Confronting the Fear of "Too Much Justice":[1] The Need for a Texas Racial Justice Act

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ABSTRACT

Texas should enact a Racial Justice Act. The Supreme Court has acknowledged the constitutional framework's inability to adequately address racial discrimination in the application of the death penalty. Instead, the Court encouraged legislatures to respond to this racial injustice. North Carolina responded with the North Carolina Racial Justice Act (RJA). Texas should follow North Carolina's lead and pass an RJA. Texas shares with North Carolina similar empirical, historical, and anecdotal evidence of racial injustice in capital sentencing, evidencing the same need for reform that led North Carolina to pass an RJA. Yet, interest convergence in Texas suggests Texas' political will to effect reform exceeds North Carolina's political will and could, therefore, withstand the kind of opposition that led to the repeal of North Carolina's RJA. Moreover, Texas' longstanding political will against abolition efforts weighs in favor of passing an RJA because there is little fear that reform could further entrench the death penalty in Texas to a meaningful degree.

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[1] This phrase is taken from Justice Brennan's dissent from *McCleskey v. Kemp*, in which Brennan criticizes the majority's refusal to allow capital defendants to introduce statistical evidence of racial discrimination to challenge their death sentences. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) ("The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.").

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I. INTRODUCTION

> *When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more comfortable to rest on the status quo and be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.*[2]

In January 2013, Craig Watkins announced he would push for Texas to pass a Racial Justice Act (TX-RJA).[3] The TX-RJA would be based on a similar North Carolina law that allowed defendants to present statistical and other evidence that race was a "significant factor" in the decision either to charge the defendant with a capital offense, or to sentence the defendant to death.[4] As Watkins explained,

> Throughout history, race has unfortunately played a part, an ugly part, in our criminal justice system . . . . This is an opportunity for us to address not only the past, and those individuals who are still being affected by the disparities in treatment, but also in looking forward to make sure that we don't have those same disparities in our criminal justice system.[5]

Watkins's role as the Dallas County District Attorney makes his support for a TX-RJA particularly significant.

It would be unexpected for the typical elected prosecutor—in Texas, of all places—to advocate for a measure historically supported by the capital defense bar and liberal advocates. However, Watkins is an atypical D.A. His administration's work to exonerate wrongly convicted defendants, largely through DNA testing, has earned him national

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[2] Order Granting Motions for Appropriate Relief at *2–3, North Carolina v. Golphin et al., Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, (N.C. Sup. Ct. Dec. 13, 2012) [hereinafter Golphin et al. Order of Relief], *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf, <http://perma.cc/5WML-9AY2>.

[3] Scott Goldstein, *Dallas DA Craig Watkins to Push for Law Allowing Appeals Based on Racial Factors*, DALL. MORNING NEWS, Jan. 22, 2013, http://www.dallasnews.com/news/community-news/dallas/headlines/20130121-dallas-da-craig-watkins-to-push-for-law-allowing-appeals-based-on-racial-factors.ece <http://perma.cc/6HFC-7LUE>.

[4] *Id.*

[5] *Id.*

acclaim.[6] More significantly, Texas is atypical. In 2012, racial minorities comprised 89% of those sentenced to death in Texas—compared to 60% nationwide.[7] Studies suggest that these disparities are the result of sentencing patterns based on the race of defendants and victims involved, rather than either the heinousness of the crimes or other characteristics deemed appropriate in capital sentencing.[8] Additional research shows that racial bias may also affect the process of selecting capital juries, resulting in a lack of minority representation that contributes to the disparities and potential discrimination in sentencing.[9]

North Carolina, plagued by analogous evidence of past and present racial discrimination, developed legislation aimed at addressing racial bias in its capital sentencing scheme.[10] In both North Carolina and Texas, empirical studies of capital sentencing have revealed stark racial disparities that indicate that the death penalty is applied in an arbitrary manner.[11] Just as in North Carolina, capital punishment in Texas is marked by a long history of racial bias, and there is evidence to suggest that such bias persists today.[12] Furthermore, support from unlikely sources in Texas suggests that the political will to effect reform could withstand the kind of opposition that led to the repeal of the NC-RJA.[13]

This Note suggests that there is a sufficient basis and need for an RJA in Texas. Part II provides contextual background regarding litigation efforts to address racially biased capital sentencing. Part III discusses the conception of the NC-RJA as a legislative fix for this problem. Part IV examines historical, statistical, and anecdotal evidence of racial bias in North Carolina and Texas—illustrating that these states are similarly situated in their need for an RJA. Part V assesses the RJA proposals set forth during the 2013 Texas Legislative session and proposes a TX-RJA. Finally, Part VI addresses critics who (a) doubt the viability and impact of a TX-RJA, given the repeal of the NC-RJA, and (b) contend that reform efforts only entrench the death penalty and forestall or impede its abolition.

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[6] *Id.* (highlighting Watkins' push for DNA testing in the 2012 N.J. legislature); *e.g.*, Molly Hennessy-Fiske, *Dallas County District Attorney a Hero to the Wrongfully Convicted*, L.A. TIMES, May 8, 2012, http://articles.latimes.com/print/2012/may/08/nation/la-na-dallas-district-attorney-20120509 <http://perma.cc/NU3V-JFFM> (noting Watkins' stance on N.J. DNA bill); *60 Minutes: Freed from Conviction* (CBS television broadcast May 4, 2008), http://www.cbsnews.com/video/watch/?id=4069405n <http://perma.cc/VU5H-6XRB> (interviewing Watkins' on his position for DNA exoneration).

[7] *RACE: Dallas District Attorney Supports Racial Justice Act for Texas*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/race-dallas-district-attorney-supports-racial-justice-act-texas, <http://perma.cc/N9KW-2CJH>.

[8] *See infra* Part II.B.2.

[9] *Id.*

[10] *See* 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, 2113 (2010) (discussing the impetus for the NC-RJA and describing its functionality).

[11] *See infra* Part IV.

[12] *See infra* Part IV.

[13] *See infra* Part V.

II. BACKGROUND: RACE AND THE DEATH PENALTY

A. Background: "Just" Theory and the Death Penalty

Some theorists suggest that racial disparities have no bearing on the justness of the death penalty.[14] This argument relies on the premise that all defendants found guilty of a death-eligible offense deserve the death penalty.[15] If a convicted defendant does not receive the death penalty, it is merely because the decisionmaker has been lenient.[16] Therefore, the influence of race on the administration of capital punishment only impacts the likelihood of leniency—which a convicted defendant does not deserve—and does nothing to alter the fact that defendants who *are* sentenced to death deserve that fate.[17] By this reasoning, there is no injustice done to the defendant justly condemned to death, merely because an unrelated defendant escaped the gallows. Other scholars counter that punishment's moral legitimacy depends on the moral legitimacy of the punishing institution.[18] Under this framework, a just punishment requires "a particular form of treatment, for a particular reason, *from* a particular authority."[19] Accordingly, "[i]f the harm that the person receives does not satisfy these requirements . . . then the punishment is unjust."[20] That is to say: if a punishment involves improper treatment, is administered for an improper reason, or the authority imposing the treatment is compromised, then the punishment is morally illegitimate.

Supreme Court jurisprudence supports this latter tripartite conception of justice, but the Court has left it to the states to ensure these principles are properly enforced.

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[14] Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era,* 50 HOUS. L. REV. 131, 152 (2012) (citing Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV.1662, 1663 (1986)).

[15] *Id.*

[16] *See id.* (describing the "mere incarceration" of a defendant convicted of murder as the injustice).

[17] *Id.*

[18] *Id.* (citing Daniel McDermott, *A Retributivist Argument Against Capital Punishment*, 32 J. SOC. PHIL. 317, 322 (2001)); *see also* Bryan Stevenson, *Close to Death: Reflections on Capital Punishment in America*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 97 (Beau and Cassell ed. 2004) ("Ultimately, the moral question surrounding capital punishment in America has less to do with whether those convicted of violent crime deserve to die than with whether state and federal governments deserve to kill those whom it has imprisoned.").

[19] Phillips, *supra* note 14, at 152.

[20] *Id.*

B. Background: Supreme Court Jurisprudence on Procedural Protections Against Racial Biases That Result in Unjust Punishment

For several decades, the NAACP's Legal Defense Fund (LDF) waged a systematic Supreme Court campaign in an effort to demonstrate the death penalty violates the Eighth Amendment. Primarily, LDF suggested that the death penalty is unconstitutional if judges and juries apply it arbitrarily.[21] Moreover, LDF presented evidence indicating that "if any basis [could] be discerned for the selection of these few to be sentenced to die, it [wa]s the constitutionally impermissible basis of race."[22]

In each of the following cases,[23] the LDF offered "[e]vidence of caste discrimination and capricious inequality," suggesting that the application of the death penalty was not only arbitrary, but discriminatory.[24] As this evidence developed over the course of decades of litigation, it included two primary components. First, the evidence demonstrated that the application of the death penalty was influenced by the race of defendants,[25] suggesting decision makers were more willing to impose this extreme punishment on African Americans. Second, the evidence demonstrated that the application of the death penalty was influenced by the race of victims,[26] suggesting that decision-makers tended to consider white victims to be more worthy of the retributive justice theoretically offered by executing their accused assailants. The Court responded by condemning the arbitrary application of the death penalty, but not the death penalty itself, and requiring that states develop procedural protections to safeguard against arbitrariness.[27] Although LDF later returned to the Court with substantial statistical evidence that these procedural protections do not, in fact, ensure just punishment, the

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[21] Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey,* 39 COLUM. HUM. RTS. L. REV. 34, 40 (2007).

[22] Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

[23] In *Furman*, LDF attorneys Jack Greenberg—Director-Counsel of LDF—and Anthony G. Amsterdam were listed in the case as attorneys for two of the three petitioners. 408 U.S. at 238. In *Gregg v. Georgia* and *Batson v. Kentucky*, the LDF submitted Amici Curiae Briefs supporting the petitioners. *See generally* Brief for Batson as Amici Curiae Supporting Petitioner, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263), 1984 WL 565907; Brief for Gregg as Amici Curiae Supporting Petitioner, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178715. In *McCleskey v. Kemp*, LDF attorney John Charles Boger argued the cause for petitioner. 481 U.S. 279, 282 (1987).

[24] *See* Amsterdam, *supra* note 21, at 41 (citing Brief for Petitioner at *15–18, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), 1971 WL 134168) ("[T]he point [of this evidence] being that the death penalty would not enjoy even the limited acceptance that it has if it were not visited almost exclusively upon poor and powerless pariahs.").

[25] *McCleskey*, 481 U.S. at 287.

[26] *Id.*

[27] Amsterdam, *supra* note 21, at 41. ("Henceforth, the Court appeared to be saying, States that chose to retain the death penalty would have to provide sentencing standards that were sufficiently detailed, clear, and objective to assure regular, even-handed results.") (citations omitted).

Court declined to articulate any further requirements.[28]

The cases described below demonstrate: (1) the Supreme Court's condemnation of a death penalty applied at least arbitrarily, if not discriminatorily,[29] (2) its call for procedural protections to ensure against arbitrariness[30] and racial discrimination,[31] and (3) its rejection of a constitutional argument based on statistical evidence that current procedural protections are ineffective at guarding against arbitrariness and racial discrimination.[32] Accordingly, the following cases demonstrate the need for states to develop mechanisms for addressing discrimination through legislation such as RJAs.

1. Furman v. Georgia *and* Gregg v. Georgia*: The Court Requires Procedural Protections*

In *Furman v. Georgia*,[33] the LDF argued that prosecutors, judges, and juries applied the death penalty arbitrarily, in violation of the Eighth Amendment.[34] The LDF's argument centered around the principle that "the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[35] Justices Stewart, Marshall, Brennan, Douglas, and White wrote separately, but all condemned the arbitrary application of the death penalty.[36] A generally accepted doctrinal rule

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[28] *Id.* at 43–45 (2007); *McCleskey*, 481 U.S. at 297. The Baldus study, which was used the *McClesky* case, demonstrated that a defendant convicted of killing a white victim had 430% higher chance of being sentenced to death than if a defendant had been convicted of killing a black victim. Beau Breslin & David R. Karp, *Debating Death: Critical Issues in Capital Punishment*, *in* CRITICAL ISSUES IN CRIME AND JUSTICE 310 (Albert R. Roberts ed., 2003). Nevertheless, the Court held that this evidence was insufficient to find McCleskey's death sentence a violation of the 14th Amendment's Equal Protection Clause or the 8th Amendment's Cruel and Unusual Punishment Clause. *McClesky*, 481 U.S. at 292, 306.

[29] Furman v. Georgia, 408 U.S. 240, 310 (1972); *see also* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 6 (2007) ("Indeed, the Justices' concern that the death penalty was being selectively applied . . . figured prominently in their decision to override" the death penalty).

[30] Gregg v. Georgia, 428 U.S. 153, 192–95 (1976).

[31] Batson v. Kentucky, 476 U.S. 79, 99 (1986).

[32] McCleskey v. Kemp, 481 U.S. 279, 308, 311–12, 319 (1987).

[33] 408 U.S. 240 (1972).

[34] Brief for Petitioner at *11, *Furman*, 408 U.S. 238 (No. 71-5003), 1971 WL 134167 (referring and citing to the Brief for Petitioner in *Aikens v. California*, which sets out the statistical evidence); Brief for Aikens as Amici Curiae Supporting Petitioner at *33, Aikens v. California, 404 U.S. 812 (1971) (Nos. 68-5027, 69-6003, 69-5030, 69-5031), 1971 WL 134169.

[35] *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (emphasis added).

[36] *See id.* at 310 (Stewart, J., concurring) ("My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race") (citing concurring opinion of Justices Douglas and Marshall); *id.* at 305 (Brennan, J., concurring) ("Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily"); *id.* at 313 (White, J., concurring) ("the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in

emerged from *Furman*: states must either develop "clear and objective standards that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death'" or forego use of the death penalty entirely.[37]

While many believed this to be the moment at which America embraced abolition, the Court's prescription has not been meaningfully enforced.[38] Just four years after *Furman*, the Court in *Gregg v. Georgia*[39] suggested that legislatures could improve the consistency and fairness of the death penalty, stating: "[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[40] Specifically, the Court held that jury sentencing must be guided by "clear and objective" standards.[41]

In so doing, the Court rejected Gregg's claims that these standards could not cure the arbitrariness allowed by discretion at several stages of the death penalty process.[42] For example, Gregg pointed to the prosecutor's "unfettered authority to select those whom he wishes to prosecute for capital offenses and to plea bargain with them," the jury's option "to convict a defendant of a lesser included offense . . . even if the evidence would support a capital verdict," and a pardoning authority's ability to commute a death sentence.[43] The Court's foreclosure of this argument was situated comfortably among other decisions, wherein courts upheld statutory schemes that "contained even palpably illusory sentencing standards," which, in practice, "left juries free to make life-or-death decisions in the same unregulated, ad hoc manner that they had before Furman."[44]

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which it is not.").

[37] Amsterdam, *supra* note 21, at 41 n.27 (citing Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion); Lewis v. Jeffers, 497 U.S. 764, 774–75 (1990); Arave v. Creech, 507 U.S. 463, 470–71 (1993)).

