The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 25 | Number 2 Article 2

10-1-2023

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THE DEATH PENALTY SEALS RACIAL MINORITIES' FATE: THE UNFORTUNATE REALITIES OF BEING A RACIAL MINORITY IN AMERICA

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* Doctor of Jurisprudence, St. Mary's University School of Law, May 2022. B.S., University of Texas, 2017. I write this piece as part of my continuing passion to learn more about the history of the death penalty, its effect on our legal system today, and the efforts we have made as a society to end racism. This piece sheds light on racism that not only existed many decades ago, but that still exists today. I hope my analysis sheds light on regulations and legislation that helps bridge the gap to racism, so there can be justice for all. I want to thank my family, specifically my parents, Felix and Vilma Garcia, and my brother, Samuel Garcia, for their constant love and support throughout my law school career and the time I spent writing this piece. I wouldn't be the person I am today, and I could not have accomplished this achievement, without them by my side. Additionally, I would like to thank Volume 24 of *The Scholar* for their support and constant words of encouragement throughout my time as a Staff Writer, as well as Volume 25 of *The Scholar* for editing this piece and bringing it to life. My comment would not be what it is today without all of you, so thank you.

INTRODUCTION

> On September 21, 2011, the state of Georgia ended Troy Anthony Davis' life with a lethal injection. Davis was executed for the murder of a police officer, a crime he always maintained he did not commit. In the months before his execution, people around the country urged Georgia to reconsider in light of the serious doubts about his guilt, including the fact that seven out of nine witnesses recanted their testimony against him. Despite calls to stay his execution from politicians on both sides of the aisle, the NAACP, the Innocence Project, and Amnesty International, the State moved ahead with Davis' execution. On the morning of his scheduled execution, Davis asked Wende Gozan-Brown of Amnesty International to share a message with the world. "The struggle for justice doesn't end with me. This struggle is for all the Troy Davis's who came before me and all the ones who will come after me," he said.[1]

This comment will address the racial gap in death penalty cases in America, specifically, how it affects Black Americans.[2] Part I discusses the history of the death penalty in the United States beginning when the

1. Daniele Selby, *Nine Years After the Execution of Troy Davis, Innocent Black Men Are Still Being Sentenced to Death*, INNOCENCE PROJECT (Sept. 21, 2020), https://innocenceproject.org/troy-davis-pervis-payne-race-death-penalty/, [https://perma.cc/6FFN-D9A2] (serving as one narrative to the broader issue of the death penalty disproportionately executing racial minorities).

2. *E.g.*, NGOZI NDULUE, ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 1 (Robert Dunham ed., Death Penalty Info. Ctr. 2020), https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf [https://perma.cc/K5CK-DE37] (establishing race is a factor in whether a defendant receives the death penalty by comparing and contrasting the punishment for crimes that White citizens and Black citizens committed. Black citizens would receive a harsher punishment).

Code of Hammurabi codified the death penalty for the first time.[3] Although there was a brief period in the late 1800s and early 1900s where several states abolished death penalty statutes, they were quickly reinstated.[4] The use of the death penalty debate continues today.[5]

Part II of this comment discusses the failed challenges to the constitutionality of the death penalty.[6] The discussion presented throughout this comment illustrates how race plays the decisive role on who lives and who dies.[7] Supporters and opponents of the death penalty agree that its application is racially discriminatory because a defendant's race contributes to the likelihood of them receiving the death penalty.[8] Factors, such as prosecutorial discretion, ineffective counsel, procedural bars, current venue, and jury selection processes, contribute to the

3. *See generally Early History of the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty [https://perma.cc/26HR-AJEE] (introducing the history and purpose behind the death penalty law and its evolution into modern law. This evolution leads Britain influencing America's death penalty law more than any other country).

4. *See* John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 538 (1992) (explaining America's reinstatement of capital punishment was the result of "economic recession following World War I or during the 1930s").

5. *See generally* Amber Widgery, *Capital Punishment Divides Legislators, but not Along Party Lines*, NCSL (Jan. 16, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/debating-the-death-penalty.aspx [https://perma.cc/ZDS4-DP97] (emphasizing the recent debate about the death penalty and the recent arguments for and against this type of punishment).

