehaving.[49] The executions of enslaved people were coupled with lynchings to punish Black people for crimes against white victims, resulting in a system founded upon inherently unequal and discriminatory practices.[50]

After the Civil War, North Carolina reinvented how the State applied laws to newly freed Black persons in an attempt to "reassert their mastery over these former slaves."[51] During this period, any violence or unequal treatment of Black Americans was largely ignored, and Black citizens were "charged, tried, convicted, sentenced to death, and executed" quickly and under a justice system infused with racial bias.[52] These "trials" were largely adjudicated based on "popular anger" and were commonly known as "legal lynchings."[53] Actual lynchings also frequently occurred during this period, continuing within the state until around the 1940s.[54] Although these lynchings were not state-controlled, they largely mirrored the "legal" death penalty executions of the era: both were public events fueled by anger about an accusation of some criminal activity and usually supported by respected members of the community.[55]

Additionally, this racist dynamic perpetuated racial prejudices in the criminal system by barring Black people from serving on juries.[56] Once courts found it unconstitutional to bar a citizen from serving on a jury based on race, North

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[47] *See* Kotch & Mosteller, *supra* note 33, at 2049.

[48] *See id.*

[49] *See id.* at 2047–48.

[50] *See* Powers, *supra* note 22, at 132–33.

[51] Kotch & Mosteller, *supra* note 33, at 2051.

[52] *Id.* at 2038, 2051–52.

[53] *Id.* at 2064.

[54] *Id.*; *see* Center for Death Penalty Litigation Staff, *In Black & White: Lynchings & the Death Penalty were Two Sides of the Same Coin*, RACIST ROOTS, https://racistroots.org/section-1/two-sides-of-the-same-coin/ (last visited Feb. 11, 2021) (describing a newspaper from 1906 titled *Mob Violence vs. Trial by Law* which explains the circumstances of the lynchings of three Black men and states, "[a]lthough the evidence against any of the negroes was to a degree slight, yet there was little doubt but that some, if not all, of the negroes, on the evidence obtainable, would have been found guilty of the crimes and hanged . . . .").

[55] *See* Kotch & Mosteller, *supra* note 33, at 2064–65; *see also* Center for Death Penalty Litigation Staff, *supra* note 54 ("Before dismissing the jury Judge Ward took occasion to commend the people of Bladen . . . in the restraining of their passions at the time when their blood fairly boiled with rage on account of the nature of the hellish crime."). The article then states the two men were executed by public hanging within the next month. *Id.*

[56] *See* Kotch & Mosteller, *supra* note 33, at 2038.

Carolina continued to devise ways to mandate jury composition.[57] For example, in *State v. Speller*, during jury selection, the court placed all prospective jurors' names in a box, and then drew them one by one.[58] However, white people's names were written in black ink while Black people's names were written in red ink.[59] When any name written in red was drawn, the prosecutor would dismiss the juror "for want of good moral character or sufficient intelligence."[60] It was only in the mid-twentieth century when North Carolina recorded the first cases containing Black jurors.[61]

The decision in *McCleskey* left the power to implement a means of reducing racial discrimination in capital punishment in the hands of each state's legislature.[62] The Act in North Carolina was first introduced by the General Assembly in 2001 and was "[p]ostponed [i]ndefinitely" in October 2002.[63] Subsequently, the legislature defeated another attempt to pass this 2001 version of the Act in 2007.[64] This defeat prompted multiple North Carolina representatives, the North Carolina Legislative Black Caucus, and numerous other organizations to give the Act their full support.[65] The representatives who had supported the original 2001 bill reintroduced the Act in March 2009 to both the House of Representatives and the Senate.[66] The North Carolina Legislative Black Caucus, North Carolina Coalition for a Moratorium, and North Carolina NAACP worked with other activists within the death penalty and civil rights movements to pass the Act that year.[67]

The Act finally passed in 2009 because of fortuitous circumstances.[68] A Democratic majority controlled the House when the General Assembly passed the Act in 2009.[69] Additionally, the defeat of the 2007 Racial Justice Act coincided with the overturning of several erroneous convictions of defendants

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[57] *See* Batson v. Kentucky, 476 U.S. 79, 80 (1986); State v. Speller, 47 S.E.2d 537, 538–39 (1949); SETH KOTCH, LETHAL STATE: A HISTORY OF THE DEATH PENALTY IN NORTH CAROLINA 113 (Heather Ann Thompson et al. eds., 2019).

[58] *Speller*, 47 S.E.2d at 538–39; KOTCH, *supra* note 57, at 113.

[59] KOTCH, *supra* note 57, at 113.

[60] *Id.*

[61] *See* Kotch & Mosteller, *supra* note 33, at 2039 (citing Miller v. State, 74 S.E.2d 513, 521 (N.C. 1953) and State v. Roman, 70 S.E.2d 857, 857 (N.C. 1952)).

[62] *See* McCleskey v. Kemp, 481 U.S. 279, 319 (1987); *see also* Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting).

[63] Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't*, 2011 MICH. ST. L. REV. 463, 476 (2011).

[64] *Id.*

[65] *Id.* at 477.

[66] *Id.*

[67] *Id.* at 478.

[68] *See id.* at 488.

[69] *See id.* at 481–82.

on death row, all people of color.[70] The inherently racist attitudes toward the defendants caused serious public outcry and prompted more support for the reintroduced Racial Justice Act in 2009.[71] This increase in public attention, coupled with the tireless lobbying efforts of the aforementioned organizations, resulted in the Act taking effect in August 2009.[72]

C. *The North Carolina Racial Justice Act's Purpose and Allowance of Statistical Evidence to Prove Racial Discrimination*

The purpose of the Act was to accept the invitation extended by the *McCleskey* Court when it said that state legislatures have the ability to allow statistical evidence of racial discrimination to overturn capital sentences.[73] Because of the *McCleskey* precedent, without enacting this legislation, courts were incapable of reversing capital sentences primarily based on statistical evidence that illustrated racially discriminatory practices within capital punishment litigation.[74] The Act accomplished this by lowering the Equal Protection Clause's burden of proof to show discrimination, allowing statistical data to be sufficient as evidentiary proof of racial discrimination.[75]

The Act banned a capital sentence if it was found that "race was a significant factor in decisions to seek or impose the sentence of death."[76] A "significant factor" within the context of the statute meant "having or likely to have influence or effect" on the outcome of the litigation and thus the outcome of the sentence.[77] Defendants could make pretrial claims under the Act or, for defendants currently on death row, make their claims retroactively.[78] The courts had the power to review charging decisions, sentencing decisions, and the use of peremptory challenges during jury selection.[79] By lowering the standard for proving racial discrimination and only requiring race to be a "significant factor," the North Carolina legislature allowed for the admissibility of evidence showing the

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[70] *See* Powers, *supra* note 22, at 134.

[71] *See id.* ("[C]alls to adopt the NCRJA were reinvigorated after the convictions of several minority death row inmates in North Carolina were overturned after errors in their cases were made public. Heeding the public outcry, the legislature passed the NCRJA by narrow margins in the 2009 legislative session.").