[38] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 416–17 (1995) (the "current doctrine prohibits imposition of the death penalty for crimes other than murder, but places no other meaningful limits on death eligibility."). Capital sentencing statutes that afford unguided discretion are problematic not just because they allow for sentencing decisions to be made in an ad hoc manner, but also because they allow for such decisions to be impacted by racial bias. *See, e.g.*, Sheri Lynn Johnson, *Race and Capital Punishment, in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 140 (Stephen P. Garvey ed., 2003) (describing the nature of the court's individualization requirement as infusing opportunity for racial bias to operate in the system).

[39] Gregg v. Georgia, 428 U.S. 153 (1976).

[40] *Id.* at 195; Amsterdam, *supra* note 21 at 41 n.28 (explaining the Court's evaluation of various state statutes to determine whether they accorded proper procedural protections).

[41] *Gregg*, 428 U.S. at 198 (1976); *see also* Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) ("Our decisions in [*Gregg*] upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman*.").

[42] *Gregg*, 428 U.S. at 199 (1976).

[43] *Id.*

[44] Amsterdam, *supra* note 21, at 41.

2. Batson v. Kentucky: *The Court Prohibits Explicit Racial Bias*

The Supreme Court has developed other mechanisms aimed at guarding against the arbitrary application of the death penalty. Along with procedures for guiding jury discretion, the Court has acknowledged the need to prevent racially biased jury selection. Even apart from the capital context, the Court has long accepted that the systematic exclusion of African Americans from serving on juries is "at war with our basic concepts of a democratic society and representative government."[45] It was in a 1986 capital case, however, that the Court first recognized the way in which persistent prosecutorial efforts to select racially homogenous juries contributes to such exclusion,[46] and developed a method for challenging race-based peremptory strikes.

In *Batson v. Kentucky*,[47] the Court provided a burden-shifting framework for cases challenging the prosecutor's peremptory strikes.[48] Under *Batson*, a defendant may challenge the prosecutor's peremptory strikes exerted only in his own case.[49] First, the defendant must establish membership in a "cognizable racial group" and demonstrate that the prosecutor peremptorily struck venire members of his race.[50] Second, the defendant may rely on the fact that the peremptory challenge process permits "those to discriminate who are of a mind to discriminate."[51] Third, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen . . . on account of their race."[52] The burden then shifts to the State to provide a race-neutral explanation for her strikes.[53] Unfortunately, to the extent that *Batson* offered a promise of addressing racially biased jury selection practices, "more than twenty-five years

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[45] Smith v. State of Texas, 311 U.S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."); *see also* Barbara O'Brien & Catherine M. Grosso, *Beyond Batson's Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1625 (2013) ("The U.S. Supreme Court has grappled with the pernicious role of race in jury selection repeatedly since at least 1880.") (citing Batson v. Kentucky, 476 U.S. 79 (1986); Casteneda v. Partida, 430 U.S. 482 (1977); Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522, 698 (1975); Swain v. Alabama, 380 U.S. 202 (1965); Glasser v. United States, 315 U.S. 60, 86 (1942); Strauder v. West Virginia, 100 U.S. 303 (1880)).

[46] O'Brien & Grosso, *supra* note 45, at 1625 n.1 (citing EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14–27 (2010), *available at* http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf, <http://perma.cc/DT98-R5XP>).

[47] 476 U.S. 79 (1986).

[48] *Id.* at 96.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

[53] *Id.* at 97.

later, a widespread consensus has emerged among judges, practitioners, and academics that this method is 'indeterminate, unprincipled, and generally ineffective.'"[54]

3. McCleskey v. Kemp: *The Court is Paralyzed by the "Fear of Too Much Justice"*

With years of evidence demonstrating that Georgia's procedural protections were ineffective at protecting defendants from an arbitrary application of the death penalty, LDF litigators returned to the Court.[55] In *McCleskey v. Kemp*,[56] the LDF introduced robust statistical evidence demonstrating that the standards promulgated by post-*Furman* statutes "produced a pattern of results explainable on no ground other than race."[57]

The principal witness at McCleskey's federal habeas hearing was Professor David C. Baldus, a national expert on legal statistics.[58] Baldus and his associates analyzed capital sentencing data using "a wide variety of procedures, including cross-tabular comparisons, weighted and unweighted least-squares regressions, logistic regressions, index methods, [and] cohort studies."[59] Baldus concluded that even "after taking into account most legitimate reasons for sentencing distinctions, the odds of receiving a death sentence were still more than 4.3 times greater for those whose victims were white than for those whose victims were black."[60] More specifically, he found that "at Mr. McCleskey's level of aggravation the average white victim case has approximately a [20%] higher risk of receiving a death sentence than a similarly situated black victim case."[61] The data also demonstrated that cases involving black defendants and white victims were "significantly more likely" to result in death sentences.[62]

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[54] O'Brien & Grosso, *supra* note 45, at 1625 (quoting David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1425 (2011)). The impact of the *Batson* decision will be discussed throughout the remainder of this Note.

[55] Amsterdam, *supra* note 21, at 43.

[56] 481 U.S. 279 (1987).

[57] Amsterdam, *supra* note 21, at 43; *see also* Brief for Petitioner at *9–16, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811) [hereinafter *McCleskey* Brief for Petitioner] ("The studies drew from a remarkable variety of official records on Georgia defendants convicted of murder and voluntary manslaughter, to which Professor Baldus obtained access through the cooperation of the Georgia Supreme Court, the Georgia Board of Pardons and Paroles, and other state agencies. These records included not only trial transcripts and appellate briefs but also detailed parole board records, prison files, police reports and other official documents.").

[58] *McCleskey* Brief for Petitioner, *supra* note 57, at *7–8.

[59] *Id.* at *68.

[60] *Id.* at *14.

[61] *Id.* at *85.

[62] *Id.* at *15–16.

The Court did not find these statistics constitutionally relevant.[63] Despite the overwhelming evidence of racially-motivated capital sentencing, the Court held that the Equal Protection Clause affords relief only if a claimant is able to prove that "the decisionmakers in *his* case acted with discriminatory purpose."[64] According to the Court, statistics—even when analyzed at a high level of scientific certainty—do nothing to illustrate the subjective intent of individual actors in a *particular* case.[65]

This reasoning was surprising in light of the Court's willingness to consider statistical evidence of disparate impact as at least relevant (if not determinative) in other contexts.[66] However, Justice Powell denied that the *McCleskey* decision departed from relevant precedent, and claimed that the death penalty context is "fundamentally different."[67] He noted that capital juries are "properly selected," that the State in a capital case has "no practical opportunity to rebut" the statistical evidence presented, and that "implementation of [criminal] laws necessarily requires discretionary judgment."[68] He cautioned that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties"; thus an acceptance of the "claim that racial bias has impermissibly tainted the capital sentencing decision," could result in "similar claims as to other types of penalty."[69] Justice Brennan, dissenting, criticized the Court's "fear of too much justice."[70]

Justice Powell later expressed regret for the *McCleskey* decision,[71] and Justices Stevens, Blackmun, and Breyer have respectively cited the Baldus study as valid evidence of racial discrimination in the death penalty.[72] However, the *McCleskey* Court did provide one source of hope: while dismissing the constitutional implications of the Baldus study, it encouraged legislatures to consider such evidence.[73]

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[63] McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

[64] *Id.*

[65] *Id.* at 292–93.

[66] *Id.* at 293–94 (acknowledging that the Court "ha[d] accepted statistical disparities as proof of an equal protection violation" and "ha[d] accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964." (citing Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977); Bazemore v. Friday, 478 U.S. 385, 400–401 (1986) (Brennan, J., concurring in part))).

[67] *Id.* at 294.

[68] *Id.* at 296–97.

[69] *Id.* at 314–15 (citations omitted).

[70] *Id.* at 339. The *McCleskey* decision has been widely written about and criticized. *See, e.g.*, Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905, 1917–18 (2012) (noting that the case has been compared to Dred Scott v. Sandford, 60 U.S. 393 (1857), Plessy v. Ferguson, 163 U.S. 537 (1896), and Korematsu v. United States, 323 U.S. 214 (1944)); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388–89 (1988).

[71] Gross, *supra* note 70, at 1918 (citing JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (revealing that, when asked if he could change one decision, Justice Powell cited *McCleskey*)).

[72] *Id.* at 1920.

[73] *McCleskey*, 481 U.S. at 319 (noting that it is the duty of elected bodies "to respond to the will and consequently the moral values of the people") (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)). In fact, the results of the study have since been affirmed by

In 1990, the Congressional Black Caucus introduced the Racial Justice Act, a "modest piece of legislation intended to ferret out race discrimination in the application of the death penalty."[74] Although the United States House of Representatives passed the Act in both 1990 and 1994 through omnibus crime bills, the Act never made it out of conference with the Senate.[75] The opposition contended that passage of the Act "would amount to [an] abolition of the death penalty."[76]

III. THE NORTH CAROLINA RACIAL JUSTICE ACT: THE ORIGIN AND PURPOSE OF RJAS

In 2009, the North Carolina state legislature crafted the first robust statutory answer to *McCleskey*'s call to action.[77] The North Carolina Racial Justice Act (NC-RJA) allowed defendants to appeal their capital sentences based on statistical and historical evidence of racial discrimination in the imposition of the death penalty.[78] The Act also expanded admissible evidence regarding peremptory strikes beyond that allowed by the *Batson* framework.[79] Under *Batson*, a defendant may only challenge the peremptory strikes exerted in his own case by the prosecutor, and the prosecutor may respond by providing a race-neutral response for the strike.[80] In contrast, the NC-RJA allowed for systemic analyses of strike patterns and practices in a given jurisdiction.[81] The legislation thus recognized that "[t]he tool of race neutrality cannot address discrimination that is based on unconscious stereotypes and emotional distance, and it is an especially poor tool in areas, such as

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several subsequent analyses, including a report by the United States General Accounting Office (GAO). *See* U.S. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), *available at* http://www.gao.gov/assets/220/212180.pdf, <http://perma.cc/WR4V-VXAH> (reviewing twenty-eight post-Furman studies based on twenty-three different data sets).

[74] Don Edwards & John Conyers, Jr., *The Racial Justice Act—A Simple Matter of Justice*, 20 U. DAYTON L. REV. 699, 700 (1995); Gross, *supra* note 70, at 1918.

[75] Gross, *supra* note 70, at 1918.

[76] *Id.* at 1918 n.74 (citing Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655, 655 (1995)).

[77] 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, 464 (2011) ("North Carolina was only the second state to pass legislation in response to the McCleskey decision despite numerous local and federal efforts to pass a racial justice act. Kentucky passed similar legislation in 1998, but the Kentucky law provides for only an almost fatally narrow claim. In this respect, North Carolina stands alone in providing capital defendants a strong claim for relief based on statistical evidence . . . ." (citations omitted)).

[78] O'Brien & Grosso, *supra* note 45, at 1633.

[79] *Id.* at 1634 ("[T]he RJA treads new ground by expressly recognizing the importance of analyzing the role of race in decision making across cases . . . . This broadened scope of a potential [RJA] claim distinguishes it from a typical Batson claim.").

[80] Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[81] *Id.*

capital sentencing, where the decision at issue is multifaceted and indeterminate."[82] Essentially, the NC-RJA used "*McCleskey's* requirement of proof of subjective racial animus . . . as a sword, to pry open and expose the magnitude of the culture of racism that produces the ubiquitous outcome of race-based differentials in capital sentencing."[83] The legislation accepted the *McCleskey* Court's challenge to: (a) uncover the horrific abuses of justice that have plagued the capital punishment system since its inception, (b) document these abuses through empirical and historical analysis, and (c) insert these findings into court records and the public domain.[84]

The NC-RJA was intended to ensure 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."[85] To achieve this objective, the law allowed defendants to present a broad range of evidence that race was a "significant factor" in the decision to seek or impose a death sentence.[86] As under *McCleskey* and *Batson*, a defendant could introduce evidence that a decision-maker in his case acted with discriminatory intent.[87] However, in contrast to *McCleskey* and *Batson*, a defendant could additionally introduce evidence of systemic bias in the general time and place that defendant was sentenced.[88]

Under the NC-RJA, claimants could rely on "statistical evidence" as well as "other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system."[89] If a defendant made an initial threshold showing 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," then the burden would shift to the prosecution to rebut the inference of discrimination.[90] In rebuttal, the prosecution had the opportunity to show that "the disparate impact demonstrated by the defendant resulted from any statutorily authorized factor" since such factors "may correlate with race and thereby eliminate significance of the apparent impact of race in producing that disparate impact."[91]

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[82] Johnson, *supra* note 38, at 143.

[83] Amsterdam, *supra* note 21, at 50–51.

[84] *Id.*

[85] N.C. GEN. STAT. § 15A-2010 (2012) (repealed 2013).

[86] *See* § 15A-2011(b) (repealed 2013) (listing potential evidentiary sources as including statistical evidence from the jurisdiction that delivered the sentence, and sworn testimony as to race's impact upon choice to seek the death penalty, rate of conviction, and juror selection).

[87] *See, e.g.*, Golphin et al. Order of Relief, *supra* note 2, at *3 (granting relief on defendants' race-based jury selection claim primarily "based on the words and deeds of the prosecutors . . . in [d]efendants' cases.").

[88] *See, e.g., id.* at *5 (noting the relevance of defendants' statistical evidence).

[89] § 15A-2011(a) (repealed 2013).

[90] § 15A-2012(a) (repealed 2013); *see also* Kotch & Mosteller, *supra* note 10, at 2115 (describing the burden shifting process).

[91] Kotch & Mosteller, *supra* note 10, at 2119.

Professors Seth Kotch and Robert Mosteller of the University of North Carolina-Chapel Hill have comprehensively analyzed the legislative motivation for passing the RJA and its unique features.[92] Although Kentucky passed similar legislation in 1992,[93] Kotch and Mosteller demonstrate that the Kentucky RJA (KY-RJA) is more limited in scope and has not had much impact.[94] For example, the KY-RJA applies only to the charging decision, while the NC-RJA allowed claimants to challenge both the charging and sentencing decisions.[95] Additionally, defendants challenging their sentences under the KY-RJA must state "with particularity how . . . racial considerations played a significant part in the decision to seek a death sentence in his or her case."[96] Kotch and Mosteller remind that the KY-RJA language mirrors the *McCleskey* requirement that a defendant be able to prove that "the decisionmakers [sic] in *his* case acted with discriminatory purpose."[97]

Contrastingly, the NC-RJA's particularity provision required that a defendant merely demonstrate that race is a "significant factor" in a given geographic area rather than in his individual case.[98] North Carolina lawmakers conscientiously chose this distinguished requirement, seeking to go beyond what was already permissible under *McCleskey*.[99] As one legislator explicitly acknowledged:

> The *McCleskey* decision . . . specifically directed that if states wanted to provide this additional protection and [allow the use of statistics to] prove racial discrimination, then they could do it. . . . 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 [through] an admission by the person engaging in racial discrimination. We would have had very little change in our society and culture in

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[92] *See generally id.*

[93] *See id.* at 2117 n.380 (citing KY. REV. STAT. ANN. §§ 532-300 to 309 (West 1998)) (describing the KY-RJA).

[94] *Id.* at 2117 n.381 (describing the limitations of the Kentucky Act, and comparing the provisions with that of the NC-RJA).