6. *See generally* Dara Lind, *5 Ways Race Affects Every Step of Death Penalty Cases*, VOX, (Dec. 18, 2014, 12:56 PM), https://www.vox.com/2014/10/7/6923089/death-penalty-race-bias-discrepancy-row-black-white [https://perma.cc/769P-C2R6] (holding that while the Constitution allows capital punishment, it does not require it, thus, the death penalty is not per se unconstitutional. Because there is no constitutional requirement, policymakers have difficulty fixing the racial bias within death penalty juries).

7. *See generally id.* (emphasizing how race affects every stage in the criminal justice system. Race plays a factor with juries who are deciding the fate of a defendant, especially Black defendants. In North Carolina, they are trying to fix the issue through legislation that allows death row inmates to have their cases reconsidered if there is evidence that race played a part in their sentencing).

8. *See Arguments for and Against Capital Punishment*, BRITANNICA, https://www.britannica.com/topic/capital-punishment/Arguments-for-and-against-capital-punishment [https://perma.cc/YND8-NGYM] (opposing arguments against the death penalty focus on its humaneness, lack of deterrent effect, continuing racial and economic biases, and irreversibility while supporters believe that those who commit murder have forfeited their own right to life).

patterns of racial discrimination.[9] Multiple cases discussed in this comment have been heard by the Supreme Court, consistently upholding the constitutionality of the death penalty.[10]

Part III examines how current laws fail to provide a remedy for the racist administration of the death penalty and why they need to be changed.[11] A solution to the death penalty's racial discrimination begins with the Racial Justice Act (RJA), which is the beginning of the change we need in America—a start that should have happened years ago.[12] This comment argues the death penalty is inherently unconstitutional in all cases because its imposition has always been arbitrary and capricious, leaving no real way to circumvent these circumstances.[13] Ultimately, the death penalty is unconstitutional.[14]

I. HISTORY

A. The history of capital punishment in America led racial minorities to be put to death by shooting, hanging, electrocution, poison gas, and

9. *See id.* (analyzing these factors leads to the dispute about whether "capital punishment can be administered in a manner consistent with Justice" within America's criminal justice system).

10. *See* David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition*, THE BELKNAP PRESS OF HARV. UNIV. PRESS 12, 280-84 (2010) (explaining the Supreme Court has decided to allow the death penalty to respond to popular will, enhancing the power of politics, providing drama for the media, and bringing pleasure to audiences who want its chilling tales).

11. *See id.* (increasing questions exist as to whether the ultimate death penalty can be administered fairly and free from the taint of racism. The Court has drawn back from evaluating evidence of race discrimination and therefore continuing the problem of race discrimination with the death penalty leaving states to find the solution).

12. *See* Cassandra Stubbs, *The Truth About the Racial Justice Act*, ACLU (Nov. 30, 2011), https://www.aclu.org/blog/smart-justice/mass-incarceration/truth-about-racial-justice-act [https://perma.cc/N52H-T93K] ("Unfortunately, on November 28, 2011, the Senate responded and passed SB 9, a bill to repeal the RJA. The future of this civil rights law is now in the hands of Gov. Beverly Perdue, who has the opportunity to veto the repeal legislation").

13. *See generally* Hugo Adam Bedau, *The Case Against the Death Penalty*, ACLU (2012), https://www.aclu.org/other/case-against-death-penalty [https://perma.cc/5695-NAZZ] (emphasizing many American citizens prefer alternative ways to deter capital crimes).

14. *See* Furman v. Georgia, 408 U.S. 238, 238, 242–43 (1972) (holding that the death penalty is unconstitutional under the Eighth Amendment when applied in an arbitrary or discriminatory manner. In the Court's per curiam opinion it found that the death penalty applied disproportionately to poor minorities).

lethal injection.

The beginning of the death penalty laws began during the eighteenth-century B.C. in the Code of King Hammurabi of Babylon.[15] Capital punishment was enforced against crimes such as sexual assault, treason, and various military offenses.[16] These capital punishment laws were written on stone tablets which notified the people about the penalties they would face for participating in any of the listed crimes.[17] The Babylonian King Hammurabi collected the Code of Hammurabi which contained 282 laws, including the theory of an "eye for an eye."[18]

These historic punishments were designed to be slow, painful, and tortious.[19] Twenty-five different crimes were subject to tortious methods such as crucifixion, drowning, beating, burning, and impalement.[20] However, later societies found these methods to be cruel and unusual forms of punishment, turning to different practices.[21] Today, a challenge remains—defining what methods are considered cruel and unusual punishment in America.[22] Currently, the law of cruel and unusual punishment is referred to as the following:

15. *See Early History of the Death Penalty*, *supra* note 3 (explaining the death penalty law throughout different centuries such as the Fourteenth Century B.C.'s Hittite Code, the Seventh Century B.C.'s Draconian Code of Athens, and the Roman law of the Twelve tablets).