[72] North Carolina Racial Justice Act, N.C. GEN. STAT. ANN. § 15A-2010 (West 2020) (repealed 2013); Powers, *supra* note 22, at 134.

[73] *See* McCleskey v. Kemp, 481 U.S. 279, 319 (1987); Powers, *supra* note 22, at 135.

[74] *See McCleskey*, 481 U.S. at 319; Powers, *supra* note 22, at 135.

[75] *See* Powers, *supra* note 22, at 135.

[76] North Carolina Racial Justice Act, N.C. GEN. STAT. ANN. § 15A-2011 (West 2020) (repealed 2013); *see* Defendant-Appellant's Brief at 31, State v. Robinson, 846 S.E.2d 711 (N.C. 2020) (No. 411A94-6), 2018 WL 3576802, at *31 [hereinafter Robinson Brief]; *see also* Powers, *supra* note 22, at 136.

[77] Robinson Order, *supra* note 3, at 31.

[78] *See* Robinson Brief, *supra* note 76, at 8–9.

[79] *See id.* at 9.

prosecution sought capital punishment more frequently due to the race of either the defendant or the victim in the case.[80] The threshold was comparable to the language used in disparate impact claims by not requiring a discriminatory motive, only discriminatory consequences of an act or decision.[81]

Bringing a claim under the North Carolina Racial Justice Act was much easier than bringing a claim under the Kentucky Racial Justice Act.[82] The North Carolina Racial Justice Act required proving, by a preponderance of the evidence, that race was a significant factor in the act or decision.[83] Dissimilarly, the Kentucky Racial Justice Act requires proving, by clear and convincing evidence, that race was a significant factor in the act or decision.[84] North Carolina's preponderance standard was a much lower hurdle to overcome and thus, was easier for defendants to satisfy than Kentucky's clear and convincing standard.[85] Under the Act, the State could then rebut with their own evidence, which may include statistical evidence.[86] A defendant's claim under the Act, if successful, resulted in either the court ordering the defendant to be resentenced to life imprisonment without the possibility of parole, or ordering preemptively that the death sentence could not be sought by the prosecution.[87]

This kind of judicial analysis differs from the Supreme Court's in *McCleskey* because such a review does not focus on the specific decisions and data within the defendant's case (i.e., by the prosecutor, jury, etc.), but instead examines the broad range of decisions made in four geographic locations: "the county, prosecutorial district, judicial division, or state—at the time the death sentence was sought or imposed."[88] Thus, the defense needed to only prove that within one of the four locations a trend of racial discrimination existed during the time period that the system charged or sentenced the defendant.[89] This eliminated the burden of having to show specific racial discrimination against the defendant.[90] The Act also eliminated the extremely burdensome requirement of proving a "discriminatory purpose" as mandated by *McCleskey*.[91]

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[80] Robinson Order, *supra* note 3, at 30.

[81] *Id.* at 33–35; *see* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 136 (2003).

[82] *See* Powers, *supra* note 22, at 136–37; Robinson Order, *supra* note 3, at 33.

[83] Robinson Order, *supra* note 3, at 33.

[84] Powers, *supra* note 22, at 136–37; *see* KY. REV. STAT. ANN. § 532.300 (West 2020); *see also* Robinson Order, *supra* note 3, at 33.

[85] Powers, *supra* note 22, at 136–37; *see* KY. REV. STAT. ANN. § 532.300 (West 2020); *see also* Robinson Order, *supra* note 3, at 33.

[86] *See* Powers, *supra* note 22, at 137.

[87] *See id.*

[88] *Id.* at 137–38.

[89] *See id.*

[90] *See id.*

[91] *Id.* at 138; *see* McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

D. *Case Law in North Carolina and the Application of the Act: Marcus Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine.*

After the state legislature passed the Act in 2009, the first case the North Carolina Superior Court heard under the Act was *State v. Robinson* in 2012.[92] Marcus Robinson, the defendant in the case, was charged and convicted of killing a white man, Erik Tornblom, in the midst of an armed robbery in 1991.[93] During the trial, there was questionable evidence admitted regarding who actually shot the victim, and the prosecution injected the trial with racial bias by offering evidence "that Robinson said he was going to kill himself a whitey" before the murder.[94] After the conviction, the trial court sentenced Robinson to death.[95] He appealed his case in both the state and federal courts on the merits.[96]

Prior to the enactment of the Act, however, the Supreme Court denied his case review.[97] Then, once the state legislature put the Act into effect, Robinson appealed his sentence on the basis that race was a significant factor, specifically in the State's use of peremptory challenges.[98] Robinson presented statistical evidence, primarily relying on a study done by Barbara O'Brien and Catherine M. Grosso at Michigan State University College of Law, that demonstrated the statistical rate of Black jury members struck on account of race.[99] In addition, Robinson also tied the findings of the study into the facts of his own case by emphasizing that the jury that tried him only had two Black members.[100] This bias was evident as the prosecution used strikes on fifty percent of eligible Black jurors while only using strikes on fifteen percent of other potential jurors.[101] The judge held in favor of the defense, and reduced Robinson's sentence to life in prison without the possibility of parole based on a determination that race had been a significant factor in the use of peremptory challenges by the prosecution.[102] The judge found that 26.3% of eligible venire members were Black, yet after the prosecution's peremptory strikes, only 17.2% of the venire members were Black.[103] Judge Weeks held that at the time of Robinson's trial,

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[92] Robinson Order, *supra* note 3, at 28; Powers, *supra* note 22, at 138 n.206.

[93] *See* Powers, *supra* note 22, at 138.

[94] *Id.* at 138–39.

[95] *See id.* at 139.

[96] *See id.*

[97] Robinson v. North Carolina, 517 U.S. 1197, 1197 (1996); Robinson v. Polk, 444 F.3d 225, 225 (4th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1003 (2006); State v. Robinson, 350 N.C. 847, 847 (1999).

[98] Powers, *supra* note 22, at 139.

[99] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533–34 (2012).

[100] Powers, *supra* note 22, at 139.

[101] *Id.*

[102] *See* Robinson Order, *supra* note 3, at 162–67.

[103] *Id.* at 168.

race was a significant factor in prosecutors' use of peremptory strikes within North Carolina, in the former Second Judicial Division, and in Cumberland County.[104]

After the holding in *Robinson*, the State Supreme Court heard three cases for Tilmon Golphin, Christina Waters, and Quintel Augustine, to review their capital sentences and determine if race improperly played a role in their cases under the Act.[105] The trial court convicted Tilmon Golphin of two counts of first-degree murder in 1998 and sentenced him to death, affirmed by the Supreme Court of North Carolina.[106] In another case, a jury convicted Christina Walters of two first-degree murders in 1998 and she was sentenced to death row, the same outcome as in *Golphin*.[107] Finally, Quintel Augustine was indicted in 2001 and convicted of first-degree murder in 2002 and similarly sentenced to death.[108]

The three defendants, Golphin, Walters, and Augustine, filed Motions for a Grant of Sentencing Relief under the Act on May 15, 2012.[109] The court held that race was a significant factor in the State's decisions when striking jury members.[110] Largely, the prosecution buried this evidence in their notes taken during jury selection, which revealed the use of racially-charged terms when making strike decisions.[111] Assistant District Attorney Cal Colyer took notes of potential Black jurors as "blk" and described one as a "thug."[112] During Golphin's trial, the prosecution allowed two white jurors to remain even after they stated Golphin should be lynched.[113] The list continues for all three defendants as to the racial injustices and biases that the prosecution injected into their trials, leading to the inescapable conclusion that race played a large role in their conviction and death sentences.[114]

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[104] *Id.* at 166.