[95] *Id.* at 2131 (*comparing* KY. REV. STAT. ANN. § 532-300(2) (allowing for claims based only on charging decision), *with* N.C. GEN. STAT. §§ 15A-2010 (repealed 2013) (allowing for claims based on charging decision or sentencing) & 15A-2011(a) (repealed 2013) (allowing for claims based on charging or sentencing).

[96] *Id.* at 2116–18 (citing KY. REV. STAT. ANN. § 532-300(4) (West 2008)).

[97] *Id.* at 2117 n.380 (citing *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (emphasis added)).

[98] *Id.* at 2116–18 (citing N.C. GEN. STAT. §§ 15A-2010 & 15A-2011(a) (2012) (repealed 2013)). Additionally, the Kentucky Act requires proof by clear and convincing evidence, while the NC-RJA imposes a preponderance standard. *Compare* KY. REV. STAT. ANN. § 532- 300(5), *with* N.C. GEN. STAT. § 15A-2011(c) (repealed 2013).

[99] Kotch & Mosteller, *supra* note 10, at 2112 ("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.").

> 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, you could use statistics.' And [that is], in fact, what we did, and there's a parallel to what we're doing in this bill.[100]

In 2012—immediately after the first successful appeal under the NC-RJA—the North Carolina legislature amended the Act, attacking its most effective provisions.[101] The amended version of the Act: (1) limited the timeframe that could be considered with regard to each defendant,[102] (2) required the defendant to waive any objection to a sentence of life without the possibility of parole,[103] (3) limited the introduction of evidence to the county or prosecutorial district level,[104] (4) eliminated consideration of the race of the victim in defendants' arguments,[105] and (5) specified that statistical evidence *alone* was not sufficient to establish that race was a significant factor.[106]

In June 2013, the NC-RJA was repealed.[107] The legislature's swift response to the impact of its own earlier reform measure illustrates the difficulty of enacting reform in states committed to the use of the death penalty.[108] Specifically, it raises questions regarding the political and sociological factors that may facilitate lasting reform, and whether the NC-RJA can still be considered a success.

This Note returns to these questions in Part VI. Part IV compares

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[100] *Id.* at 2112–2113 (citing Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009)). Kotch and Mosteller note that Sen. Berger was "responding in opposition to an amendment offered by Senator Phil Berger to limit the use of statistical evidence as set out in *McCleskey*." *Id.* at 2113 n.360.

[101] Initially, admissible evidence included any which demonstrated that: (1) race of the defendant affected the charging or sentencing decision; (2) race of the victim affected the charging or sentencing decision; and/or (3) race influenced prosecutorial decisions to exercise peremptory challenges during jury selection. An Act to Amend Death Penalty Procedures, 2012 N.C. Sess. Laws (2012), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S416v6.html, <http://perma.cc/5XHC-BJGB>.

[102] *Id.* (amending § 15A-2011(a) to allow for evidence from "10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence").

[103] *Id.* (adding § 15A-2011(a)(1)).

[104] *Id.* The 2009 version of the Act allowed for state-level statistical examinations, in addition to county-level and district-level examinations. The 2012 version allowed only examinations of evidence from the county and/or prosecutorial district in which defendant was sentenced.

[105] N.C. GEN. STAT. § 15A-2011(d).

[106] *Id.* § 15A-2011(e).

[107] Cassandra Stubbs, *In the Battle of Racial Bias vs. Racial Justice in North Carolina, Governor Insists on Bias*, ACLU CAPITAL PUNISHMENT PROJECT, https://www.aclu.org/blog/capital-punishment-racial-justice/battle-racial-bias-vs-racial-justice-north-carolina-governor, <http://perma.cc/FRJ9-76X7>.

[108] *Id.* ("It is clear that the law was removed because of its successes: four North Carolina death row inmates had prevailed in showing systemic discrimination across North Carolina and in their own cases. Using the law, these defendants had uncovered evidence that prosecutors made racially derogatory notes during jury selection and discriminated against large numbers of African American prospective jurors."); *see also* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEXAS L. REV. 1869, 1870–71 (2006) (discussing the difference between symbolic death penalty states that do not frequently sentence individuals to death and those which regularly carry out death sentences).

the empirical, historical and anecdotal evidence of racial injustice in capital sentencing in North Carolina and Texas. Part V describes the TX-RJA Proposals in the 2013 Texas Legislative Session, and advocates a particular TX-RJA embodiment. Part VI then returns to these questions and argues that—in light of the evidence in Parts IV and V, as well as additional evidence offered in Part VI—a TX-RJA would likely be both viable and impactful, despite the NC-RJA's repeal.

IV. RACIAL BIAS AND CAPITAL PUNISHMENT IN NORTH CAROLINA AND TEXAS

North Carolina and Texas have a shared history of racial discrimination, rich with compelling evidence that today's system is not untainted by its past. This shared reality, which made the RJA appropriate in North Carolina, renders it similarly appropriate in Texas.

A. North Carolina

1. Admitting Historical and Statistical Evidence of Racial Bias Under the North Carolina Racial Justice Act

In *North Carolina v. Robinson*,[109] the first case brought under the NC-RJA, Judge Gregory Weeks of Cumberland County Superior Court interpreted the statute in light of its legislative history. He noted that the "General Assembly was aware of both *Batson* and *McCleskey* when it enacted the RJA and therefore did not write the RJA as a mere recapitulation of existing constitutional case law."[110] He also observed that, unlike in other direct discrimination-based legal theories, "the words intentional, racial animus, or any similar references to calculation or forethought on the part of prosecutors do not appear anywhere in the text of any RJA provision."[111] Similarly, with regard to jury selection, he held that the NC-RJA "does not require that the defendant show that the prosecutor's decisions resulted in any specific final jury composition," but rather only that the strikes were influenced by race.[112]

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[109] North Carolina v. Robinson, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012).

[110] Order Granting Motion for Appropriate Relief at *36, *Robinson*, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012) [hereinafter Robinson Order of Relief], *available at* http://www.aclu.org/files/assets/marcus_robinson_order.pdf, <http://perma.cc/G3CB-DV5P> (reminding that *McCleskey* explicitly invited "legislatures to pass their own remedies to race discrimination in capital cases," especially remedies which would include "permitting the use of statistics" in sentencing challenges).

[111] *Id.* at *34.

[112] *Id.* at *40–41.

Because the NC-RJA did not require proof of discriminatory intent, claimants could present evidence that would likely not be considered probative—and thus excluded or accorded little weight—under *McCleskey*.[113] Accordingly, Judge Weeks considered Marcus Robinson's extensive record demonstrating racial bias in North Carolina capital sentencing and ordered relief. In the next three cases brought in front of Judge Weeks, he considered the appellants' claims under both the *original* NC-RJA, and the NC-RJA *as amended* in 2012.[114] Even under the limited 2012 version of the NC-RJA, Judge Weeks ordered relief for all appellants.[115]

Significantly, the NC-RJA opened the courthouse door to evidence of racial bias that—while perhaps generally accepted or well known—had thus far been considered generally irrelevant in the context of capital appeals. Through the NC-RJA, the appellants in these cases were able to introduce a vast record that would not otherwise be considered probative.[116] It was this evidence that led Judge Weeks to conclude, "[R]ace, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government."[117]

By providing a judicial forum for historical and statistical evidence of racial bias in capital sentencing, the NC-RJA offered "hope that acknowledgment of the ugly truth of race discrimination revealed by Defendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law."[118]

2. *History of Race and the Death Penalty in North Carolina*

As Seth Kotch and Robert Mosteller note in their historical examination of race and the death penalty in North Carolina, the state's first recorded execution took place when the state was still a colony.[119]

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[113] O'Brien & Grosso, *supra* note 77, at 499 ("A claimant operating under the McCleskey framework would have to assert evidence of discrimination specific to his or her own case.").

[114] Golphin et al. Order of Relief, *supra* note 2, at *2–3.

[115] *Id.* at *2.

[116] *See, e.g.*, O'Brien & Grosso, *supra* note 77, at 499–500 ("When problematic findings about the system do come to light, it is generally through academic publications, which can be dismissed as smoke and mirrors. Under the RJA, however, this kind of evidence is presented and tested in court. Findings of bias may not be dismissed summarily or ignored, but must be tested and rebutted with specificity. This process—even if it does not result in relief for the litigant—serves an important function by bringing this evidence into the public's consciousness." (citations omitted)).

[117] Golphin et al. Order of Relief, *supra* note 2, at *4.

[118] *Id.* at *6.

[119] Kotch & Mosteller, *supra* note 10, at 2038.

From its inception through emancipation, capital punishment was an integral part of the slave-master power dynamic.[120] While "a slave owner could not be punished for a physical assault against his slave,"[121] his power to punish "did not formally include the right to execute."[122] As a result, the death penalty served not only as "the required legal method of executing slaves but also the ultimate method for slave owners to enforce slave discipline."[123] Importantly, during this time, all-white juries imposed the death penalty primarily on black slaves.[124]

After Emancipation, the use of the death penalty remained intertwined with racial discrimination, even through the late nineteenth century, when the state centralized all executions from the county level.[125] When North Carolina assumed administrative control over the death penalty from the counties, it failed to change this dynamic. From 1868–1910, 74% of the 160 people executed in North Carolina were African-American.[126] This failure powerfully illustrates the way in which North Carolina's capital punishment system is bound to its legacy of slavery.[127]

The influence of race—both the victim's race and the defendant's race—on death sentencing in North Carolina persisted into the twentieth century.[128] Disparities in death sentencing were particularly pronounced for the crimes of rape and burglary, suggesting the influence of racial stereotypes regarding black criminality.[129] Trial records and newspaper accounts from this time period reveal rushed trials marked by explicit racial animus.[130] One newspaper, for example, described a black defendant as "short, squat, thick-bodied, and with the face of a gorilla."[131] In stark juxtaposition, media coverage of the executions involving white defendants—convicted of similarly horrendous crimes—was comparatively constrained.[132] The functional absence of minority

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[120] *Id.*

[121] *Id.* at 2047 (citing State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829)).

[122] *Id.*

[123] *Id.* at 2048.

[124] *Id.* at 2044 n.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.").

[125] *Id.* at 2054.

[126] *Id.* (noting that percentage of black people in the population never exceeded 38% during this period).

[127] *Id.*

[128] *Id.* at 2056 (noting that, from 1910 to 1961, "78% of those executed were African American and 80% were minorities.").

[129] *Id.* at 2068; *see also id.* at 2066–68 (discussing the racially-charged dynamics regarding these crimes in the South during this period).

[130] *See id.* at 2056–64 (discussing several examples of such trials).

[131] *Id.* at 2068–69 (2010) (citing *John Goss Dies Admitting Crime*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 8, 1925, at 9).

[132] The same newspaper that provided the above-mentioned account of a black defendant contrastingly described a white defendant sentenced to death for raping a ten-year-old girl as "straight and calm" and "a nice-looking fellow." *Id.* at 2069 (citing Charles Craven, *State Finally*

jurors no doubt exacerbated the racial hostility of these cases.[133] Even after the Court more aggressively enforced inclusive juries, these legal gains were not necessarily implemented.[134]

Additionally, from emancipation through the 1940s, lynchings were a prominent feature of life in North Carolina. Lynchings mirrored—and, at times, outnumbered—executions.[135] While lynching is sometimes conceptualized as a form of vigilantism,[136] sociologist David Garland suggests that "public torture lynchings"—characterized by mass mobs, publicity, ritual, abnormal cruelty, and large crowds[137]—were not simply the work of private citizens operating outside of the law.[138] Rather, lynchings were observed, supported, and perpetuated by community leaders and local law enforcement—giving the practice of lynchings a gloss of state sanction.[139] Accordingly, lynchings in the American South functioned as a "mode of racial repression . . . that deliberately adopted the forms and rituals of criminal punishment."[140]

Granting relief for Marcus Robinson, Judge Weeks acknowledged the relevance of North Carolina's history with respect to racial bias in the state's contemporary capital punishment system.[141] Statistical evidence further illustrates the endurance of these historical trends today.

Claims Life of Guilford County Rapist, NEWS & OBSERVER (Raleigh, N.C.), July 22, 1950, at 1).

[133] *Id.* at 2038 (observing that "except briefly during Reconstruction, jury participation by African Americans was negligible" into the twentieth century).

[134] Robinson Order of Relief, *supra* note 110, at *113.

[135] Kotch & Mosteller, *supra* note 10, at 2053.

[136] *E.g.*, FRANK E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–118 (2003) (discussing vigilantism's intersection with historical lynchings and modern capital punishment).

[137] David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 803 (2005) (citing W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA 1880–1930 (1993)) (describing variants of lynching behavior, and noting that public torture lynchings were characterized by mass mobs, publicity, ritual, abnormal cruelty, and large crowds).

[138] *Id.* at 797–98 ("[L]ynchings are usually omitted from that history and sociology [because they are] regarded not as legal punishments but as unofficial conduct . . . [and] arbitrary racial violence."); *see also, e.g.*, Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE 96, 99–106 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (describing the racial underpinnings of capital punishment in the eighteenth and nineteenth century South); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 22–23 (2002) (discussing various motivations for lynchings).

[139] Garland, *supra* note 137, at 797–98.

[140] *Id.* at 798. Indeed, evidence from North Carolina supports Garland's conception of lynchings as criminal punishment rather than extra-legal deviance. For example, records show that local law enforcement officers sometimes spared black men from lynching in North Carolina specifically in order to impose a state-sanctioned execution. Kotch & Mosteller, *supra* note 10, at 2063–64.

[141] Robinson Order of Relief, supra note 110, at *112–115 (citing as relevant factors in ordering relief: North Carolina prosecutors' resistance to selecting black people as jurors in capital cases, the history of the racially-biased application of the death penalty, and the unique relationship between the death penalty and lynching); *see also* Transcript of Record Vol. IV at 845–52, 857–63, North Carolina v. Robinson, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012) [hereinafter Transcript of Record: Bryan Stevenson], *available at* https://www.aclu.org/files/assets/transcript_robinson_rjahearing.pdf, <http://perma.cc/L54Z-N4QZ> (testimony of Bryan Stevenson).

3. Statistical Evidence of Current Racial Bias in North Carolina Capital Punishment

Marcus Robinson's NC-RJA claim relied in part on statistical analysis conducted by Barbara O'Brien and Catherine M. Grosso at the Michigan State University College of Law.[142] Their study analyzed peremptory challenges in North Carolina capital cases between 1990 and 2010.[143] Grosso and O'Brien found that black qualified jurors consistently faced a significantly higher risk of strike than all other qualified jurors.[144] The findings remained statistically significant "even when controlling for characteristics frequently cited by prosecutors [as race-neutral reasons] to strike potential jurors, including death penalty views, criminal background, employment, marital status, [and] hardship . . . ."[145]

As a rebuttal, the state used what it referred to as a "*Batson* methodology . . . to determine the best possible race-neutral reason for the peremptory strikes of every African-American venire member in the 173 cases" examined by the MSU study.[146] This entailed "asking prosecutors . . . involved in the selection of jurors to provide those race-neutral reasons."[147] There are obvious weaknesses in this approach. First, it did not allow for open-ended responses, and was instead set up to produce only race-neutral explanations.[148] Second, expert witness Bryan Stevenson testified that these tactics, when employed in the context of a *Batson* challenge, simply demonstrate an effort on the part of prosecutors to conceal racial bias by developing acceptable-sounding rationales for exclusion.[149] Rather than demonstrating that the strikes were, in fact,

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[142] O'Brien & Grosso, *supra* note 45, at 1634.