16. *See Origins of Capital Punishment*, CRIME MUSEUM, https://www.crimemuseum.org/crime-library/execution/origins-of-capital-punishment [https://perma.cc/YHD9-PCHR] ("'A life for a life' has been one of the most basic concepts for dealing with crime since the start of recorded history").

17. *See id.* (describing how crimes during the Code of Hammurabi were distributed to the tribal societies).

18. *See id.* (exemplifying the death penalty theory dated back to 1760 BC and was also contained in other ancient documents "including Jewish Torah, the Christian Old Testament, and the writings of an Athenian legislator named Draco, who proposed the death penalty for a large variety of misdeeds in ancient Greece").

19. *See id.* (describing capital punishment during the era of the Code of Hammurabi by stoning, crucifixion, being burned at the stake, and even slowly being crushed by elephants).

20. *See id.* (describing how tortious capital punishment was for certain crimes. Using different means of punishment was determined by the kind of crime committed).

21. *See id.* (establishing forms of punishment were traditionally found to be too extreme and even early societies engaged in punishment reformation).

22. *See id.* ("In 1791, the Constitution was amended for the eighth time, to prohibit any form of punishment considered 'cruel and unusual.' Although this was not an attempt to ban capital punishment, it did begin a movement towards carrying out more humane executions. By the late 1800s, employees of Thomas Edison introduced the electric chair to accomplish this goal. Later, in the 1970s, lethal injections entered the foray as another option.").

> The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." Virtually every state constitution also has its own prohibition against such penalties. In a nutshell, the cruel and unusual punishment clause measures a particular punishment against society's prohibition against inhuman treatment. It prevents the government from imposing a penalty that is either barbaric or far too severe for the crime committed.[23]

The prohibition on "cruel and unusual punishment" began in 1689, when it first appeared in the English Bill of Rights.[24] Benjamin Rush helped establish the slavery abolition movement and criticized capital punishment tactics during the late eighteenth century.[25] While advocating for the abolition of the death penalty, Rush published many works—including a pamphlet titled *Considerations on the Justice and Policy of Punishing Murder by Death*.[26] Rush argued that crime was not deterred by threats of capital punishment, and that states overstepped their powers when executing citizens.[27] Rush gained the support of Benjamin Franklin and other prominent political names, including William Bradford.[28]

> Bradford suggested the idea of different degrees of murder, some of which did not warrant the death penalty. As a result, in 1794 Pennsylvania repealed the death penalty for all crimes except first-degree murder, which was defined as "willful, deliberate, and premeditated killing or murder committed during arson, rape, robbery, or burglary." Rush's proposals attracted many followers, and petitions aiming to abolish all capital punishment were presented in Massachusetts, New Jersey, New York, and

23. Micah Schwartzbach, *The Meaning of "Cruel and Unusual Punishment,"* NOLO, https://www.nolo.com/legal-encyclopedia/the-meaning-cruel-unusual-punishment.html [https://perma.cc/S3QJ-52X3] ("The practical meaning of "cruel and unusual" has troubled courts for generations, because it is difficult to image that any punishment, no matter how barbarous, should be accepted simply because it is "usual").

24. *See Furman*, 408 U.S. at 317–18 (providing historical context as to when the Eighth Amendment language was ratified, and the actions taken thereafter).

25. *E.g.*, KIM M. EVANS, CAPITAL PUNISHMENT 3 (9th ed. 2018) (walking through the death penalty abolition movement and its key actors throughout the Eighteenth and Nineteenth Century).

26. *See id.* (explaining how Benjamin Rush advocated for the abolition of the death penalty and garnered support along the way).

27. *See id.* (explaining the influence that the enlightenment had on Rush as well as the death penalty movement).

28. *See id.* (highlighting individuals like Benjamin Franklin and Attorney General of Pennsylvania William Bradford who joined in support of the death penalty abolition movement).