[105] Golphin, Walters, & Augustine Order, *supra* note 3, at 7.

[106] State v. Golphin, 533 S.E.2d 168, 248 (N.C. 2000).

[107] State v. Walters, 588 S.E.2d 344, 349 (N.C. 2003); *Golphin*, 533 S.E.2d at 183.

[108] *See* Augustine v. North Carolina, 548 U.S. 925, 925 (2006) (affirming all state and federal holdings for all three defendants and further the U.S. Supreme Court denying certiorari review); State v. Augustine, 616 S.E.2d 515, 520 (N.C. 2005); *Walters*, 588 S.E.2d at 349; *Golphin*, 533 S.E.2d at 183.

[109] Golphin, Walters, & Augustine Order, *supra* note 3, at 8.

[110] *Id.* at 209.

[111] *Id.* at 51; *North Carolina v. Tilmon Golphin, Christina Walters, and Quintel Augustine – Augustine Jury Strikes (Prosecutor's Handwritten Jury Selection Notes)*, AM. C.L. UNION (Dec. 12, 2012), https://www.aclu.org/legal-document/north-carolina-v-tilmon-golphin-christina-walters-and-quintel-augustine-augustine.

[112] Lane Florsheim, *Four Inmates Might Return to Death Row Because North Carolina Republicans Repealed a Racial Justice Law*, NEW REPUBLIC (May 9, 2014), https://newrepublic.com/article/117699/repeal-racial-justice-act-north-carolina-gop-takeover.

[113] *North Carolina Supreme Court*, *supra* note 4.

[114] *See id.*

Additionally, a prosecutor that was involved in *all three* of these cases had an adjudicated record of prior discrimination during jury selection.[115] The prosecutor previously violated the constitutional prohibition under *Batson v. Kentucky* by "giving a pretextual explanation and incredible reason for her strike of an African-American venire member."[116] The court found that the State had an overwhelming history of striking Black prospective jury members from the pool within Cumberland County for specific reasons while retaining white members with similar traits.[117] The evidence illustrated that "in Defendants' cases, in Cumberland County, and in North Carolina as a whole, prosecutors strike African Americans at double the rate they strike other potential jurors . . . even when controlling for characteristics that are frequently cited by prosecutors as reasons to strike potential jurors."[118] The court then vacated the three defendants' capital sentences, and they were subsequently resentenced to life in prison without the possibility of parole.[119]

E. *Repeal of the Act and the Ensuing Effect on the Defendants' Previously Granted Relief Under the Act.*

The legislature repealed the North Carolina Racial Justice Act in 2013 when the House and Senate were once again controlled by a Republican majority.[120] The terms of the repeal dictated that all pending Act motions filed prior to the repeal were void, dismissing any just claims "caught in the back log of litigation."[121] Further, the repeal mandated that a court be able to vacate any previous sentence mitigation under the Act and have the original capital sentence reinstated on appeal.[122] The repeal of the Act stated:

> This section does not apply to a court order resentencing a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act if the order is affirmed upon appellate review and becomes a final Order issued by a court of competent jurisdiction. *This section is applicable in any case where a court resentenced a petitioner to life imprisonment without parole* pursuant to the provisions of Article 101 of Chapter 15A of

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[115] Golphin, Walters, & Augustine Order, *supra* note 3, at 3.

[116] *Id.*

[117] *Id.* at 4.

[118] *Id.* at 5.

[119] *Id.* at 210.

[120] Act of June 13, 2013, N.C. Sess. Laws 2013-154, § 5(a); Matt Smith, '*Racial Justice Act' Repealed in North Carolina*, CNN (June 21, 2013), https://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html.

[121] N.C. Sess. Laws 2013-154, § 5(d).

[122] *Id.*

> the General Statutes prior to the effective date of this act, *and the Order is vacated upon appellate review by a court of competent jurisdiction*.[123]

Six defendants—four of whom had their sentences reduced in light of dispositive statistical evidence of racial discrimination, as described in Section I.D above, as well as two with claims the court dismissed prior to adjudication—were denied the justice promised by the Act and promptly appealed.[124] The State transferred Robinson back to death row after the repeal.[125] As for defendants Andrew Ramseur and Rayford Burke, the North Carolina Supreme Court never heard their arguments under the Act despite the similarity of their claims to those of Robinson, Golphin, Walters, and Augustine.[126] Ramseur and Burke filed their claims prior to the repeal of the Act, yet were told their claims were void upon repeal.[127]

Prior to Ramseur's trial, the candidates running for district attorney in the same district as Ramseur's upcoming trial, transformed Ramseur's upcoming trial into campaign fodder, attempting to create public outrage and gain the votes of death penalty proponents.[128] Support groups published racist propaganda referring to Ramseur as a "monkey" who should hang, among other horrific, derogatory, and discriminatory slurs and threats.[129] Due to a reasonable fear that a fair trial in that district would be impossible, the defense petitioned for a change of venue to remove the case from the specific district in which the elections were being held.[130] The court denied this motion.[131] The defense further petitioned to delay the trial until a study that the Act was premised on was to be published—again the court refused.[132]

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[123] *Id.* (emphasis added).

[124] *North Carolina Supreme Court*, *supra* note 4.

[125] *See* Jeffery Robinson, *Will North Carolina's Supreme Court Allow Racism to Remain a Persistent Factor in Its Death Penalty*, AM. C.L. UNION (Aug. 23, 2019), https://www.aclu.org/blog/capital-punishment/racial-disparities-and-death-penalty/will-north-carolinas-supreme-court; Robinson Brief, *supra* note 76, at 76.

[126] Herbert L. White, *Last Gasp for Racial Act Appeals Before NC Supreme Court*, CHARLOTTE POST (Aug. 26, 2019), http://www.thecharlottepost.com/news/2019/08/26/local-state/last-gasp-for-racial-justice-act-appeals-before-nc-supreme-court/.

[127] *See id.*

[128] *See* Dax-Devlon Ross, *Bias in the Box: For Capital Juries across America, Race Still Plays a Role in Who Gets to Serve*, 90 VQR (2014), https://www.vqronline.org/reporting-articles/2014/10/bias-box.

[129] *Id.*

[130] *See id.*

[131] *See id.*

[132] *See id.* (referring to the O'Brien Study used in the resentencing of Robinson).