[143] Robinson Order of Relief, *supra* note 110, at *59–60 (noting that of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members); *see also* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Capital Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1557 n.101 (2011) (presenting the study findings).

[144] Grosso & O'Brien, *supra* note 143, at 1548 ("Of the 166 cases that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members."); *see also* Robinson Order of Relief, *supra* note 110, at *60 (noting the court's acceptance of these figures as findings in Robinson's case).

[145] Golphin et al. Order of Relief, *supra* note 2, at *5; *see also* Grosso & O'Brien, *supra* note 143, at 1546–1548 (discussing methods for reliability testing). When broken down into geographical units, these findings held true in all but four counties, and in all but one prosecutorial district. Robinson Order of Relief, *supra* note 110, at *62–65.

[146] Robinson Order of Relief, *supra* note 110, at *120.

[147] *Id.* When the trial attorneys were unavailable, the District Attorney's office appointed reviewers to read through the trial transcript and provide their assessment of the race neutral reason for the strike. *Id.*

[148] *Id.* at *121.

[149] Transcript of Record: Bryan Stevenson, *supra* note 141, at 865 ("One of the ways it was manifest was that lawyers would get together and actually come up with ways to conceal racial bias by developing reasons that were going to be deemed race-neutral and, therefore, acceptable to reviewing courts, and in training materials, we saw a good bit of evidence of that. We saw that in states all across the country where lawyers were saying, Here's how you get around a Batson

justifiable, the state's rebuttal served to demonstrate the ease of providing pretextual race-neutral explanations for racially discriminatory behavior and, accordingly, the need for an RJA.[150]

Judge Weeks held that "Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina" and that this evidence was not substantially rebutted by the State.[151] He added that this evidence not only required relief in Robinson's case, but also "should serve as a clear signal of the need for reform in capital jury selection proceedings in the future."[152] Three additional claimants cited the MSU study to challenge sentences under the amended NC-RJA.[153] Even under the amended NC-RJA's temporal and geographic limitations, the Court found that prosecutors struck black venire members "at double the rate they struck other potential jurors," in capital cases.[154]

4. *Other Evidence of Current Racial Bias in North Carolina Capital Punishment*

The NC-RJA also allowed claimants to introduce evidence regarding the "the words and deeds of the prosecutors involved in Defendants' cases."[155] The initial NC-RJA claimants, for example, offered "handwritten pretrial notes about black potential jurors, as well as evidence that prosecutors strongly favored black jurors in two racially charged murder trials with black victims."[156] As stated by Judge Weeks, the notes described "the relative merits of North Carolina citizens and prospective jurors in racially-charged terms, and constitute unmistakable evidence of the prominent role race played in the State's jury selection strategy."[157] Furthermore, defendants presented evidence that prosecutors were trained to provide pretextual race-neutral justifications for striking black jurors.[158] This training, titled *Top Gun II*, was held by the North

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objection.").

[150] *See* Cassandra Stubbs, *Sweeping Ruling about Racial Bias in Capital Jury Selection Shows the Need for Sweeping Reforms*, ACLU BLOG RIGHTS (Dec. 17, 2012, 2:47 PM), https://www.aclu.org/blog/capital-punishment-racial-justice/sweeping-ruling-about-racial-bias-capital-jury-selection, <http://perma.cc/VG62-H93V> ("These cases provided an unprecedented examination of the role of race in capital jury selection. By comparing evidence across cases, Weeks was able to peel away layers of pretext and subterfuge that have for too long concealed the role of race. This kind of close and unflinching investigation lives up to part of the promise of the Racial Justice Act.").

[151] Robinson Order of Relief, *supra* note 110, at *3.

[152] *Id.*

[153] O'Brien & Grosso, *supra* note 45, at 1627 n.21.

[154] Golphin et al. Order of Relief, *supra* note 2, at *5.

[155] *Id.* at *3.

[156] O'Brien & Grosso, *supra* note 45, at 1633 n.49 (quoting Golphin et al. Order of Relief, *supra* note 2, at *51–52).

[157] Golphin et al. Order of Relief, *supra* note 2, at *3.

[158] Robinson Order of Relief, *supra* note 110, at *156.

Carolina Conference of District Attorneys, and it included a seminar regarding race discrimination in jury selection.[159] Tellingly, the training did not discuss how to avoid discrimination in jury selection, but rather "how to avoid a finding of a *Batson* violation in case of an objection by opposing counsel."[160] The court found overwhelming evidence that one prosecutor—who was personally involved in all four cases granting relief under the NC-RJA—relied on this "cheat sheet" during jury selection.[161]

B. Texas

1. History of Race and the Death Penalty in Texas

Texas has a long history of racial discrimination. In 1866, it was one of the first states to develop legislation mandating racial segregation.[162] The policy did not last through Reconstruction, but it set the stage for the eventual establishment of the Jim Crow system in the state.[163] For a time, at the turn of the century, the Texas state government was "almost completely under the domination of the [Ku Klux] Klan."[164]

As in North Carolina, Texas has a profound history of lynching that relates to its history of capital punishment.[165] As Bryan Stevenson aptly summarizes: "The tolerance of racial bias in the modern death penalty era, placed within the context of this troubling history, represents a serious threat to anti-discrimination reforms and equal justice in America."[166]

As abovementioned, David Garland has suggested that public torture lynchings were not simply homicides marked by racial animosity, but rather "represented and understood by most actors and commentators" as "collective criminal punishments."[167] Despite the

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[159] *Id.*

[160] *Id.* (listing as justifications: (1) Inappropriate Dress; (2) Physical Appearance; (3) Age; (4) Attitude; (5) Body Language; (6) Rehabilitated Jurors; (7) Juror Responses; (8) Communication Difficulties; (9) Unrevealed Criminal History; and (10) Any other sign of defiance, sympathy with the defendant, or antagonism to the State).

[161] *See id.* at *157 n.361 (noting that evidence of the prosecutor's reliance on the cheat sheet was apparent).

[162] C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 23–24 (2nd ed. 1966).

[163] *Id.* at 117.

[164] *Id.* at 116.

[165] States in which lynchings were frequent a century ago are much more likely to execute today, and both North Carolina and Texas are in this category. ZIMRING, *supra* note 136, at 95 tbl.5.1.

[166] Stevenson, *supra* note 18, at 94.

[167] Garland, *supra* note 137, at 795; *id.* at 828 ("To interpret these public torture lynchings as a summary form of criminal punishment . . . is not to miss their role in racial repression—it is to focus more precisely on the nature of an institution through which that repression was, for a while, sustained."); *see also supra* Part IV.A.2. Garland acknowledges the counter argument that "[l]ynching is not punishment" but rather "racial aggression." *Id.* at 828 (citing Oliver Cox, *Lynching and the Status Quo*, 14 J. OF NEGRO EDUC. 576, 576–88 (1944) (arguing that lynching is

heinous and brutal nature of public torture killings, certain features of these events suggest that they were orchestrated and enacted with a sense of legitimacy. For example, "lynch mobs conducted themselves in ways that resembled official public executions" through the use of processions, public squares, raised platforms, and compelled confessions.[168] Additionally, every single one of the public torture lynchings covered by *The New York Times* "involved allegations of serious crimes for which the death penalty was legally available."[169] Through these rituals and retributive narratives, participants viewed public torture lynchings as legitimate acts of punishment.[170]

Texas holds the disgraceful distinction of having hosted the first public torture lynching, which took place in 1893.[171] While other forms of lynching "occurred prior to the 1890s, the killing [of Henry Smith in Paris, Texas] inaugurated a new kind of event" in which:

> A black suspect would be named following reports that a respectable white person had been raped or murdered. Lurid accounts of the crime would circulate. A posse of the victim's relatives and townspeople would chase down the suspect or, if he or she was already in custody, the crowd would seize the suspect from law officers.[172]

Then, "members of the crowd would torment and physically abuse the dying man."[173]

Historical records from Texas illustrate the extent to which public torture lynchings were both normalized and intertwined with the function of capital punishment. For example, one postcard from 1910 includes the following inscription: "Well John-This is a token of a great day we had in Dallas, March 3rd, a negro was hung for an assault on a three year old girl. I saw this on my noon hour. I was very much in the bunch. You can see the Negro hanging on a telephone pole."[174] Another, from 1916, displays a photograph of the "charred, barely recognizable, corpse of [a man] suspended from a utility pole in Robinson, Texas" and includes the message, "This is the Barbecue we had last night my picture is to the left with a cross over it your son Joe."[175] Far from being reprimanded by

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not punishment, but racial aggression)).

[168] Garland, *supra* note 137, at 813 (describing the lynching rituals and noting that they most closely resembled anachronistic executions).

[169] *Id.* at 811 n.26 (describing his method and findings, and acknowledging that the *Times* did not report all incidents of public torture lynchings).

[170] *Id.* at 828 ("[Public torture lynchings] operated as an occasion for the socially approved expression of racist sentiment and for public displays of racial dominance. And unlike white race riots or unprovoked acts of racial violence . . . public lynchings could claim to be a legitimate expression of popular justice, and summon large crowds to attest to the power of this claim.").

[171] *Id.* at 804.

[172] *Id.* (citations omitted).

[173] *Id.* at 805.

[174] *Id.* at 794 (citing JAMES ALLEN, WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA *(2000))*.

[175] *Id.*

state courts, these individuals were lauded by officials.[176] One Texas judge, rendering his determination following a public-torture-lynch burning, stated, "I find that the deceased came to his just death at the hands of the incensed and outraged feelings of the best people in the United States . . . . The evidence, as well as the confession of guilt by the deceased, shows that his punishment was fully merited and commendable."[177] It was not as if Texas towns and counties lacked effective law enforcement, but rather citizens and officials at times favored public torture lynching instead.[178]

Since the dismantling of Jim Crow, Texas has remained at the forefront of efforts to oppose integration. It is one of nine states that was subject to the Section 5 preclearance requirement of the Voting Rights Act, which was intended to police jurisdictions that have demonstrated "systematic resistance to the Fifteenth Amendment."[179] For Texas, such resistance has included the institution of a poll tax[180] and the use of race-based gerrymandering.[181] After the Supreme Court decided *Brown v. Board of Education*,[182] the Governor of Texas explicitly attempted to avoid compliance, and efforts to integrate Texas schools were met with violence.[183] Of course, like North Carolina and the country at large, Texas underwent tremendous change as its discriminatory history was confronted by the legal, political, and social challenges of the Civil Rights Movement.[184] However, as demonstrated by the statistical and

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[176] *See, e.g.*, *id.* at 810 (suggesting that local law officers applauded these crimes because lynching were not viewed as a violation of the social moral code).

[177] *Id.* at 806 n.19.

[178] *Id.* at 798 ("Public torture lynchings were a preferred alternative to 'official' justice, not a necessary substitute for it"). One *New York Times* columnist commented on this phenomenon in Corsicana, Texas: "Corsicana, it must be remembered, is no frontier hamlet, but a prosperous and progressive city, a railway center of some importance, with many and varied manufacturing interests and equipped with all the facilities of civilization, including those for the prompt and vigorous execution of legal justice." *Id.* at 815 n.34 (quoting N.Y. TIMES, Mar. 15, 1901 at 8).

[179] South Carolina v. Katzenbach, 383 U.S. 301, 327–28 (1966); *History of Federal Voting Rights Laws*, DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php, <http://perma.cc/N7AK-CFT7>. In June of 2013 the Supreme Court invalidated Section 5 of the Voting Rights Act, holding that its preclearance formula was not narrowly tailored to current needs. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013). Justice Ginsburg, dissenting, specifically cited actions taken by the state of Texas in contending that Congress was justified in its determination "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." *Id.* at 2640–41 (Ginsburg, J., dissenting) ("In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore 'the mark of intentional discrimination that could give rise to an equal protection violation,' and ordered the district redrawn in compliance with the VRA. In response, Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement.") (citations omitted).

[180] WOODWARD, *supra* note 162, at 84; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes are unconstitutional).

[181] Gerrymandering in Dallas and Bexar Counties was eventually struck down by the Supreme Court. White v. Regester, 412 U.S. 755, 769–770 (1973).

[182] 347 U.S. 483 (1954).

[183] WOODWARD, *supra* note 162, at 162.

[184] Because of its large Latino population, Texas was actually the site of innovative efforts to move "beyond the black-white dichotomy which dominated racial dynamics in the East and South." Quintard Taylor, *"Justice Is Slow but Sure": The Civil Rights Movement in the West: 1950–1970*, 5

anecdotal evidence outlined below, race continues to influence capital sentencing in the state.

2. *Statistical Evidence of Current Racial Bias in Texas Capital Punishment*

a. Statewide

Texas, like North Carolina, is an "executing state."[185] Unlike "symbolic state[s]," which issue death sentences but rarely carry them out, "[i]n states such as Texas, 'counsel are less likely to file substantial briefs' and 'reviewing courts are less likely to hold hearings' such that "the whole legal process is likely to be 'nasty, brutish, and short.'"[186]

Texas was one of the first states to successfully reinstate the death penalty in the post-*Furman* era.[187] Since 1976, "sixteen states have not sentenced anyone to death."[188] Seventeen additional states have "executed fewer than ten people."[189] In contrast, Texas is among three states that have "performed executions at a rate significantly in excess of two per year," and has sentenced the most people to death of any state.[190] Empirical studies of capital sentencing in Texas reveal patterns similar to those that emerged in North Carolina.

Several statistical examinations of Texas have demonstrated "disparities based on the race of the victim" that indicate a pattern of discriminatory sentencing.[191] These disparities persist even when

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NEV. L.J. 84, 89 (2004); *see also* MARIO T. GARCIA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY AND IDENTITY, 1930–1960, at 46–59 (1989).

[185] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 42 (2010) (noting that AL, AR, AK, DE, FL, GA, LA, MO, NC, OK, SC, TX, and VA are executing states). The term "executing state" comes from an analysis by Carol and Jordan Steiker regarding regional variations in the use of the death penalty. The Steikers divide the United States into "three sorts of jurisdictions: states without the death penalty by law ('abolitionist states'), states with the death penalty but insignificant numbers of executions ('symbolic states'), and states with both the death penalty in law and in practice—states actively carrying out executions ('executing states')." Steiker & Steiker, *supra* note 108, 1870–71.

[186] GARLAND, *supra* note 185, at 203 (citing Steiker & Steiker, *supra* note 108, 1915–16).

[187] Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding the Texas death penalty statute).

[188] Virginia and Oklahoma are the other two states in this category. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 237 (2012) (citing Frank R. Baumgartner, *The North Carolina Database of U.S. Executions*, U.N.C. CHAPEL HILL, DEP'T POL. SCI., http://www.unc.edu/~fbaum/Innocence/executions.htm, <http://perma.cc/J7XV-CL6Z>).