> Ohio. No state reversed its laws, but the number of crimes punishable by death were often reduced.[29]

The first recorded execution was over two centuries ago.[30] Capital punishment reform in America was necessary.[31] During the nineteenth century, societies and organizations collaborated to work towards abolishing the death penalty.[32] Prior to the 1830s, executions were public events that attracted many people, creating large crowds.[33] However, Horace Greeley, who was the founder and editor of the New York Tribune, was instrumental in leading the death penalty abolition movement in the late 1840s.[34] After such efforts, a shift began in America, and "Michigan became the first state to abolish the death penalty for all crimes except treason (until 1963), making it the first English-speaking jurisdiction in the world to abolish the death penalty for common crimes."[35]

However, during the commencement of the Civil War, the death penalty abolition movement lost momentum.[36] While the Civil War and Emancipation altered the legal status of African Americans, White southerners continued to uphold strict racial caste systems.[37] White southerners used Black Codes, convict-leasing systems, and Jim Crow laws to continue control over the African Americans post-Emancipation.[38] These laws provided White southerners a way to control

29. *Id.*

30. *See id.* at 1 ("In fact, the earliest recorded execution occurred in 1608, only a year after the English constructed their first settlement in Jamestown, Virginia").

31. *See id.* at 3 (noting that opponents of capital punishment followed footsteps of advocates who were working on antislavery and anti-saloon movements).

32. *See id.* ("Capital punishment opponents rode the tide of righteousness and indignation created by anti-saloon and antislavery advocates. Abolitionist societies (organizations against the death penalty) sprang up, especially along the East Coast. In 1845 the American Society for the Abolition of Capital Punishment was founded").

33. *See id.* (touching on the common phenomenon in the 1830s of having taken pleasure in public executions that eventually was outlawed).

34. *See id.* (noting that Horace Greeley was the leading advocate of abolition causes).

35. *See id.* (homing in on the change in society as to how advocacy efforts have broken away from death penalty sentencing).

36. *See id.* at 4 (noting how the efforts of various states to abolish the death penalty were put on hold as efforts to end slavery were on the rise during 1861-1865).

37. *See* NDULUE, *supra* note 2, at 5 (explaining convict-leasing systems were just a portion of the ways white southerners manipulated the legal system to subjugate African Americans).

38. *See id.* (explaining how white southerners attempted to maintain power over Black Americans post-Emancipation); *see also* Priscilla A. Ocen, *Punishing Pregnancy: Race,*

status based on race.[39] Through these laws, White supremacist principles were validated and "legitimized."[40] While northern states did not enact the same laws as southern states, White northerners and White southerners both believed in White supremacy.[41] Because of these discriminating laws and white supremacist principles, the battle for racial equality began.[42]

Following the Civil War, White southerners used violence such as lynching, among African Americans to gain social control and ensure superiority.[43] Lynching, which is defined as an extrajudicial killing by a group, was used to terrorize Black people, particularly in the South.[44] The driving force behind an angry White mob stringing up a Black man to a tree and lynching him was to instill fear into Black people so they would have no other choice than to give up their freedom.[45] After thousands of lynchings took place throughout the states, it became clear—race was a dominating factor that determined whether an

Incarceration, and the Shackling of Pregnant Prisoners, 100 CALIF. L. REV. 1239, 1262 (2012) ("Through the Black Codes, Southern states criminalized a range of conduct thought to be committed by former slaves. These crimes included vagrancy, absence from work, the possession of firearms, insulting gestures or acts, job or familial neglect, reckless spending, and disorderly conduct. Blacks were also prosecuted for the failure to perform under employment contracts").

39. *See generally Reconstruction*, HIST. (Jan. 11, 2022), https://www.history.com/topics/american-civil-war/reconstruction [https://perma.cc/58V2-NWLB] ("Though federal legislation passed during the administration of President Ulysses S. Grant in 1871 took aim at the Klan and others who attempted to interfere with Black suffrage and other political rights, white supremacy gradually reasserted its hold on the South after the early 1870s as support for Reconstruction waned").