Ramseur's trial was similarly infected with racial bias in the courtroom.[133] During the trial, his family was required to sit in the back of the courtroom, behind crime scene tape, while the family of the white victim was seated directly behind the prosecutor.[134] The prosecution in Rayford Burke's case referred to him in front of an all-white jury, as "a big black bull" during closing arguments, along with other pejorative racial slurs.[135]

Ramseur's appeal, arguing he required a hearing as his pending claim was dismissed when the Act was retroactively repealed, was heard in August 2019.[136] Amidst the Black Lives Matter protests that began in May 2020, the Supreme Court of North Carolina released an opinion about Ramseur's case, holding that the retroactive repeal was unconstitutional for any defendants whose claims were pending when the Act was repealed but were never heard.[137] Ramseur and Burke qualified under this decision as their appeals were pending, however, the other four defendants' appeals are still pending for their claims that the retroactive repeal was unconstitutional.[138]

In sum, the North Carolina criminal system deprived all six of these defendants of their right to a fair trial due to prosecutorial racial bias during trial while seeking the death penalty.[139] Although, Ramseur and Burke, among many others who filed their petitions before the repeal, will now receive hearings after the 2020 decision, the Act is still repealed and thus offers no future protections, which means that the State must act to provide further safeguards.

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[133] *See* Staff, *Must Read: The N.C. Racial Justice Act and Why It Still Matters in the Fight to End the Death Penalty*, NC POL'Y WATCH (Aug. 9, 2019), http://www.ncpolicywatch.com/2019/08/09/must-read-the-n-c-racial-justice-act-and-why-it-still-matters-in-the-fight-to-end-the-death-penalty/.

[134] Robinson, *supra* note 125; Staff, *supra* note 133 (stating the prosecutor eventually removed the crime scene tape but still required Ramseur's family to remain in the back of the courtroom).

[135] White, *supra* note 126; Staff, *supra* note 133.

[136] *North Carolina Supreme Court*, *supra* note 4.

[137] State v. Ramseur, 843 S.E.2d 106, 122 (N.C. 2020); State v. Burke, 843 S.E.2d 246 (N.C. 2020) (affecting Burke similarly as the repeal affected Ramseur); Jin Hee Lee & Sherrilyn Ifill, *The Fight for Black Lives in North Carolina State Courts*, 46 HUM. RTS. MAG. (Dec. 14, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/rbgs-impact-on-civil-rights/the-fight-for-black-lives-in-nc-state-courts/.

[138] *In Landmark Decision*, *supra* note 5.

[139] *See North Carolina Supreme Court*, *supra* note 4.

II. ARGUMENTS FOR REINSTATING THE NORTH CAROLINA RACIAL JUSTICE ACT TO SAFEGUARD DEFENDANTS FROM RACIAL BIAS.

A. *The Threshold of the Equal Protection Clause is Too High to Fulfill Its Purpose of Preventing Racial Discrimination.*

The 2013 repeal of the North Carolina Racial Justice Act eliminated the safeguards within the North Carolina criminal system that protected defendants from prosecutorial racial bias and discrimination within the context of capital punishment trials and sentencing.[140] The Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution, however, does not fulfill its purpose of preventing discrimination due to the high threshold required to prove a violation.[141] As a result, discrimination and bias not reaching that threshold is not federally protected.[142] Due to the inherent and systemic racism in the United States criminal system[143] states have an obligation to safeguard defendants from a criminal legal system that perpetuates racist punishments.[144]

The Equal Protection Clause of the Fourteenth Amendment mandates that no state can "deny to any person within its jurisdiction the equal protection of the laws."[145] The *McCleskey* Court detailed that Congress enacted the Fourteenth Amendment to eliminate discrimination from the decision-making power of a state.[146] However, *McCleskey* did not eliminate such discrimination in the context of capital crimes, as the Court declined to address vulnerable areas where discriminatory intent was difficult or impossible to prove.[147] The Court mandated that to win an equal protection claim, a defendant must prove intentional and purposeful discrimination on the part of the prosecutor.[148] The Court additionally concluded that statistical evidence of such racial disparities within the trial was insufficient proof of a violation.[149] The level of protection that the Equal Protection Clause was meant to safeguard is thus not achieved by

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[140] *See* North Carolina Racial Justice Act, N.C. GEN. STAT. ANN. § 15A-2010 (West 2020) (repealed 2013) ("AN ACT TO PROHIBIT SEEKING OR IMPOSING THE DEATH PENALTY ON THE BASIS OF RACE").

[141] *See* McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987) (finding no equal protection violation where there was no explicit proof of purposeful discrimination on the basis of race).

[142] *See id.*

[143] *See supra* Section I.A.

[144] *See* Powers v. Ohio, 499 U.S. 400, 412 (1991).

[145] U.S. CONT. amend. XIV, § 1.

[146] *See McCleskey*, 481 U.S. at 292 ("[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

[147] *Id.* at 321–27 (Brennan, J., dissenting).

[148] *Id.* at 298 (majority opinion).

[149] *See id.* at 279; *see also* Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 103 (2012).

the federal precedent set by the Supreme Court in *McCleskey*.[150] This is due to the Court's reading of *McCleskey* which allows for harmful racial bias in capital sentencing to escape scrutiny under the Equal Protection Clause.[151]

The United States' criminal system allows for prosecutorial discretion at multiple stages of criminal trials, which perpetuates implicit racial bias—a form of harmful discrimination that is not recognized as *purposeful discrimination* as defined by Equal Protection Clause jurisprudence.[152] This discretion, specifically at the trial stage, allows a prosecutor to make choices based on the specificity of each case which can lead to leniency or understanding for the particular defendant's circumstances.[153] However, prosecutorial discretion also creates the potential for implicit bias leading to blatant discrimination.[154]

Prosecutorial discretion within capital cases creates a greater risk for defendants due to the heightened punishment at stake and should require an even stricter evaluation.[155] Yet, in practice, prosecutors have "more unreviewable discretion than any other actor in the criminal justice system."[156] Prosecutors have unreviewable discretion when choosing whether to charge a crime, which crime to charge, whether to oppose bail, whether to offer a plea bargain, and whether to disclose evidence to the defense that may lead to exculpation of the defendant.[157] In further stages of a trial, the prosecution has additional discretion in exercising peremptory strikes when selecting jurors.[158] These peremptory strikes, under the Due Process Clause of the Fourteenth Amendment, cannot be used by attorneys on either side of the case to strike jurors from participating in a trial on the basis of their race.[159] Yet, the actual guarantee of a racially unbiased venire is difficult (to say the least), as prosecutors can simply offer a race-neutral explanation for their peremptory strikes if challenged by the

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[150] *See McCleskey*, 481 U.S. at 279.

[151] *See id.* at 325, 342 (Brennan, J., dissenting).

[152] *See id.* at 322–29 (emphasizing the risk of racial prejudice in capital trials and the heightened nature of this risk due to the Equal Protection Clause's stringent requirements).

[153] See *id.* at 336 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

[154] *Id.* at 312 (majority opinion) ("[T]he power to be lenient [also] is the power to discriminate . . ."); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012).