[189] *Id.*

[190] *Id.*

[191] Deon Brock et. al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. CRIM. L. 43, 70 (2000) ("Across the state, and within each of the major jurisdictions . . . the prevalence and consistency of disparities based on the race of the victim indicate a pattern of arbitrary sentencing. These findings are consistent with other studies performed in Texas.").

controlling for the seriousness of the offense,[192] and these hold true both across the state and within each of the major jurisdictions.[193] From 2007–2012, "nearly 75% of all death sentences in Texas [were] imposed on people of color."[194] One study, conducted by the Texas Defender Service (TDS) in 2007 demonstrated that "23% of all Texas murder victims were black men," yet only 0.4% of executions resulted from cases involving black male victims.[195] In stark contrast, the study found that 0.8% of all Texas murder victims were white women, yet 34.2% of executions resulted from cases involving white female victims.[196]

Additionally, TDS found that "capital juries are far 'whiter' than the communities from which they are selected."[197] TDS also published statements from several former prosecutors who admitted to witnessing race-based peremptory challenges in Texas capital cases, even in the post-*Batson* era.[198] Indeed, the Supreme Court has repeatedly recognized—and criticized—jury selection practices of Texas prosecutors.[199] Put simply, in Texas, "non-whites are for the most part excluded from the process of assessing a punishment that is disproportionately visited upon them. African-American Texans are the least likely to serve on capital juries, but the most likely to be condemned to die."[200]

However, while most executions occur in Texas, most of Texas is non-executing. "Of Texas' 254 counties, 136 have never sent a single offender to death row."[201] Harris and Dallas counties are particularly noteworthy. Of all counties in Texas—and, indeed, in the United States—Harris County has imposed the most death sentences in the modern era of capital punishment.[202] As Scott Phillips observed in his article analyzing racial disparities in the county's capital sentencing practices, "if Harris County were a state it would rank second in

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[192] *Id.* at 68–69 (noting that the amount of disparity decreases as the level of seriousness increases, but that the disparity exists nonetheless).

[193] *Id.* at 70.

[194] TEXAS COALITION TO ABOLISH THE DEATH PENALTY, TEXAS DEATH PENALTY DEVELOPMENTS IN 2012, at 2 (2012) [hereinafter TEX. COALITION TO ABOLISH THE DP], *available at* http://www.tcadp.org/TexasDeathPenaltyDevelopments2012.pdf, <http://perma.cc/QNF7-575B>.

[195] TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 52 (2007) [hereinafter TEX. DEFENDER SERVICE], *available at* http://www.deathpenaltyinfo.org/node/402, <http://perma.cc/VK7E-ENF9> (conceding that the data is from 1998, but noting that the results are still indicative of the racial disparities that have traditionally existed in the state).

[196] *Id.*

[197] *Id.* at 54–59.

[198] Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 79 n.105 (2009) (citing TEX. DEFENDER SERVICE, *supra* note 195, at 54–59; *Ex parte* Brandley, 781 S.W.2d. 886, 926 (Tex. Crim. App. 1989)).

[199] *Id.* at 78 n.99 (noting that Smith v. Texas, 311 U.S. 128, 132 (1940), Batson v. Kentucky, 476 U.S. 79 (1986), Miller-El v. Dretke, 545 U.S. 231 (2005), were all Supreme Court decisions regarding the constitutional implications of jury discrimination, and all involved Texas state courts).

[200] TEX. DEFENDER SERVICE, *supra* note 195.

[201] *Texas,* DEATH PENALTY INFO. CTR. (Nov. 30, 2013, 3:06 PM), http://www.deathpenaltyinfo.org/texas-1, <http://perma.cc/K8EN-UK77>.

[202] *See id.*

executions, after Texas."[203] Recent data demonstrate the persistence of county-level disparities, but also a geographic shift in which Harris County is no longer the leader.[204] Since 2002, "more than half of death sentences" in Texas came from Dallas County.[205] These county-level disparities suggest a potential arbitrariness in capital sentencing, since there is no reason to believe that a handful of counties would produce the vast majority of death-worthy offenders. Furthermore, a county-level analysis can perhaps provide a more nuanced understanding of how and why Texas employs the death penalty. [206] Below I examine statistical evidence with respect to these two most active counties in the state.

b. Harris County

In Harris County, "12 of the last 13 defendants sentenced to death [were] African-American," and one was Hispanic.[207] Professor Scott Phillips from the University of Denver has conducted two studies examining racial disparities in death sentencing in Harris County. Phillips first focused on the end of Johnny Holmes's tenure as Harris County District Attorney, examining "504 defendants indicted for capital murder in Harris County from 1992 to 1999."[208] He found that (1) death was more likely "to be imposed against black defendants than white defendants," and (2) death was also more likely "to be imposed on behalf of white victims than black victims."[209] Phillips next examined the years 2001 to 2008, when Charles Rosenthal served as District Attorney. The study considered the "roster of death sentences attributable to the Rosenthal administration" against the backdrop of "death-eligible crimes" from the same period, and "compare[d] the racial distribution" of each.[210]

Phillips found race of victim to be a predictive factor in capital sentencing.[211] Among the cases resulting in a death sentence, "white

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[203] Phillips, *supra* note 14, at 133.

[204] TEX. COALITION TO ABOLISH THE DP, *supra* note 194, at 1–2.

[205] *Id.* at 1 (noting specifically that the Dallas-Fort Worth Metroplex is the site of death sentencing in the county). This shift warrants further observation. This Note accepts the data and uses both Harris and Dallas counties as focal points of the analysis.

[206] Because jury decision-making is a valuable indicator of how citizens feel about the death penalty, generally, and juries are drawn from "the county where the offense occurred," county-level analysis illuminates support for the death penalty in a *particular* jurisdiction because it avoids attributing that support to citizens in other counties. Smith, *supra* note 188, at 228.

[207] TEX. COALITION TO ABOLISH THE DP, *supra* note 194, at 2.

[208] Phillips, *supra* note 14, at 133.

[209] *Id.* at 134.

[210] *Id.*; *see also id.* at 138–139 (discussing methodology).

211 Phillips used Supplementary Homicide Reports to determine the number of death-eligible offenses, by coding the homicides according to whether or not they implicated a statutory aggravator. Id. at 142–144 (explaining methodology). He acknowledged that, although "the SHR data do not include information on all the aggravators in the Texas capital murder statute . . . the SHR data do include the small number of aggravators that account for almost all death sentences in

victims [we]re overrepresented,"[212] "Hispanic victims [we]re underrepresented,"[213] and "black victims [we]re at parity."[214] When he took into account the proportion of death-eligible crimes, Phillips found a more pronounced disparity: while "a mere 5% of the death-eligible crimes include[d] a white female victim . . . 27% of the cases resulting in a death sentence include[d] a white female victim."[215] Thus, Harris County "imposed [death sentences] on behalf of white female victims at more than 5 times the rate one would expect" of a race and gender-blind system and "imposed [death sentences] on behalf of white male victims at almost two times the rate one would expect in a neutral system."[216]

A closer examination demonstrated that this disparity further supports the evidence discussed above regarding the race of victims. That is, white defendants more often kill white victims and consequently were more frequently sentenced to death for doing so.[217]

> Holding the race of the victim constant . . . whites who killed whites were sentenced to death at 2.5 times the rate one would expect in a neutral system[218] . . . and minorities who killed whites . . . were sentenced to death at 2.3 times the rate one would expect in a neutral system.[219]

In short, "[a]nyone who kills a white victim [in Harris County] has an elevated chance of being sentenced to death."[220]

Phillips acknowledged the possibility that white victims—"particularly, white female victims"—might be more frequently killed in a more "heinous" manner than other victims, thus providing a "race-neutral explanation" for the disparity in sentencing rates.[221] However, when he examined the data he found that the opposite is true: "the chance of being killed in the most gruesome crimes . . . was markedly higher for minority victims."[222] While 15% of minority victims were killed in crimes marked by three or more statutory aggravators,

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the state, and come closer to defining the universe of death-eligible crimes in Texas than any other publicly available data source." Id. at 143.

[212] *Id.* at 145 ("20% of the death-eligible crimes include a white victim, compared to 50% of the cases resulting in a death sentence").

[213] *Id.* ("39% compared to 20%").

[214] *Id.* at 145 ("38% compared to 33%").

[215] *Id.*

[216] *Id.* ("15% of the death-eligible crimes include a white male victim, versus 27% of the cases resulting in a death sentence").

[217] *Id.* at 147 ("Thus, the apparent bias against white defendants is illusory" and "the true bias occurs on behalf of white victims. Anyone who kills a white victim has an elevated chance of being sentenced to death, and white defendants are simply more likely to do so than minority defendants.").

[218] *Id.* at 147 ("8% of the death-eligible crimes compared to 20% of the cases resulting in a death sentence").

[219] *Id.* ("13% compared to 30%").

[220] *Id.*

[221] *Id.*

[222] *Id.* at 148.

only 10% of white victims and 4% of white female victims were killed in crimes involving these circumstances.[223] Therefore, the heinousness does not explain the disparities discussed above and, on the contrary, "[d]eath sentences were more likely to be imposed on behalf of white victims, and particularly white female victims, despite the fact that minority victims were more likely to be killed in the most egregious crimes."[224]

While it might seem counterintuitive that a capital defendant—who may be white—should be able to rest an appeal on race-of-victim sentencing disparities, it is important to reiterate that race is an impermissible consideration in the application of the death penalty. If two white defendants "are both guilty of heinous murders involving similar aggravating and mitigating circumstances, their culpability and thus 'deathworthiness' should not differ based on the race of their victim."[225] To the extent that the decision to seek or impose death is influenced by the race of the victim involved, the state has (1) violated defendant's right to a justly imposed, proportional punishment,[226] and (2) suggested that race is a relevant to the valuation of a human life.[227]

c. Dallas County

Two of the Supreme Court's seminal cases on the proper use of peremptory challenges—*Batson v. Kentucky* and *Miller-El v. Dretke*[228]—explicitly named Dallas County as guilty of using race-based jury selection practices.[229] In *Batson*, the court considered an extensive investigation conducted by the *Dallas Morning News* regarding race-based jury selection in Dallas County.[230] The investigation revealed that "only 2.8% of the jurors on capital murder cases were Black and prosecutors used peremptory challenges to strike an amazing 92% of Black jurors."[231] The investigation also revealed that the Dallas County D.A. "used a handbook for jury selection that encouraged prosecutors to eliminate 'any member of a minority group."[232] Concurring in *Batson*,

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[223] *Id.*

[224] *Id.* at 148.

[225] Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 34 (2007) (arguing this point in the context of a black and white defendant).

[226] *See supra* Part II (explaining how the victim's race influences the state's decision to seek the death penalty).

[227] Kotch & Mosteller, *supra* note 10, at 2121 ("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.").

[228] 545 U.S. 231 (2005).

[229] Price, *supra* note 198, at 79 (discussing Texas courts' involvement in *Batson* and *Miller-El*).

[230] *Id.* at 78–79.

[231] *Id.*

[232] *Id.* at 71 n.62 (citing Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection:*

Justice Marshall cited the handbook as illustrative of the need for a judicial remedy for race-based peremptory strikes.[233]

Nine years later, in *Miller-El*, the Court heard the case of a habeas petitioner who alleged that prosecutors in his case struck 10 of 11 qualified black venire members during jury selection.[234] *Batson* was decided while his initial appeal was pending, and the case was remanded.[235] On remand, the trial court found no *Batson* violation and the Texas Court of Criminal Appeals affirmed.[236] The Supreme Court reversed, persuaded not only by the "bare statistics" but also by a comparative juror analysis that demonstrated black jurors were struck from the venire for having characteristics that were equally present in white jurors who were kept.[237] The Court held that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination."[238] The Court also "urg[ed] lower courts to look at broader practices during the jury selection,"[239] and noted that "*Batson* hearings, without significant investigation . . . often fail . . . [to] prevent[] discrimination."[240] The *Miller-El* opinion suggested that *Batson* challenges require "an analysis of the cultural context in which the strikes occur," and cannot be silenced simply by the provision of purportedly race-neutral explanations for a strike.[241]

In addition to providing interpretive guidance to lower courts and "add[ing] some muscularity to the *Batson* analysis,"[242] the *Miller-El* opinion illustrates Dallas County's historical use of race-based jury selection. For example, the Court noted that Dallas prosecutors employed a practice known as the "jury shuffle," in which they would shuffle the

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Prosecutors routinely bar blacks, DALL. MORNING NEWS, Mar. 9, 1986, at 1A, *available at* 1986 WLNR 1683009). Price also notes that "[a]n earlier jury-selection treatise circulated in the same county instructed prosecutors: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Id.* (citing Tompkins v. State, 774 S.W.2d 195, 203 (Tex. Crim. App. 1987)).

[233] Batson v. Kentucky, 476 U.S. 79, 104 (1986); *see also* Price, *supra* note 198, at 70–71 ("Justice Marshall pointed to several examples where defendants attempted to mount such claims. In one instance, the defendant presented evidence that in a single year prosecutors in Dallas County, Texas, struck 405 out of 467 Black jurors with peremptory challenges.").

[234] Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) ("Out of 20 black members of the 108-person venire panel for Miller–El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution.").

[235] *Id.* at 236.

[236] *Id.* at 236.

[237] *Id.* at 241.

[238] *Id.*

[239] Price, *supra* note 198, at 71; *see also Miller-El*, 545 U.S. at 253 ("The case for discrimination goes beyond these comparisons to include broader patterns of practice during the jury selection.").

[240] Price, *supra* note 198, at 79–80.

[241] *Id.* at 80 (citing *Miller-El*, 545 U.S. at 252–66) ("These include, for instance, the racist history and practices of the Dallas County District Attorney, a comparative analysis of differences in treatment between those jurors seated and those removed—for instance, a comparison of Blacks and Whites in the venire—and attention to what is physically taking place in the courtroom—for instance, jury shuffles.").

[242] Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1369 (2012).

cards bearing the names of veniremembers when black veniremembers were seated at the front of the panel—ostensibly in an effort to avoid having to question and, thus, seat them.[243] The state offered no race-neutral reason for the shuffling, and thus did not rebut the inference of discriminatory intent.[244]

Additionally, the Court described problematic questioning practices employed by Dallas County prosecutors. Review of the record revealed that "prosecutors gave a bland description of the death penalty to 94% of white venire panel members" before asking whether the venire members supported the death penalty but used a "graphic script" to describe the death penalty to 53% of the black venire members before inquiring whether they supported the punishment.[245] The state justified the disparate questioning by suggesting "that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire."[246] However, the record demonstrated that the graphic script was used more frequently with black-venire members even when controlling for ambivalence about the death penalty.[247]

The *Dallas Morning News* subsequently revisited its examination of jury strikes in the post-*Batson* Era. [248] The journalists controlled for non-racial characteristics of jurors and found that race-based jury selection persists.[249] More specifically, the journalists found that prosecutors in Dallas County excluded eligible black jurors at twice the rate they rejected eligible white jurors, and that being black was the most important personal trait affecting which jurors prosecutors rejected.[250]

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[243] *Miller-El*, 545 U.S. at 254. "Texas law permits either side to shuffle the cards to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed." *Id.* at 253.

See also Price, *supra* note 198, at 80–81 ("What is relevant is that . . . the trial court permits, the prosecutors request, and everyone participates in literally moving the entire panel around the courtroom in an attempt to consistently position Blacks for exclusion. The whole performance pivots around the state's desire to exclude Blacks rather than to select a fair jury.").