40. *Id.*

41. *Id.*

42. *See* NDULUE, *supra* note 2, at 16 ("These alarming disparities across the South led civil rights groups to challenge the continued use of the death penalty for rape. In the 1930s and 1940s, first the NAACP and then the separately incorporated NAACP Legal Defense and Educational Fund, Inc. ("LDF") began working in the courts to dismantle the South's Jim Crow racial caste system, focusing on education, voting rights, employment, and eventually criminal justice"); *see generally The Civil Rights Act of 1964: A Long Struggle for Freedom: The Segregation Era (1900-1939)*, LIBR. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/segregation-era.html [https://perma.cc/S6YU-YA9L] (walking through the history and individuals who made efforts towards equality due to racial injustice).

43. *See* NDULUE, *supra* note 2, at 5 (identifying violence and race to affect how authorities carried out executions).

44. *See id.* (rising to prominence in the South after the Civil War and the Emancipation as a way to maintain social control over Black Americans and terrorize them).

45. *See id.* at 6 ("Lynchings were also conducted to fuel a sense of white community outrage and to reinforce images of African Americans as subhuman deviants").

individual would be lynched—perhaps because White southerners hoped to maintain social control.[46]

> The Equal Justice Initiative has recently documented an explosion of post-Civil War racial violence and lynching that led to the deaths of at least 2,000 Black people between 1865 and 1876. Between the 1880s and the 1930s, lynchings were an almost daily occurrence. During this period, the vast majority of lynchings took place in the South. After 1900, southern lynchings almost exclusively targeted African Americans. They also became more torturous and gruesome, serving both to terrorize the Black community and sometimes as an entertainment spectacle enjoyed by thousands of white celebrants.[47]

This research illustrates a glimpse of how America treated Black Americans only two centuries ago.[48] An America filled with fear and hate—perhaps, this is still the America we live in today?[49]

During the early 1900s, lynching was not the sole problem in our country.[50] In the early 1900s, while some Black southerners faced the atrocities of lynching, Eddie Slovik was experiencing a different type of terror in America.[51] Although Eddie was not Black, he was a racial

46. *See id.* ("At first blush, the history of lynching may not seem relevant to a discussion of the history of race and the death penalty. Yet, links between lynching, mob violence, and the legal capital punishment system were present throughout the lynching era").

47. *See id.* at 5—6 (detailing the horrific accounts of lynching, sometimes even seen as a celebration to white Americans. The use of lynching of Black Americans transitioned from not only crimes that were punishable by death but also crimes that did not require death. The use of lynching is a formal use of the criminal legal system and used to terrorize Black Americans).

48. *See* Charles Seguin & David Rigby, *National Crimes: A New National Data Set of Lynchings in the United States, 1833 to 1941*, 5 SOCIUS: SOCIO. RSCH. FOR A DYNAMIC WORLD (2019)https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf ("[o]ver a century of scholarship has shown us that American lynching was a different practice in different times and places").

49. *See generally* NDULUE, *supra* note 2 (analyzing the evolution of the tactic and usage of lynching Black Americans to create fear and how it is used today in modern law. There is a correlation with states that have a high number of lynchings and Black populations and high death sentencing rates).

50. *See* Corey Adwar, *The Story of the Only American Soldier Executed for Desertion Since the Civil War*, INSIDER (June 9, 2014, 3:28 PM), https://www.businessinsider.com/eddie-slovik-was-last-deserter-executed-since-civil-war-2014-6 [https://perma.cc/4NVD-JPVH] (providing history of issues other than lynching; Black Americans were also facing desertion).

51. *See id.* (recounting Eddie Slovik's state of fear writing, "I was so scared nerves and trembling that at the time the other replacements moved out I couldn't move, wrote Slovik in that confession, explaining why he hid during his first combat experience . . . I told my commanding officer my story. I said that if I had to go out their again Id run away. He said there was nothing

minority whose execution went down in history.[52] He was the only American soldier during World War II executed under the crime of desertion since the Civil War in 1864.[53]

Desertion is the act by which a person unjustifiably abandons their station, in which they, renounce their responsibilities and duties.[54] Desertion, primarily used in military law, "consists of the abandonment of a post and duties by a person commissioned or enlisted in the army or navy, without leave with the intention not to return."[55] Desertion, or the attempt to desert, during war is punishable by death.[56]

Eddie Slovik was a Polish American who was drafted and stationed in France in 1944.[57] After Slovik encountered shell bursts and heavy fire for the first time, he became paralyzed with fear and separated from his unit.[58] Managing to hide from the chaos, Slovik joined Canadian soldiers, spending six weeks with them.[59] The Canadian Cors eventually returned Slovick to American military control, and upon his arrival he handed in a note confessing his desertion to other American soldiers.[60]

A later review of the death sentence by the officers revealed it was granted with little expectation to actually be carried out.[61] However, the

he could do for me so I ran away again AND ILL RUN AWAY AGAIN IF I HAVE TO GO OUT THEIR").