[155] Woodson v. North Carolina, 428 U.S. 280, 303 (1976); *see also McCleskey*, 481 U.S. at 322–29 (Brennan, J., dissenting).

[156] Smith & Levinson, *supra* note 154, at 805 (citing Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability,* 157 U. PA. L. REV. 959, 960 (2009)).

[157] *Id.*

[158] FED. R. CRIM. P. 24(b); *see* Smith & Levinson, *supra* note 154, at 818 (explaining attorneys are allowed a specific number of peremptory challenges to eliminate jurors without giving a reason).

[159] Smith & Levinson, *supra* note 154, at 818.

defense.[160] Such an explanation is virtually impenetrable due to the defense's lack of ability to show a racially discriminatory purpose behind this most notorious use of discretion.[161]

The racial discrimination that results from the discretionary actions of prosecutors in capital criminal trials is fundamentally antithetical to the purpose behind the Equal Protection Clause.[162] Due to the permanent and lethal penalty behind capital sentences, these sentencing decisions should require a "greater degree of scrutiny."[163] Yet, as seen throughout the history of North Carolina's criminal system, without an intentional showing of discrimination, most of the blatantly discriminatory actions of prosecutors go unchecked.[164] Racism today is less overt and seemingly becoming more covert as "unconscious discriminatory motivation has taken on greater significance."[165] In *Miller-El v. Cockrell*, there were twenty Black members of a 108-person venire panel and only one of them eventually served on the jury.[166] The Court casually commented on this use of peremptory striking to exclude ninety-one percent of eligible Black jury members, stating that "[h]appenstance is unlikely to produce this disparity."[167] Yet the Court could only officially determine that two peremptory strikes were based on race under the Equal Protection Clause, illustrating that the standard for proving intentional discrimination is insufficient to prevent all discriminatory uses of peremptory strikes, even where racial influence is obvious.[168]

Further, within the trials of the defendants appealing the reinstatements of their sentences under the Act, prosecutorial discretion provided no safeguard against the racial bias that the Equal Protection Clause guarantees as a constitutional right.[169] The prosecutor in Robinson's trial struck fifty percent of eligible Black venire prospects, and only fifteen percent of non-Black prospects,

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[160] *See id.* (specifying race-neutral explanations such as "avoiding eye contact, possessing an apparent lack of intelligence, or showing signs of nervousness").

[161] *See* McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting); Smith & Levinson, *supra* note 154, at 819 (reporting that Justice Breyer noted his lack of surprise at the continued discriminatory use of peremptory challenges remaining a problem even after the federal precedent had been set).

[162] *See McCleskey*, 481 U.S. at 347–48 (Blackmun, J., dissenting).

[163] California v. Ramos, 463 U.S. 992, 998–99 (1983).

[164] *See* KOTCH, *supra* note 57, at 113. For examples see discussion *supra* Part I.E.

[165] *See* Kotch & Mosteller, *supra* note 33, at 2042–43.

[166] Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 240–41 (2005) (citing Miller-El v. Cockrell (*Millier-El I*), 537 U.S. 322, 331 (2003)).

[167] *Id.* (quoting *Miller-El I*, 537 U.S. at 342).

[168] Powers, *supra* note 22, at 122.

[169] *See supra* Section I.D.

resulting in only two Black jurors participating in the trial.[170] Without the Act's allowance for the demonstration of racial bias within a trial based on such discriminatory uses of discretion, Robinson's claim would have failed under a equal protection violation argument.[171] Robinson did not show an explicit illustration of the prosecutor's specific intent to strike jurors on the basis race.[172] However, the statistical evidence within the district paired with the prosecutor's specific actions within Robinson's case proved the prosecutor's biased use of race when striking jurors.[173] Without the Act, the court would have sentenced Robinson to death despite the biased use of race during his trial, which defeats the purpose of the Equal Protection Clause in its entirety.[174] In Quintel Augustine's case, the trial was before an all-white jury after peremptory strikes were used against every Black prospective juror.[175] This, combined with prosecutorial notes strewn with racially pejorative labeling, led to an inference of racial bias that caused Augustine's guilty verdict and death sentence.[176] Without the Act, however, there was no concrete proof of "intent" to discriminate by the prosecutors.[177]

The U.S. Supreme Court must reconsider *McCleskey* and *Batson* in regard to the extremely high threshold required to satisfy an equal protection violation.[178] The findings in these and other cases illustrate the validity of statistical data for proving racial discrimination in capital sentencing contexts.[179] In addition, the Equal Protection Clause, ratified after the Civil War in 1868, had a fundamental and primary purpose in its enactment: to "stop states from discriminating against [B]lacks."[180] This purpose has expanded to prohibit discrimination on the basis of race, ethnicity, and gender.[181] The Equal Protection Clause's purpose is not effectuated when a state bases its decision to kill a defendant on "an unjustifiable

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[170] Powers, *supra* note 22, at 139 (explaining that this data, combined with statistical data of racial disparities in capital punishments in North Carolina through the O'Brien Study, was sufficient to find a valid claim under the Act).

[171] *Id.* at 145 (stating that the *McCleskey* requirement would result in the Act becoming irrelevant because of the standard being impossible to satisfy).

[172] *See id.*

[173] *See id.* at 144–45.

[174] *See id.*

[175] *See* Petitioner's Brief at 23, State v. Augustine, 847 S.E.2d 729 (N.C. 2020) (No. 01-CRS-65079), 2018 WL 3598174, at *23.

[176] *See id.* at *24–29.

[177] *See id.*

[178] Powers, *supra* note 22, at 144–45.

[179] *Id.*

[180] Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702 (last visited Feb. 13, 2021).

[181] *Id.* (detailing the expansion of the doctrine and the most recent debate being one of whether sexual orientation is a protected class).

standard such as race, religion, or other arbitrary classification."[182] The statistical evidence of racial bias proven in cases such as Robinson's, paired with the denial of racial bias by prosecutors in North Carolina capital trials, creates an inference that implicit bias within decision-making is a root cause of such discrimination.[183]

States also have a constitutional obligation under the Equal Protection Clause to safeguard criminal defendants against racial bias in criminal trials and to create a reliable system within the courtroom.[184] In general, a justice system that is blind to the racial inequalities in its decision-making processes, undermines itself by creating "doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . ."[185] This is especially true in a system with such grave consequences as capital punishment.[186] A prosecutor utilizing their discretion in a racially biased way casts doubt on the integrity of the other officers of the court and on the legitimacy of the system as a whole.[187] The use of peremptory strikes in either an explicitly or implicitly biased way fatally undermines our faith in the criminal system, and the result is deadly.[188]

The State's obligation to maintain the public's trust in the judicial system and ensure equal and fair administration of the laws under the Equal Protection Clause should be heightened when the lives of individuals are at stake.[189] As North Carolina Governor Beverly Purdue stated when signing the Act into law in 2009, "[T]he 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."[190] Governor Purdue's declaration emphasized the need for a lower threshold to prove a violation of the Equal Protection Clause, especially in capital cases, which the Act provided.[191]

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[182] McCleskey v. Kemp, 481 U.S. 279, 364 (1987) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[183] *See generally* Robinson Order, *supra* note 3.