[244] *Miller-El*, 545 U.S. at 254–55.

[245] *Id.* at 255–56 (noting that prosecutors gave 6% of white venire panel members a "graphic script.").

[246] *Id.* at 256.

[247] *Id.* at 260 (noting that 30% of non-blacks whose questionnaires expressed ambivalence or opposition received the graphic script, while 86% of black venire-members who expressed ambivalence or opposition received the graphic script); *see also* Price, *supra* note 198, at 81–82 ("Prosecutors frequently offer ambivalence about the death penalty on the part of African American members of the venire as a race neutral reason for use of peremptory strikes . . . . However, in Miller-El the Court found this reason did not fit the facts of the case, given that Black jurors were more likely to hear the latter 'graphic' statement about the death penalty than Whites regardless of their opinion on the death penalty.").

[248] Price, *supra* note 198, at 79 n.102 (citing Steve McGonigle et al., *Jurors Race a Focal Point for Defense: Rival Lawyers Reject Whites at a Higher Rate*, DALL. MORNING NEWS, Jan. 24, 2006).

[249] McGonigle et al., *supra* note 248.

[250] Grosso & O'Brien, *supra* note 143, at 1539–40 (citing Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A, *available at* 2005 WLNR 24658335 (additional citations omitted)).

3. *Other Evidence of Current Racial Bias in Texas Capital Punishment*

As in North Carolina, "numbers do not tell the entire story" with regard to race and the death penalty in Texas.[251] Several case examples poignantly illustrate the way in which racial bias has affected the Texas criminal justice system. Capital defendants affected by the scenarios discussed below—and undoubtedly similar scenarios that remain undiscovered—deserve a means of legal recourse.

a. Charles Rosenthal

In 2008, Harris County District Attorney Charles Rosenthal[252] "was forced out of office in a scandal that included racist e-mails found on his computer."[253] Along with his statistical investigation of capital sentencing in Harris County, Scott Phillips examined media reports regarding the scandal, and the culture of the District Attorney's office under Rosenthal. One e-mail included the title "Fatal Overdose" and depicted a black man "lying dead on a sidewalk next to slices of watermelon and a bucket of chicken."[254] Another "suggested that former President Bill Clinton was like a black man because he 'played the saxophone, smoked marijuana and receives a check from the government each month.'"[255] Unsurprisingly, media investigations indicate that these racist sentiments pervaded the District Attorney's office during Rosenthal's tenure.[256] Black prosecutors described "being passed over for promotions." White prosecutors spoke condescendingly to black prosecutors and "subject[ed them] to racist (and sexist) remarks."[257] Even when such comments were not directed at black prosecutors, they promulgated a sentiment of white superiority throughout the office. For example, black prosecutors reported that "Hurricane Katrina evacuees were referred to as NFLs—'N[iggers] from Louisiana.'"[258] Furthermore, there was a sense that these racist behaviors had to be protected by a

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[251] Phillips, *supra* note 14, at 150.

[252] *See supra* Part IV.B.2.b.

[253] Phillips, *supra* note 14, at 151; *see also, e.g.*, Ted Oberg, *Why Rosenthal Had to Turn Over E-mail* (Jan. 31, 2008), http://abclocal.go.com/ktrk/story?section=news/in_focus&id=5926157, <http://perma.cc/QC2C-M7K3> (noting that the records were subpoenaed by a federal judge in a case regarding Rosenthal's failure to investigate an incident of potential police misconduct).

[254] Phillips, *supra* note 14, at 151 (citing Leslie Casimir, *Black Leaders Urge Rosenthal to Step Down*, HOUS. CHRON., Jan. 12, 2008, at A1).

[255] *Id.*

[256] *Id.*

[257] *Id.* Phillips notes, for example, "[o]ne young prosecutor was working in a poorly lit room when a senior prosecutor walked in and said: 'All I see is eyes and teeth. You need to turn the light on, girl.'" *Id.*

[258] *Id.*

code of silence: "[w]hen asked if the office would have been open to a diversity council . . . one black prosecutor responded [that] '[i]f you were to even mention that concept in our office, they would look at you like you had (expletive) on your face.'"[259]

According to the Supreme Court's directive that the death penalty not be imposed on the "constitutionally impermissible basis of race,"[260] these revelations should prompt an inquiry into whether Texas can constitutionally execute individuals who were prosecuted by District Attorneys that operated in (or perpetuated) this problematic environment.[261]

b. Exonerations

Texas ranks third in the country for number of death-row exonerations, behind only Illinois—which has already abolished the death penalty—and Florida.[262] In fall 2010, Texas took center stage in the national discussion of death and innocence, after it freed Anthony Graves. Graves was an innocent man, who spent 18 years in prison—12 of which were on death row.[263] He was "convicted of assisting Robert Earl Carter," who was executed in 2000 for allegedly committing multiple murders.[264] Ultimately, Carter admitted that Graves had nothing to do with the crimes and "[t]wo weeks before his death, he provided a sworn statement" to that effect. [265] "[M]inutes before his death [he repeated]: 'Anthony Graves had nothing to do with it. . . . I lied on him in court.'"[266] Although the Burleson County District Attorney did not believe Carter,[267] the Fifth Circuit overturned Graves' conviction in 2006, finding that "prosecutors elicited false statements from two witnesses and withheld two [potentially exculpatory] statements."[268] Prosecutors attempted to retry the case but, after extensive investigation, eventually conceded that they found "'not one piece of credible evidence that links Anthony Graves to the commission of this capital murder.'"[269]

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[259] *Id.*

[260] Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J. concurring).

[261] Phillips, *supra* note 14, at 151–52.

[262] *Innocence and the Death Penalty,* DEATH PENALTY INFO. CTR. (Nov. 30, 2013, 3:06 PM), http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st, <http://perma.cc/DQQ6-8V4Q>.

[263] Brian Rogers, *Texas Sets Man Free From Death Row,* HOUS. CHRON. (Oct. 27, 2010), http://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php, <http://perma.cc/L35N-5TZL>.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.* (quoting former Harris County assistant district attorney, and special prosecutor in the Graves case, Kelly Siegler).

Graves's case and others led *Texas Monthly* "to call for a moratorium on executions in the state, explaining, 'Five times in the past seven years we've learned about a person wrongly convicted and taken off death row or a person convicted on bogus forensic science—and executed.'"[270]

For all of the cases of innocence that have been documented in Texas, we will never know how many have gone undiscovered. For example, "[i]n 2006, the *Chicago Tribune* published a three-part investigative series about the case of Carlos De Luna, who was executed in Texas in 1989,"[271] for the murder of a store clerk in Corpus Christi.[272] The paper discovered that another man, Carlos Hernandez, "bragged to several people that someone else was on death row for a crime that he had committed" and that he had committed a nearly identical crime after De Luna was executed.[273] De Luna had "claimed from the start that another man named Carlos" committed the murder, but "the lead prosecutor told the jury that Carlos Hernandez was a 'phantom' of DeLuna's imagination."[274] After De Luna was executed, five people revealed that they personally heard Hernandez confess to the crime.[275]

Death Penalty litigation expert James Liebman recently led a team of Columbia Law students in a comprehensive study of evidence from the case. This evidence included "law enforcement files, crime photographs, court records, newspaper and television reports (including videotapes, and notes, transcripts, and a number of videotapes of interviews)."[276] They found that DeLuna's conviction rested on a "single, nighttime, cross-ethnic eyewitness identification with no corroborating forensic evidence."[277] Furthermore, they uncovered evidence that police

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[270] Tim Murphy, *Rick Perry's 235th Execution Won't Come Yet,* MOTHER JONES (Sept. 2, 2011), http://www.motherjones.com/mojo/2011/09/rick-perry-death-penalty-duane-buck, <http://perma.cc/CW67-S6XS>.

[271] Juan Roberto Melendez, *Presumed Guilty: A Death Row Exoneree Shares His Story of Supreme Injustice and Reflections on the Death Penalty*, 41 TEX. TECH L. REV. 1, 11 (2008) (citing Steve Mills & Maurice Possley, *A Phantom, or the Killer?*, CHI. TRIB., Jun. 26, 2006, at C1, *available at* 2006 WLNR 11036659; Maurice Possley & Steve Mills, *Did One Man Die for Another Man's Crime? The Secret That Wasn't*, CHI. TRIB., Jun. 27, 2006, at C1, *available at* 2006 WLNR 11106679; Maurice Possley & Steve Mills, *'I Didn't Do It. But I Know Who Did': New Evidence Suggests a 1989 Execution in Texas Was a Case of Mistaken Identity*, CHI. TRIB., Jun. 25, 2006, at C20, *available at* 2006 WLNR 10990963).

[272] *Press Releases: 2012 Archives: Columbia Law School Investigation Uncovers New Evidence Suggesting Texas Executed Innocent Man*, COLUM. L. SCH. (May 15, 2012), http://www.law.columbia.edu/media_inquiries/news_events/2012/may2012/the-wrong-carlos, <http://perma.cc/US2W-WQCL> [hereinafter: *Investigation Uncovers New Evidence*].

[273] Melendez, *supra* note 271, at 11.

[274] *Investigation Uncovers New Evidence*, *supra* note 272.

[275] Melendez, *supra* note 271, at 11 (citing Possley & Mills, *Did One Man Die for Another Man's Crime? The Secret That Wasn't*, *supra* note 271).

[276] James S. Liebman et al., *Los Tocayos Carlos*, 3 COLUM. HUM. RTS. L. REV. 711, 716 (2012). This article is part of The Columbia Human Rights Law Review's issue publishing the investigation and its results.

[277] *Investigation Uncovers New Evidence*, *supra* note 272. Cross-ethnic witness identification has been widely discredited as error-prone and unreliable. *See, e.g.*, Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1053 (2011) ("Numerous experiments have shown that people have an easier time identifying people of their own race and tend to make false identifications

and prosecutors knew of Hernandez at the time of the trial, but suppressed relevant evidence.[278] Liebman released one such piece of evidence: an audiotape showing "that police chased another man who matched Hernandez's (but not DeLuna's) description for 30 minutes immediately following the crime."[279]

As Liebman noted, "Sadly, DeLuna's story is not unique."[280] An investigation by the *Houston Chronicle* suggests that Ruben Cantu—who was executed in 1993 and was a 17 year old with no previous convictions when the crime occurred—was innocent.[281] The evidence is particularly compelling in light of its sources: Cantu's co-defendant, the lone eyewitness/alleged victim, and the prosecutor. First, Cantu's co-defendant later "signed a sworn affidavit saying he allowed his friend to be falsely accused."[282] Second, "the lone eyewitness, the man who survived the shooting . . . recanted" his earlier testimony condemning Cantu, explaining that he was "sure that the person who shot him was not Cantu, but he felt pressured by police to identify the boy as the killer."[283] Finally, the "San Antonio prosecutor who authorized the death penalty" in the case has also since conceded that Cantu may have been innocent.[284] These potential innocence claims suggest that it is a serious possibility that the Texas death penalty is faulty and in need of reform—or, if impervious to reform efforts, abolition.

c. Duane Buck

Duane Buck was tried for capital murder and sentenced to death by a jury in Harris County.[285] Texas' death penalty statute requires prosecutors to demonstrate that "there is a probability that the defendant would commit criminal acts of violence that would constitute a

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more often when identifying people of other races.") (citation omitted); David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 CRIM. JUST. 4, 4 (2008) ("Approximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications. Of that 77 percent, where race is known, 48 percent of the cases involved cross-racial eyewitness identifications." (citation omitted)).

[278] *Investigation Uncovers New Evidence*, *supra* note 272.

[279] *Id.*

[280] *Id.*

[281] Lise Olsen, *Did Texas Execute an Innocent Man?*, HOUS. CHRON, Nov. 20, 2005, http://www.chron.com/news/houston-texas/article/Did-Texas-execute-an-innocent-man-1559704.php, <http://perma.cc/SQ85-2HCF>; *see also* Melendez, *supra* note 271, at 11 (discussing Cantu's case).

[282] *Id.*

[283] *Id.*

[284] Melendez, *supra* note 271, at 11 (citing Kim Cobb, *Cantu DA's New Views Get a Tough Reception in Texas: Now an Ardent Foe of the Death Penalty, He Weaves Past into Message*, HOUS. CHRON., Jan. 30, 2007, at A1, *available at* 2007 WLNR 1809747).

[285] Buck v. Thaler, 132 S. Ct. 32, 33 (2011), *reh'g denied*, 132 S. Ct. 1085 (2012).

continuing threat to society." [286] If a jury does not find that the defendant poses a future danger to society, the jury cannot impose the death penalty.[287] In Buck's case, the jury's finding was supported by the presentation of what the United States Supreme Court later called "bizarre and objectionable testimony" by an expert witness, Dr. Walter Quijano.[288] Dr. Quijano testified that Buck *himself*, "if given a noncapital sentence, would not present a danger to society," but that black people "are statistically more likely than the average person to engage in crime."[289] Dr. Quijano testified in several other capital cases, in which defendants were accorded relief. [290]

The Supreme Court, while acknowledging the problematic nature of Quijano's testimony, ultimately denied Buck's petition for certiorari.[291] The Court explained that if, as in previous cases that were granted relief, the *prosecution* had introduced Quijano's testimony, then the testimony "would provide a basis for reversal."[292] In Buck's case, however, Dr. Quijano testified regarding future dangerousness in response to *defense* questioning.[293] In her dissent, Justice Sotomayor, joined by Justice Kagan, contended that the state's argument on this point was "misleading,"[294] and that, in fact, Buck's case was not the only one in which Dr. Quijano testified on behalf of the defense rather than the prosecution.[295]

Justice Sotomayor discussed the several other capital cases in which Dr. Quijano testified and defendants were accorded relief.[296] For example, when Victor Hugo Saldano challenged Quijano's testimony in a petition to the U.S. Supreme Court, "the State of Texas confessed error," acknowledging that "'the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process.'"[297] The State also conceded that "the infusion of race as a factor for the jury to weigh in making its determination violated [Saldano's] constitutional right to be sentenced without regard to the

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[286] TEX. CRIM. PROC. CODE ANN. § 37.071(b) (West 2011).

[287] *Id.* § 37.071(b) & (g); *see also Duane Buck: Sentenced to Death Because He is Black*, NAACP (Dec. 5, 2012), http://www.naacpldf.org/case-issue/duane-buck-sentenced-death-because-he-black, <http://perma.cc/E997-PNLW> ("Under Texas' death penalty statute, prosecutors must demonstrate a defendant's 'future dangerousness' and juries may impose a death sentence only if they find that the defendant poses such a future danger.").

[288] *Buck*, 132 S. Ct. at 33.

[289] *Id.*

[290] *Id.* at 36 (Sotomayor, J., dissenting).

[291] *Id.* at 33, 35.

[292] *Id.* at 33. Even though the prosecutor in the case cross-examined Quijano specifically regarding the correlation between race and future dangerousness, the Court concluded that "the colloquy did not go beyond what defense counsel had already elicited on direct examination." *Id.* at 34.

[293] *Id.* at 33.

[294] *Id.* at 35.

[295] *Id.* at 37 (Sotomayor, J., dissenting) ("Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand.")