[184] *See* Georgia v. McCollum, 505 U.S. 42, 49 (1986).

[185] *See* Powers v. Ohio, 499 U.S. 400, 412 (1991).

[186] *See* Kotch & Mosteller, *supra* note 33, at 2034. It is noteworthy that most democratic countries have abolished the death penalty altogether. *Policy Issues: International*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international (last visited Feb. 23, 2021). The death penalty in the U.S. should be abolished completely as it should be considered cruel and unusual punishment under the Eighth Amendment as well as international law and treaties; however, if the U.S. continues to use it, it must be fine-tuned to reduce racial discrimination especially given the grave consequences. *Id.*

[187] *See McCollum*, 505 U.S. at 49.

[188] *See* Ali Eacho, Note, *Surviving Implicit Bias: Why the Appellate Court's Interpretation of the 2012 Amendment to the Racial Justice Act Will Be a Life or Death Decision for North Carolina Death Row Prisoners*, 21 AM. U. J. GENDER SOC. POL'Y & L. 647, 677–78 (2013).

[189] *See* Kotch & Mosteller, *supra* note 33, at 2034.

[190] *Id.*

[191] *Id.*

Phrased slightly differently, even without proof of intentional discrimination, do the highest courts in the country want to kill citizens if there is even the slightest chance that race played into the decision to execute them?[192] As Justice Brennan detailed in his passionate dissent in *McCleskey*, the death penalty's unique status requires a "degree of care" higher than other sentences, and the Court's narrow reading of the protections provided by the Equal Protection Clause in *McCleskey* does not provide a sufficient safeguard.[193] Justice Brennan emphasized the *McCleskey* majority's perplexing rationale that to determine guilt in a criminal case, the prosecution must prove such guilt beyond a reasonable doubt (an extremely high standard), yet allowed courts to take a person's life when there was a *chance* that the death sentence was imposed due to racial bias.[194]

B. *North Carolina has a Specific Obligation to Correct the Racial Discrimination that Lies at the Root of the State's Institutions and History.*

Even if critics of the Act claim that the threshold of the Equal Protection Clause is sufficient to combat racial bias, the North Carolina legislature must work towards making amends for the gruesome legacy within the state's criminal system.[195] As famously argued by Thurman Arnold, "institutions have habits."[196] The habits of North Carolina's criminal system's use of the death penalty include "preying on the mentally compromised, people of color, and people in poverty; presenting itself unevenly over time . . . and above all, expressing the cruelties and prejudices of white supremacy by asserting through its uneven outcomes the rule that white lives—especially educated, white lives of means—mattered most."[197]

North Carolina's criminal system has a painful history of executions and lynchings based on racial bias, and that system continues to target poor people of color today.[198] The death penalty in North Carolina illustrates that racial

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[192] *See id.*

[193] *See* McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting) (finding the majority's holding violated the Fourteenth Amendment); Golphin, Walters, & Augustine Order, *supra* note 3, at 168 (implying that the safeguards set by federal precedent do not completely eliminate racial bias).

[194] *See McCleskey*, 481 U.S. at 328 (Brennan, J., dissenting) ("In determining the guilt of a defendant, a State must prove its case beyond a reasonable doubt. That is, we refuse to convict if the chance of error is simply less likely than not. Surely, we should not be willing to take a person's life if the chance that his death sentence was irrationally imposed is *more* likely than not.").

[195] KOTCH, *supra* note 57, at 7 (reasoning this is due to the history of executions and lynchings as punishment for citizens of color and specifically Black citizens).

[196] *Id.*

[197] *Id.*

[198] *Id.* at 7, 184–85.

prejudice "during slavery outlived emancipation."[199] North Carolina's pattern of disproportionately executing Black citizens, particularly when accused of victimizing white citizens, perpetuates Jim Crow-era racial attitudes into the present day.[200]

This pattern of the State's exacting punishment in a cruel and unfair way against Black defendants *and* Black victims has lasted from the 1900s into the present day.[201] The specific history of slavery, executions, and lynchings has created North Carolina's legacy of racial animus which more than justifies the State taking action to correct this malicious prejudice.[202] Therefore, North Carolina must work to ensure this pattern is broken by securing justice for those who were unfairly sentenced substantially on the basis of their race.[203]

Many defendants have successfully appealed their death sentences, either under the Act or through other methods of appeal; multiple governors of North Carolina have also granted clemency to defendants who experienced discrimination within the pre-trial process, the actual trial, or sentencing.[204] This raises the question: why do so many death sentences require appeals, reversals, or clemency in North Carolina? These statistics are indicative of the fact that the North Carolina justice system was founded on racist ideas that have lingered on in the modern-day criminal legal practices.[205] Efforts by the State to ensure "fair" executions are not completely absent, but the State's attempts have focused largely on the methods of execution rather than on the targets of execution.[206] Further, the State's appellate courts have never reversed a case due to discrimination against a minority juror.[207]

North Carolina's history with the death penalty is a complicated one: as a former Confederate state, the legacy of slavery in North Carolina breeds prejudice.[208] Yet, North Carolina also has a reputation amongst the southern states as being moderate due to its attempts to create progressive changes to its system—including the Act.[209] The drafting and passage of the Act is consistent

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[199] *See* Kotch & Mosteller, *supra* note 33, at 2035; *supra* Section I.B.

[200] *See* Kotch & Mosteller, *supra* note 33, at 2036.

[201] *See id.* at 2098 (articulating that racial prejudice not only impacts Black defendants disproportionately, but also is more commonly implemented when the victim is white); *supra* Part I.B.

[202] Golphin, Walters, & Augustine Order, *supra* note 3, at 20–21 (citing McCleskey v. Kemp, 481 U.S. 279, 319 (1987)).

[203] *See generally* Kotch & Mosteller, *supra* note 33, at 2034.

[204] *See id.* 2090–93.

[205] *See id.*

[206] *See id.* at 2055.

[207] James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, CHAMPION (June 2018), https://www.nacdl.org/Article/June2018-ThePersistenceofDiscrimination.

[208] Kotch & Mosteller, *supra* note 33, at 2036–37.

[209] *Id.*

with the State's vocalization, in *State v. Cofield*, of its purported lack of tolerance for the corruption of juries by racism and other types of irrational prejudice.[210] The statistical evidence presented in *Robinson* supports a finding that race has played, and continues to play, a significant role in prosecutorial strikes of potential Black jurors.[211] To continue the legacy of excluding Black Americans from juries furthers the painful history of overt racism within the State.[212]

North Carolina can begin a new chapter within capital punishment to combat the long and painful history of racially motivated killings.[213] In passing the Act in 2009, with the purpose of providing fairness and justice within capital punishment determinations, the State satisfied its duty to North Carolinians to work towards combatting racial influence in death penalty cases.[214] Yet, with the repeal of the Act, the State now has a further obligation to enact replacement legislation to reject the legacy of its racist attitude within its criminal system.[215]

The historical treatment of Black Americans in North Carolina is important in explaining why prosecutorial discretion within jury and sentencing decisions are crucial elements in perpetuating discrimination.[216] Further, this history shows how actors in the system—judges and lawyers—remain complicit with prosecutors' implicit or explicit decision-making based on race.[217] To combat this history, the State must make a commitment, such as the one made by the Act, to reject the racial prejudice that is ever present in trials.[218]

C. *The North Carolina Legislature Has Enacted Prior Legislation to Enhance Other Areas of Federal Precedent, and Thus the Expectation of Doing So Within Capital Punishment Is Not Unreasonable.*

The federal Constitution sets the "floor" for what safeguards states can put in place to protect the rights of their citizens.[219] Thus, states must protect the base

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[210] State v. Cofield, 357 S.E.2d. 622, 625 (N.C. 1987).

[211] Robinson Order, *supra* note 3, at 3.

[212] *Id.* at 158 (citing *Cofield*, 357 S.E.2d at 625).

[213] Kotch & Mosteller, *supra* note 33, at 2037.

[214] *Id.* at 2128. Assuming the argument can be made that *any* system of capital punishment is fair or just.

[215] McCleskey v. Kemp, 481 U.S. 279, 279 (1987); Powers, *supra* note 22, at 135.

[216] Robinson Order, *supra* note 3, at 158–59.

[217] *Id.* at 158.

[218] *Id.*

[219] *See* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1058–61 (2003) (detailing examples of enacted state legislation that furthers the protections set by the federal government, such as California enacting a state Equal Protection Clause that not only prohibits intentional discrimination, but also discrimination and de facto segregation in schools); Defendant's Petition for Writ of Certiorari at 8–9, State v. Robinson, 846 S.E.2d 711 (N.C. 2020) (No. 91-CRS-23143), 2017 WL 2494696, at *8–9 (arguing states may create broader guidelines or rights for citizens beyond federal precedent due to the inherent power in their state constitutions).

level of rights for citizens that the federal government has mandated. But states can, and should, extend protection beyond this federally mandated point to wherever they see fit.[220] In fact, multiple states have protections that raise the level of equal protection rights within their state.[221] For example, the Connecticut Supreme Court concluded that racial and ethnic segregation and differentiating treatment within schools "requires the state to take further remedial measures."[222]

Similarly, in 2009, the North Carolina legislature enacted the Act to safeguard defendants against racial discrimination in capital sentencing beyond the protections provided by the Equal Protection Clause.[223] Yet, the repeal of the Act was part of a legislative "push" by North Carolina Republicans who believed that the legislation was "unnecessary" and "excessive" to safeguard against discrimination from an already fair system.[224] Further, these legislators argued that the Act provided too many avenues for defendants to appeal, claiming this would overburden the court system and create a "backdoor deal" to eliminate capital punishment.[225] However, this rationale makes little sense in the face of extensive data on the racial discrepancies within the State's capital punishment cases and the lack of overturned convictions.[226] Further, claiming that the Act is "excessive" and "unnecessary" is ironic, considering the State has enacted legislation for other causes it believes will protect "lives" that have not burdened the criminal system.[227]

A prime example of the North Carolina legislature's willingness to regulate rights above the "floor" that the federal government has set is abortion rights.[228] Women in the United States have had the right to access legal abortions since 1973.[229] *Roe v. Wade* decided that terminating a pregnancy is a fundamental

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[220] *See* Shaman, *supra* note 219, at 1058–59.

[221] *Id.* at 1058, 1060 (giving examples of California and Connecticut legislation that combats segregation in schools absent a finding of intentional discrimination).

[222] *See id.* at 1060 (quoting Sheff v. O'Neill, 678 A.2d 1267, 1281 (Conn. 1996)).

[223] *See supra* Sections I.C & I.D.

[224] *See* Florsheim, *supra* note 112 (quoting State Senator Thomas Goolsby who claimed the Act was "bad" and unnecessary because "those convicted of capital crimes already have "multiple avenues of appeal" available to them").

[225] *See id.*; Richard Fausset, *Bias on Death Row? North Carolina Lawmakers Now Not So Sure*, L.A. TIMES (Nov. 29, 2011), https://latimesblogs.latimes.com/nationnow/2011/11/north-carolina-death-penalty-law.html.

[226] *See* O'Brien & Grosso, *supra* note 63, at 494–95.

[227] *See* Ryan Bakelaar, *The North Carolina Woman's Right to Know Act: An Unconstitutional Infringement on a Physician's First Amendment Right to Free Speech*, 20 MICH. J. GENDER & L. 187, 187–88 (2013) (detailing the legislation enacted to limit access to abortions for women in North Carolina by requiring "informed consent"); Shaman, *supra* note 219, at 1060; Florsheim, *supra* note 112 (quoting State Senator Thomas Goolsby).

[228] *See* Bakelaar, *supra* note 227, at 190–93.

[229] *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

right.[230] However, the U.S. Supreme Court limited this fundamental right as "not unqualified."[231] The holding in *Planned v. Casey* gives states the right to limit abortion access as long as it is not done in a manner that creates an "undue burden" on women seeking abortion services.[232] However, courts have interpreted this holding broadly, and in response, states such as North Carolina have passed statutes containing informed consent provisions to limit abortion access.[233]

The North Carolina legislature enacted the Woman's Right to Know Act in 2011 over the veto of Governor Perdue on June 27, 2011.[234] The statute contains multiple provisions that limit women's access to abortion because of the state's interest in physicians obtaining informed consent from patients seeking abortions.[235] The law defines consent as voluntary and informed if a physician informs the woman (orally and in writing) of information including:

> (1) the name of the doctor who will perform the abortion; (2) medically accurate information, including the risks of infection, hemorrhage, cervical tear or uterine perforation, danger to subsequent pregnancies, and possible adverse psychological effects associated with abortion; (3) the probable gestational age of the fetus; and (4) the medical risks associated with carrying her child to term; (5) whether or not the physician who is to perform the abortion has malpractice insurance; and (6) the location of the hospital that offers obstetrical or gynecological case located with 30 miles of the location where the abortion is performed at which the physician has clinical privileges. If the physician who will perform the abortion has no local hospital admitting privileges, that information shall be communicated.[236]

The State argued that the law would "protect[] abortion patients from psychological and emotional distress[,] . . . prevent[] women from being coerced into having abortions[,] . . . and "promot[e] life and discourage[e]

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[230] *Id.*

[231] *Id.*at 164–66 (allowing states to balance its interest in the health of the mother and life of the fetus with the mother's interest in privacy from state interference); Emma Freeman, *Giving* Casey *Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 287 (2013) (citing *Roe*, 410 U.S. at 153).

[232] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876–78 (1992).

[233] *See* Bakelaar, *supra* note 227, at 207.

[234] Woman's Right to Know Act, N.C. GEN. STAT. ANN. § 90-21.80 (West 2020); *North Carolina Woman's Right to Know (HB 854)*, REWIRE NEWS GRP., https://rewire.news/legislative-tracker/law/north-carolina-womans-right-to-know-act-hb-854/ (last visited Feb. 12, 2021).