[296] *Id.* at 36.

[297] *Id.*

color of his skin." [298] The Supreme Court "granted Saldano's petition, vacated the judgment, and remanded."[299]

Soon after Saldano's case, "the then-attorney general [now Senator] of Texas [John Cornyn] announced publicly that he had identified six cases" in which Quijano testified "that race should be a factor for the jury to consider" in making its sentencing determination.[300] Quijano served as a witness for the prosecution in four of the cases.[301] In the remaining two, "the defense called Quijano, but the prosecution was the first to elicit race-related testimony from him."[302] In all six cases, including Buck's, "the prosecution invited the jury to consider race as a factor in sentencing, [a]nd, in all six cases, the defendant was sentenced to death."[303] In all but one of the cases, "the State confessed error and did not raise procedural defenses to the defendants' federal habeas petitions."[304] Buck was the only defendant to be denied this modicum of justice.[305] Justice Sotomayor chastised the Court for denying "review of a death sentence marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas."[306]

Buck's attorneys are continuing the fight to keep him alive, and they have received support from unlikely sources. One of Mr. Buck's trial prosecutors, former Harris County Assistant District Attorney Linda Geffin, has voiced her opposition to Mr. Buck's execution, as has the surviving victim, Phyllis Taylor.[307] The data collected by Scott Phillips regarding racially disparate capital sentencing practices in Harris

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[298] *Id.* (citing Response to Pet. for Cert. at 7–8, Saldano v. Texas, 530 U.S. 1212 (2000) (No. 99-8119) 1999).

[299] *Id.* (citing *Saldano*, 530 U.S. 1212).

[300] *Id.* (citing Doc. 27-5 of Record at 30, Buck v. Thaler, No. 4:04-cv-03965 (S.D. Tex. 2004)).

[301] *Id.* (citing Gonzales v. Cockrell, No. 99-7, 2 (W.D. Tex. Dec. 19, 2002); Broxton v. Johnson, No. 00-1034 (S.D. Tex. Mar. 28, 2001); Garcia v. Johnson, No. 99-134 (E.D. Tex. Sept. 7, 2000); *Saldano*, 530 U.S. 1212); *see also* Press Release, Office of the Attorney General, Statement from Attorney General John Cornyn Regarding Death Penalty Cases (June 9, 2000), *available at* https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000609death.htm, <http://perma.cc/B8K9-GMG7>.

[302] *Buck*, 132 S. Ct. at 36 (Sotomayor, J., dissenting) (citing Alba v. Johnson, 232 F.3d 208 (5th Cir. 2000) (referring to a table); Blue v. Johnson, No. 99-0350 (S.D. Tex. Sept. 29, 2000).

[303] *Buck*, 132 S. Ct. at 36.

[304] *Id.*

[305] *Id.* at 36 (citing Buck v. Thaler, No. 11-70025, 2011 WL 4067164, at *8 n.41 (5th Cir. Sept. 14, 2011) (noting that the Court of Appeals for the Fifth Circuit noted that the State provided no reason for distinguishing Buck's case from the others)).

[306] *Id.* at 35.

[307] Press Release, NAACP, New Research: Harris County District Attorney's Office Was Three Times More Likely to Seek Death for African Americans Like Duane Buck (Mar. 13, 2013), *available at* http://www.naacpldf.org/press-release/new-research-harris-county-district-attorneys-office-was-three-times-more-likely-seek, <http://perma.cc/X9QZ-36P8>; *see also* Charles J. Ogletree, Jr., *Condemned to Die Because He's Black*, N.Y. TIMES (Jul. 31, 2013), http://www.nytimes.com/2013/08/01/opinion/condemned-to-die-because-hes-black.html?_r=0, <http://perma.cc/MLG3-YUQM> ("More than 100 prominent individuals from Texas and around the country—including a former Texas governor, Mark W. White Jr., and other elected officials, former judges and prosecutors, civil rights leaders, members of the clergy, past presidents of the American Bar Association—have called for a new, fair sentencing hearing. So have more than 50,000 people who have petitioned the Harris County district attorney.").

County,[308] was provided to expert witness and criminology professor Ray Pasternoster, "to examine the influence of [Mr. Buck's] race in [his] capital murder case.[309] Pasternoster analyzed the data using a logistic regression equation, including twenty-one explanatory variables, in order to narrow the field of cases to those most similar to that of Duane Buck.[310] Pasternoster then examined the impact of race within this universe of cases. He found: (1) "the Harris County District Attorney's Office was *over three times more likely to seek the death penalty against African-American defendants*" than against similarly-situated white defendants, and (2) "Harris County juries were *twice as likely*" *to impose death sentences on black defendants* than to impose death sentences on similarly situated white defendants.[311]

4. Implications of Evidence

"Despite the history" of racism in Texas and the "well-documented discriminatory practices of its agents," there has been little recourse for defendants affected by use of race-based peremptory strikes.[312] In a 2009 study, Professor Melynda Price examined cases from the Texas Court of Criminal Appeals (CCA) in the twenty years following the *Batson* decision.[313] She found that the CCA rarely afforded Texas capital defendants relief based on the improper consideration of race during jury selection.[314] Price examined *Batson* challenges, recording the supposedly race-neutral justifications for the strikes that prosecutors proffered in response to the challenge, any first person statements from venire-members made during the course of *voir dire*, and all objections made by defense counsel.[315]

Price's study demonstrates how the availability of ostensibly

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[308] *See supra* Part IV.B.2.b.

[309] RAY PASTERNOSTER, RACIAL DISPARITY IN THE CASE OF DUANE EDWARD BUCK 1–2 (2012), *available at* http://www.naacpldf.org/files/case_issue/Duane%20Buck-FINAL%20Signed%20Paternoster%20Report%20%2800032221%29.PDF, <http://perma.cc/V4UW-KSBV>.

[310] Unlike the study conducted by Professor Phillips, which examined the impact of race on cases at an aggregate level, the study presented in Buck's appeal asks the more specific question of whether the race of the defendant affected cases similar to Duane Buck's case. *See id.* at 2–3 (listing variables and explaining methodology).

[311] Press Release, NAACP, Former Governor, Former Prosecutor, Civil Rights Leaders, and Other Prominent Individuals Offer Testimony in Favor of Texas Racial Justice Act (Apr. 16, 2013), *available at* http://www.naacpldf.org/press-release/former-governor-former-prosecutor-civil-rights-leaders-and-other-prominent-individuals, <http://perma.cc/L8TA-AZDV>; *see also* PASTERNOSTER, *supra* note 309, at 6.

[312] Price, *supra* note 198, at 78.

[313] *Id.* at 84 (noting that she focuses on the CCA because (1) it was the court responsible for directly applying *Batson* and *Miller-El* at the state level; (2) the high number of capital cases in Texas allowed for a larger sample size, and (3) she wanted to examine cases that would be followed by other state courts).

[314] *Id.* at 78.

[315] *Id.* at 85 (explaining that judges are absent from the analysis because they are "limited in their ability to referee claims of Batson discrimination").

race-neutral, yet potentially pretextual, justifications renders the *Batson* regime ineffective in deterring race-based peremptory strikes. For example, she found that prosecutors frequently struck black venire-members from Texas juries due to their views about the death penalty.[316] While this justification is facially race-neutral, Price examined the black venire-members' statements that prompted the strike, and deconstructed the complex ways in which these purported anti-death penalty views correlated with race.[317] Some black venire-members, for instance, expressed ambivalence about the death penalty because they were concerned it would be applied in a racially discriminatory manner.[318] Striking a venire-member for such views would be legitimate if these views prevented the juror from even considering the death penalty; however, such strikes would be illegitimate if such views expressed only hesitancy and not opposition.[319] Given the collective history and experience of black Americans and the death penalty, such ambivalence cannot be considered race-neutral[320] and, moreover, does not necessarily indicate the level of opposition required for a strike.[321] Because "the procedures created in *Batson* do not adequately disentangle this historical and experiential mix," death penalty views "can be a proxy" for race in the use of peremptory challenges.[322]

Price also found that prosecutors provided contradictory reasons for exerting peremptory challenges against black venire-members. For example, prosecutors removed black venire-members "who expressed

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[316] *See id.* at 86 (describing findings regarding racially influenced peremptory strikes in Texas cases, drawn from records of capital cases from the Texas Court of Criminal Appeals).

[317] *Id.* (noting that the responses of black jurors across all cases fell into at least one of two categories: death penalty views and familiarity with the defendant).

[318] *Id.*

[319] Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding that venire-members cannot be struck "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"). Price also notes that, "[d]ue to high levels of religiosity among African Americans, political views are often expressed in religious language" that might trigger strikes in cases where such views, if expressed as policy preferences, would be considered acceptable. Price, *supra* note 198, at 86–88.

[320] Price, *supra* note 198, at 95 ("If one adds negative interactions with the state through law enforcement—from racially motivated traffic stops to more serious interactions like the imposition of the death penalty—the resonance of such cases orients African Americans to a particular understanding of their relationship to the state. The removal of African Americans for [these reasons] is, most arguably, not race neutral."); *see also* Robinson Order of Relief, *supra* note 110, at *2–3 ("The rationale that the State can justify the striking of African-American venire members based upon the belief that past discrimination might affect their present ability to be fair . . . would necessarily mean that African-Americans, as a group, will continue to be discriminated against in the future.").

[321] For example, the MSU report used in the Robinson case found that, in North Carolina, "if you are not black and have a death penalty reservation, you're much more acceptable to the state." Transcript of Record Vol. XIII at 2–3, North Carolina v. Robinson, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012), *available at* https://www.aclu.org/files/assets/transcript_robinson_rjahearing.pdf, <http://perma.cc/V8F5-XX84> (closing argument by Jay Ferguson).

[322] Price also found that Texas prosecutors frequently cited familiarity with the criminal justice system as a race-neutral explanation for peremptory strikes of black veniremembers. "As levels of incarceration continue to increase among African Americans," there is a danger that this rationale may be pretextual. Price, *supra* note 198, at 86–88.

general opposition to the death penalty,"[323] as well as black venire-members "who supported the death penalty."[324] Prosecutors removed black venire-members who had an "ambivalent relationship with the State," including those who "had uneasy feelings about law enforcement or the criminal justice system," even if these venire-members simultaneously expressed gratitude "to the police for putting their lives on the line to protect the public."[325] These contradictions provide further support for Price's concerns about pretext.

Post-*Batson* peremptory strike practices in Texas demonstrate the inadequacy of currently-available measures for preventing racial bias in jury selection. As the Supreme Court recognized in *Miller-El*, the complexity of determining whether a race-neutral justification is actually pretextual requires a context-specific inquiry that *Batson* methodology simply does not provide. [326] In contrast, an RJA would invite this kind of contextual inquiry by explicitly calling for the presentation of statistical and other evidence that might support a litigant's claim of racial bias.[327]

V. A PROPOSED TEXAS RACIAL JUSTICE ACT

As discussed above, the Supreme Court has made clear that arguments regarding the racially discriminatory application of the death penalty "are best presented to the legislative bodies."[328] According to the Court, "[l]egislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."[329] Accordingly, the Texas legislature has a duty to acknowledge and

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[323] *Id.* at 88 (noting prosecutors included in this group one veniremember who said he was unable to assess future dangerousness, and another who was unwilling to impose the death penalty in the case of a "nontriggerman").

[324] *Id.* at 88–89 (describing one venireman who stated his support for the death penalty but also expressed some uncertainty about particular characteristics of the defendant, another who supported the death penalty, but felt the prosecutor was too eager, and another who said that he did not believe in the death penalty but could follow the law).

[325] *Id.* at 89.

[326] *Id.* at 79–80 ("Miller-El also shows that Batson hearings, without significant investigation and motivation by the lower courts, often fail in their purpose of preventing discrimination, while succeeding in permitting unconstitutional death sentences. Miller-El calls for analysis of the cultural context in which the strikes occur.") (citing Miller-El v. Dretke, 545 U.S. 231, 252–66 (2005)); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 359–60 (1987); *supra* Part IV.B.3.

[327] In fact, the RJA has served this very purpose in North Carolina. *See, e.g.*, Order Granting Motions for Appropriate Relief at 4–5, North Carolina v. Golphin, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Sup. Ct., Dec. 13, 2012), *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf, <http://perma.cc/E4QC-LP4A> (considering evidence of differential treatment of white and black venire-members, the county's "history of discrimination in jury selection, and the role of unconscious bias in decision-making," in addition to evidence of discriminatory intent).

[328] McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

[329] *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

address the statistical, historical, and anecdotal evidence of racial discrimination the state's capital sentencing scheme.

In 2013, the Texas legislature considered several RJA proposals. All proposals would have allowed capital appeals based on claims that race was a significant factor in the decision to seek or impose a death sentence.[330] This is a core purpose of RJAs. Accordingly, this Note's proposed TX-RJA would also allow capital appeals based on claims that race was a significant factor in the decision to seek or impose a death sentence. However, beyond that core purpose, each TX-RJA proposed before the Texas legislature was severely deficient, given the evidence presented in this Note.

While one version of the bill would have required RJA claimants to waive any objection to a sentence of life without parole,[331] all others did not.[332] The evidence in this Note suggests racial discrimination infects both the guilt and sentencing phases of death penalty cases in Texas.[333] Defendants affected by such racial bias may have varying levels of culpability, including innocence.[334] A TX-RJA should not require appellants to accept a sentence of life without parole, but rather should allow for case-by-case determination of appropriate relief.

Notably, the NC-RJA—as originally enacted—allowed for consideration of racial bias with regard to jury selection, the defendant's race, and the victim's race.[335] As amended, however, the NC-RJA did not allow for consideration of racial bias with regard to the victim's race. [336] As discussed above, statistical studies suggest that race-of-victim exerts more influence than race-of-defendant in capital sentencing.[337] The TX-RJA should allow for all evidence that is probative of racial bias in the system. Therefore, in line with the NC-RJA—as originally enacted—this Note's proposed TX-RJA would reflect the information provided by current empirical studies by allowing for consideration of racial bias with regard to the victim's race.

VI. ADDRESSING POSSIBLE CRITICISM

Despite the similarities between North Carolina and Texas

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[330] Maurice Chammah, *Panel Debates Death Penalty Cases, Race Considerations*, TEX. TRIB. (Apr. 16, 2013), http://www.texastribune.org/2013/04/16/lawmakers-discuss-race-testimony-death-penalty-cas, <http://perma.cc/BBF7-EKBX>.

[331] *Id.* (citing the version introduced by Representative Senfronia Thompson of Houston). This is true of the NC-RJA as amended in 2012, but not as originally enacted. *See supra* Part III.

[332] Chammah, *supra* note 330 (citing the version introduced by state Rep. Eric Johnson and state Sen. Royce West, both Dallas Democrats).

[333] *See supra* Part III.

[334] *See supra* Part III.

[335] *See supra* Part III.

[336] *See supra* Part III.

[337] *See, e.g.*, *supra* Part II.B.

evidencing a need for a TX-RJA, advocating a TX-RJA faces two likely counter-arguments. The first argument is that the repeal of the NC-RJA puts the viability and impact of a TX-RJA in doubt. The second argument is that passing a TX-RJA is inadvisable because reform efforts help legitimize and entrench the capital punishment scheme, potentially forestalling or impeding abolition. Section A tackles the former argument; section B tackles the latter.