[235] Assurance of Informed Consent, N.C. GEN. STAT. ANN. § 90-21.90 (West 2020); Bakelaar, *supra* note 227, at 207.

[236] Informed Consent to Abortion, N.C. GEN. STAT. ANN. § 90-21.82 (West 2020); *North Carolina Woman's Right to Know (HB 854)*, *supra* note 234.

abortion."[237] To fulfill these purposes, the law was meant to ensure that physicians followed the twenty-four-hour waiting period requirement after doctors provide information to the women, before they could perform the procedure.[238] Thus, the legislation further narrowed the federal precedent set by *Roe* and *Casey* to limit access to abortions.[239]

North Carolina further restricted abortion access through legislation aimed at the State's proclaimed interest in regulating medicine and protecting the lives of women and fetuses.[240] Thus, North Carolina's legislature has affirmed its position that the state may pass legislation even if it is more protective than federal precedent.[241] Yet, the Republican state legislators argue that the North Carolina Racial Justice Act is "excessive" or "unnecessary," and that they should not step on the toes of federal precedent.[242] This argument is clearly undermined by the legislators' own practice in other arenas.[243] The central objective of limiting access to abortions, according to legislators, is the protection of women and fetuses' lives.[244] Similarly, the Act was created to protect the lives of citizens by ensuring that race did not play a factor when choosing to execute a citizen for a crime.[245] The alleged purpose of both pieces of legislation is to protect lives, so why are these legislators convinced that certain lives (those protected by the Women's Right to Know Act) are more valuable and worthy of protection than others (those protected by the Act)? Conveniently, the legislators who repealed the Act refuse to acknowledge the evidence proving the influence of race on capital punishment and justify their decisions to repeal the Act, all while maintaining legislation in other areas to protect the lives of other citizens.[246]

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[237] Stuart v. Huff, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011).

[238] Bakelaar, *supra* note 227, at 190–91.

[239] N.C. GEN. STAT. ANN. § 90-21.80; Bakelaar, *supra* note 227, at 190; *see* Roe v. Wade, 410 U.S. 113, 153 (1973); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876–78 (1992).

[240] Bakelaar, *supra* note 227, at 190.

[241] *See id.* at 207.

[242] *See id.* at 206–07 (describing how after *Roe*, states began to pass restrictive abortion legislation in the name of the State interest); Florsheim, *supra* note 112.

[243] Bakelaar, *supra* note 227; Florsheim, *supra* note 112.

[244] Bakelaar, *supra* note 227, at 193 (citing N.C. GEN. STAT. ANN. § 90-21.85) (stating by enacting the Women's Right to Know Act, the North Carolina "General Assembly added North Carolina to an expanding list of jurisdictions that have sought to regulate abortion by requiring . . . abortion-related informed consent").

[245] North Carolina Racial Justice Act, N.C. GEN. STAT. ANN. § 15A-2010 (West 2009) (repealed 2013).

[246] Florsheim, *supra* note 112.

CONCLUSION

As the Supreme Court stated in *Rose v. Mitchell*: "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[247] Yet, despite all the evidence proving that prosecutorial decision-making enables racial discrimination within capital sentencing in North Carolina, the legislature has discarded the Act's attempt to stop this injustice.[248] The criminal system within North Carolina—and the United States as a whole—is a creature whose backbone is made of racial inequalities and cruelty.[249] Furthermore, because Black Americans did not have a role in forming the U.S. criminal system as it was created during a time when Black Americans were largely enslaved, racial inequities were baked into the system and continue to wreak havoc today.[250] Conversely, Black Americans, such as Reverend William Barber (the President of the North Carolina NAACP) and Charmaine Fuller Cooper (the Executive Director of The North Carolina Justice Policy Center), played a major role in the North Carolina Racial Justice Act's enactment.[251] The professional and lived experiences of these Black Americans contributed to a systemic effort to remove racial bias from capital punishment.

The Fourteenth Amendment cannot be satisfied where there is such abundant proof that the race of defendants influenced the State's decisions to kill them.[252] Further, especially given the longstanding and racist legacy of the criminal system in North Carolina, the North Carolina legislature has an obligation to accept the *McCleskey* Court's invitation to enact laws creating more safeguards for their citizens against unequal treatment within the context of capital punishment.[253]

North Carolina has no justification for relying on the excuses of Republican legislators, who claimed that the Act was excessive or unnecessary, when the same legislators enact other laws to heighten protections for state interests without blinking in the context of abortion restrictions.[254] Is protecting the State's Black citizens from racially motivated state killings not included among

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[247] Rose v. Mitchell, 443 U.S. 545, 555 (1979).

[248] *See generally* O'Brien et al., *supra* note 2, at 1998 (detailing statistical evidence of racial discrimination within capital punishment in North Carolina).

[249] *See* Kotch & Mosteller, *supra* note 33, at 2047.

[250] *Id.* at 2126.

[251] *Id.* at 2126 n.407 (citing Cash Michaels, *Racist Justice Act Now NC Law*, WILMINGTON J., Aug. 23, 2009, at 1) (listing these names in addition to African American leaders co-sponsoring the Act, such as Senator Floyd McKissick and Representatives Larry Womble, Earline Parmon, Paul Luebke, and Pricey Harrison).

[252] Fitzpatrick & Shaw, *supra* note 180; *see* McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting) (arguing that the majority holding violates the Eighth and Fourteenth Amendments).

[253] *See McCleskey*, 481 U.S. at 319 (majority opinion); Kotch & Mosteller, *supra* note 33, at 2128.

[254] *See* Bakelaar, *supra* note 227; Florsheim, supra note 112.

the state interests that justify enacting further legislation? Time will tell. However, in the meantime, multiple defendants sit on death row in North Carolina who have previously proven that race played a role in their being there.[255] The State's obligation to Marcus Robinson, Quintel Augustine, Tilmon Golphin, Christina Walters, and any future person affected by the systemic racism that controls the criminal legal system, remains pertinent to the administration of justice and the fight against the unlawful, discriminatory, and state-sanctioned murders of people of color in the United States.[256] The refusal of the actors within North Carolina's criminal system to protect Black Americans against white supremacy in capital punishment feeds into the impact of the long-lasting legacies of slavery and Jim Crow in modern society.[257] When the criminal system and its actors fail to safeguard citizens against a capital system infected with racially biased discretion, the outcome is deadly.[258]

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[255] Florsheim, *supra* note 112.

[256] *See* Bryan Stevenson, *NC Supreme Court Should End Racial Bias in Jury Selections*, CHARLOTTE OBSERVER (Aug. 25, 2019), https://www.charlotteobserver.com/opinion/article234076852.html.

[257] *See* KOTCH, *supra* note 57, at 186 (explaining the death penalty in North Carolina today is a modern Jim Crow tactic of white supremacy).

[258] *See id.*; *see also* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. Rev. 1, 5 (2019) ("Indeed, to a certain extent, many of the problems that plague the criminal justice system—mass incarceration, over-criminalization, and capital punishment, to name just a few—are only intelligible through the lens of race.").