A. The Viability and Impact of a Texas Racial Justice Act, Given the North Carolina Racial Justice Act Repeal

Advocates of reform in Texas should not be deterred by the eventual repeal of the NC- RJA. First, unlikely coalitions are forming in Texas, suggesting the possibility of reform despite the repeal of the NC-RJA. Furthermore, there are several reasons to consider the NC-RJA a success, notwithstanding its eventual repeal.

1. A Texas Racial Justice Act Would Likely be Viable

Barbara O'Brien and Catherine M. Grosso conducted the statistical studies that served as the primary empirical evidence relied upon in the first cases heard under the NC-RJA.[338] They suggest that the passage of the NC-RJA was preceded neither by any dramatic change in political composition of the legislature, nor by sudden proliferation of new evidence. Instead, the NC-RJA was preceded by the convergence of several movement leaders—namely "legislators, civil rights advocates, and death penalty reformers"—who were able to "forge a common path."[339] O'Brien and Grosso also observed that, "[i]n the ten years preceding the passage of the [NC-]RJA, six high-profile exonerations took place in North Carolina, including those of five death row inmates."[340] Regardless of the public or legislative willingness to consider issues of race, stories of exonerations "created a competing narrative, putting a human face and a 'there but for the grace of God go I' element to the statistics."[341] Thus, these exoneration stories may have propelled the movement advocating for the NC-RJA.[342]

The factors that facilitated reform in North Carolina are present—and arguably stronger—in Texas. Supporters of the TX-RJA are drawn

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[338] *See* O'Brien & Grosso, *supra* note 77; Grosso & O'Brien, *supra* note 143; O'Brien & Grosso, *supra* note 45.
[339] O'Brien & Grosso, *supra* note 77, at 476; *see also id.* at 477–88.
[340] *Id.* at 490.
[341] *Id.* at 494.
[342] *Id.* at 488.

from unlikely communities extending beyond death penalty reformers and civil rights advocates. For example, former Texas Governor Mark White supports a TX-RJA, even though he oversaw nineteen executions during his tenure and is "a longtime supporter of [the death penalty]."[343] He testified before the Texas state legislature, proclaiming his belief "that if we are going to carry out the ultimate punishment, we must do everything in our power to make the system fair. . . . We must make sure that racial discrimination does not poison our death penalty decision-making."[344] Additionally, several prosecutors have publicly criticized death sentencing in both specific cases and generally across the State.[345] In particular, the Dallas County District Attorney is at the forefront of efforts to pass an RJA.[346] Finally, exonerations—not a new phenomenon in Texas—are being publicized by local and national media outlets,[347] raising awareness of the problematic flaws that pervade the current system.

2. *A Texas Racial Justice Act Would Likely Have a Substantial Impact*

In light of the NC-RJA's powerful impact during its short tenure,[348] the NC-RJA's repeal must be understood not as a sign of its failure, but rather as a sign of its success. In signing the repeal bill, Governor McCrory said that he was removing "procedural roadblocks" that were impeding the death penalty.[349] These so-called roadblocks were the procedural safeguards that the NC-RJA put in place to ensure that death sentences in North Carolina were *free of racial bias*. Moreover, these

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[343] *An Act Relating to Prohibiting Seeking or Imposing the Death Penalty on the Basis of a Person's Race: Hearing on H.B. 2458 Before the H. Criminal Jurisprudence Comm.*, 83d Leg., Reg. Sess. (Tex. 2013) (statement of Mark White, Governor of Texas) [hereinafter *H.B. 2458 Hearing*], *available at* http://www.naacpldf.org/files/case_issue/Governor%20Mark%20White%20RJA%20Testimony.pdf, <http://perma.cc/87FK-35SN>.

[344] *Id.*

[345] *See, e.g.*, *H.B. 2458 Hearing*, *supra* note 343 (statement of Linda Geffen, Former Harris County Assistant District Attorney), *available at* http://www.naacpldf.org/files/case_issue/Linda%20Geffin%20RJA%20Testimony.pdf, <http://perma.cc/C2E3-UFQJ> (criticizing the death penalty); Goldstein, *supra* note 3 (unveiling Dallas prosecutor Craig Watkins' criticism of the death penalty); Press Release, Office of the Attorney General, Statement from Attorney General John Cornyn Regarding Death Penalty Cases (June 9, 2000), *available at* https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000609death.htm, <http://perma.cc/SMG-6HRH> (criticizing the death penalty).

[346] Goldstein, *supra* note 3.

[347] *See, e.g.*, Brian Grissom et. al., *Texas Among Top 3 States in Total Exonerations*, TEX. TRIB., May 21, 2012, http://www.texastribune.org/2012/05/21/texas-among-top-3-states-exonerations/, <http://perma.cc/E475-2GBF>; Scott Horton, *In Texas, 41 Exonerations from DNA Evidence in 9 Years*, HARPER'S MAG. BLOG (Jan. 5, 2011, 4:18 PM), http://harpers.org/blog/2011/01/in-texas-41-exonerations-from-dna-evidence-in-9-years/, <http://perma.cc/5H6W-P2A4>.

[348] *See supra* Parts IV.A.3 & 4.

[349] *North Carolina Repeals Racial Justice Act*, EQUAL JUSTICE INITIATIVE (June 5, 2012), http://eji.org/node/784, <http://perma.cc/SN3V-WQ9D>.

so-called roadblocks resulted in a judicial determination that four defendants were sentenced to death because their cases were *infected by racial bias*.[350] To the extent that the NC-RJA slowed the flow of executions in the state, it did so because there were credible claims that the death penalty was, in fact, being imposed in an unconstitutional manner.[351]

B. Enacting a Texas Racial Justice Act, Despite Concern that a Texas Racial Justice Act Could Entrench the Death Penalty and Forestall or Impede Abolition

Critics may suggest that reform efforts help legitimize and entrench the capital punishment scheme, potentially prolonging or impeding abolition. However, a TX-RJA is unlikely to meaningfully increase the incline of a Texas abolition movement's uphill battle. Moreover, a TX-RJA might actually facilitate abolition. Lastly, even if a TX-RJA does not facilitate abolition, there are still compelling reasons it should be considered.

It is valid to consider the possibility that a TX-RJA could legitimize the death penalty and impede any momentum for abolition.[352] However, political and sociological factors in Texas suggest that abolition is not an otherwise readily-obtainable goal, which would be appreciably slowed by a TX-RJA. In the United States, when "executing" states have abolished the death penalty, there have generally been extraordinary circumstances involved. For example, the recent success of the Illinois abolition campaign has been described as "heavily dependent on serendipity."[353] The California campaign mobilized significant support for repeal and revealed a closer split on the issue among the electorate than ever before, and still was unsuccessful.[354]

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[350] "Two of the four defendants who received relief under the RJA argued on appeal that the state violated Batson in their trials but did not receive relief," suggesting that these defendants had cognizable racial discrimination claims that would not have been addressed absent the RJA. O'Brien & Grosso, *supra* note 45, at 1636 n.69 (citing State v. Augustine, 616 S.E.2d 515, 522 (N.C. 2005); State v. Golphin, 533 S.E.2d 168, 215 (N.C. 2000)).

[351] *See* Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (noting that race is an "impermissible basis" of a death sentence); *see also* O'Brien & Grosso, *supra* note 45, at 1634 (remarking that more than 150 capital defendants challenged their sentences under the RJA by citing Grosso and O'Brien's study on racial disparities in jury selection).

[352] *See* Steiker & Steiker, *supra* note 38, at 360 ("[T]he Supreme Court's Eighth Amendment jurisprudence, originally promoted by self-consciously abolitionist litigators and advanced by reformist members of the Court, not only has failed to meet its purported goal of rationalizing the imposition of the death penalty, but also may have helped to stabilize and entrench the practice of capital punishment in the United States.").

[353] Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245, 285 (2012).

[354] DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2012: YEAR END REPORT (2012), *available at* http://deathpenaltyinfo.org/documents/2012YearEnd.pdf (noting that 48% of the electorate supported repeal of capital punishment, as opposed to only 29% of the public who voted against expanding the death penalty in 1978).

In contrast, mobilization for abolition in Texas is far less advanced. The frequency with which Texas sentences defendants to death suggests that the political climate is one in which the fight for abolition would be difficult.[355] The Texas Democratic Party endorsed the abolition of the death penalty for the first time in June of 2012.[356] Yet, Governor Perry has executed more people than any other governor in the history of the United States.[357] Even if the Texas legislature were to vote for abolition—an unlikely event in itself—there is little reason to believe that Governor Perry would forego an opportunity to veto the measure.[358]

There is also the possibility that a TX-RJA might actually foster an abolition movement. A TX-RJA could create a space to talk about race and criminal justice both in the community and in the courtroom, thereby potentially facilitating abolition. By compelling the state to directly address historical and sociological evidence of racial injustice, a TX-RJA would insert this information into court records that are publically accessible, and available for citation in future cases.[359] With each sentence that is overturned, the Act would draw attention to the fact that the state has been sending people to the execution chamber based on race.[360] As exemplified by other abolition campaigns, this kind of attention can be instrumental in winning public—and, as a result, political—support for ending the death penalty.[361] Indeed, a survey

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[355] *See* Steiker & Steiker, *supra* note 108, at 1910 (suggesting that political affiliation—as evaluated according to political culture, political economy of executions, and legal culture—might account for the differences between symbolic and executing states); *see also* Editorial, *With Death Penalty Bans Gaining Steam, What's Next for Texas?*, DALL. MORNING NEWS (Mar. 20, 2013), http://www.dallasnews.com/opinion/editorials/20130320-editorial-with-death-penalty-bans-gaining-steam-whats-next-for-texas.ece, <http://perma.cc/XDS4-MQXS> (commenting on Maryland's abolition of the death penalty by noting that Maryland is "political worlds away from GOP-held Texas, where support for capital punishment has traditionally been stronger than the nation's.").

[356] "The new Death Penalty section of the platform cites wrongful convictions, evidence of wrongful executions, and the disproportionate application to the poor and minorities as part of the call to abolish the death penalty." TEX. COALITION TO ABOLISH THE DP, *supra* note 194, at 11–12 (citing TEX. DEMOCRATIC PARTY, 2012 TEXAS DEMOCRATIC PARTY PLATFORM (2012), *available at* http://www.txdemocrats.org/pdf/2012-platform.pdf).

[357] Governor Perry's tenure has been marked by quite emphatic support for the death penalty. In July 2012, he "ignored public pleas from President Barack Obama, the Mexican government, and the United Nations and went forward with the execution of a Mexican national who had never been properly informed of his rights following his arrest. Perry has also drawn criticism for his involvement in the execution of Cameron Todd Willingham, who was executed for murdering his two children via arson. Forensic scientists later found no evidence of arson, and when a state commission was on the verge of concluding that the case had been wrongly decided, Perry replaced three of its members." Murphy, *supra* note 270.

[358] For example, when running for President in 2012, Governor Perry commented that he thinks the Texas death penalty process "works just fine." Sophia Rosenbaum, *Texas Carries Out Landmark 500th Execution*, NBC NEWS (June 26, 2013), http://usnews.nbcnews.com/_news/2013/06/26/19152294-texas-carries-out-landmark-500th-execution, <http://perma.cc/N5GM-38RD>.

[359] *See, e.g.*, *Robinson* Order of Relief, *supra* note 110, at *2–3 ("When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more comfortable to rest on the status quo and be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.").

[360] *Id.*

[361] Warden, *supra* note 353, at 248.

conducted in February 2013 indicated that a majority of North Carolina residents would support replacing the death penalty with life without parole, subject to certain conditions.[362]

Regardless of whether a TX-RJA directly fosters abolition, there are compelling reasons it should be adopted. First, a TX-RJA's abovementioned public court records and public awareness may also deter prosecutorial misconduct.[363] The successes of initial cases brought under the Act—and, presumably, the embarrassment resulting from the implication that Texas prosecutors have obstructed the candor and integrity of the court—could discourage the exercise of race-based peremptory strikes in the future. [364]

Second, abolition advocates should not underestimate the expressive value in confronting modes of racial oppression. As Critical Race Theorist Derrick Bell articulated, "We yearn that our civil rights work will be crowned with success, but what we really want—want even more than success—is meaning."[365] Even if a Racial Justice Act does not directly facilitate abolition, there is meaning in an effort that explicitly aims to dismantle white supremacy,[366] and this meaning should not be disregarded without due consideration.

A final compelling reason that a TX-RJA should be adopted lies in the viable means of relief for capital defendants. In only two short years, four defendants in North Carolina were removed from death row after challenging their sentences under the NC-RJA. [367] For some, adoption of a TX-RJA is a matter of life and death.

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[362] *Public Opinion: Strong Majority of North Carolinians Prefer Life Without Parole Over the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/public-opinion-strong-majority-north-carolinians-prefer-life-without-parole-over-death-penalty, <http://perma.cc/PP9Q-KRYL> (noting that "68% of respondents would support replacing the death penalty with LWOP if the offender had to work and pay restitution to the victim's family," 63% would support repeal "if the money saved was redirected to effective crime fighting tools," and 55% would support repeal "if the money saved was redirected to solving cold cases and assisting victims of crime").

[363] One would expect the successes of the initial cases brought under the Act—and, presumably, the embarrassment resulting from the implication that North Carolina prosecutors have obstructed the candor and integrity of the court—to discourage the exercise of race-based peremptory strikes in the future. Though a plausible hypothesis, initial examination of this kind of ex ante effect reveals mixed results. Interestingly, O'Brien and Grosso's examination of post-RJA cases demonstrates that the reduction in race-based peremptory strikes "occurred primarily in cases with white defendants." O'Brien & Grosso, *supra* note 45, at 1637. Due to the "relatively small number of post-RJA cases," these findings are only "preliminary." *Id.* However, this study may suggest that the original version of the Act (which allows evidence of disparities relating to the race of the victim) as opposed to the amended Act (which does not) might be more effective.

[364] *Id.*

[365] Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 586 (1993).

[366] *Id.* at 585–86.

[367] O'Brien & Grosso, *supra* note 45, at 1636 n.69 ("Two of the four defendants who received relief under the RJA argued on appeal that the state violated Batson in their trials but did not receive relief," suggesting that these defendants had cognizable racial discrimination claims that would not have been addressed absent the RJA (citing State v. Augustine, 616 S.E.2d 515, 522 (N.C. 2005); State v. Golphin, 533 S.E.2d 168, 215 (N.C. 2000)).

VII. CONCLUSION

States have been paralyzed by the "fear of too much justice"[368] for too long. Given the historical, statistical, and anecdotal evidence that death sentences in Texas are influenced by race, Texas should adopt a Racial Justice Act similar to that which North Carolina passed in 2009. Meaningful reform must address disparities based on the defendant's race, the victim's race, and race-based peremptory strikes. Despite the discouraging evidence discussed in this Note, with the passage of a TX-RJA we may "hope that acknowledgment of the ugly truth of race discrimination revealed by [d]efendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law."[369]

[368] McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[369] North Carolina v. Golphin et al., Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, at *6 (Cumberland Cnty. Super. Ct., Dec. 13, 2012), *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf, <http://perma.cc/Z44H-8UCW>.