52. *See id.* (pointing out the fact that although Eddie Solvik was not a Black American, the death penalty still affected him. Initially Solvik was precluded from being drafted into World War II but was later drafted when the drafting requirements were lowered).

53. *See id.* (establishing ". . .only one soldier, Private Eddie Slovik, has actually been executed for desertion since the Civil War" upon unanimous vote of nine staff officers serving as judges for his military trial).

54. *Desertion*, BLACK'S LAW DICTIONARY (4th ed. 1968).

55. *See* 10 U.S.C., art. 85, § 885 (c) (2021) (stating any member of the armed forces who is guilty of desertion or attempt to desert will be punished "[I]f the offense is committed in time of war, by dear or such other punishment as a court martial may direct . . .").

56. *See id.* "[I]f the offense is committed in time of war, by dear or such other punishment as a court martial may direct . . .").

57. *See* Adwar, *supra* note 50 ("Although Slovik hated guns, he was assigned to the 28th Infantry Division in 1944 as a 24-year-old replacement rifleman to make up for high casualties the unit was suffering in Europe").

58. *See id.* (emphasizing Slovik's fear left him so scared he was unable to continue with his unit).

59. *See id.* (explaining Slovik's fear led him to befriend Canadian soldiers).

60. *See id.* (describing how Slovik was a problem for the Canadian Corps and that was the reason the new commander returned him).

61. *See* Clive Stafford Smith, *The Slovik Syndrome*, REPRIEVE (Jan. 31, 2020), https://reprieve.org/uk/2020/01/31/the-slovik-syndrome [https://perma.cc/HH27-YP4X] (resulting

sudden enforcement of the desertion death penalty struck fear in American soldiers, creating a deterrence from deserting the battlefield deeming it the "Slovik Syndrome."[62] More broadly, this syndrome relates the threat of the death penalty without it actually being imposed.[63] The Slovik Syndrome principle can be seen in American courts when judges impose harsher sentences, with the miscalculated belief of releasing prisoners after only a portion of their sentences.[64] Slovik was the first-and-last person sentenced to death for desertion since the Civil War.[65]

Today, courts face a similar problem regarding the death penalty.[66] In 2018, 15,948 murders resulted in only twenty-five executions—demonstrating the lack of enforcement of the death penalty.[67] Consequently, like Eddie Slovik's case, nobody takes true responsibility for the horrors of imposing the death penalty.[68] "The Slovik Syndrome teaches us that they just pass the parcel until it lands in the hands of the executioner and all of this is done in the name of the mythological God of Deterrence."[69]

After three terrifying decades, the Supreme Court finally decided to take a stand against the death penalty.[70] In 1972, the Court found that the

from the high number of desertions, many theorize General Eisenhower felt the need to enforce the death penalty "to encourage the others")

62. *See id.* (defining the "Slovik Syndrome" as the "[A]bsent sense of responsibility among those imposing a death sentence" which gets passed on "[u]ntil it lands in the hands of the executioner" all done in the name of deterrence.)

63. *See* Catherine A. Fitzpatrick, *Letters*, N.Y. TIMES (Sept. 21, 1979), https://www.nytimes.com/1979/09/21/archives/letters-to-rid-us-courts-of-the-slovik-syndrome.html [https://perma.cc/Q9SF-8ZMB] (expecting the death sentenced to be reduced at many stages of appeal, this creates the risk of the belief that the sentence was given with "misplaced confidence in subsequent mitigation").

64. *See id.* (representing the fact that nobody ever takes true responsibility for the horror unleased).

65. *See id.* (emphasizing that Eddie Slovik was used as the model to deter other soldiers; no one else was actually going to be sentenced to death).

66. *See id.* (showing that the courts still choose to ignore the real statistical injustice of the death penalty).

67. *See id.* (demonstrating how disproportional the number of murders is opposed to the number of death penalty sentences).

68. *See id.* (showing that Slovik Syndrome is purely for deterrent purposes).

69. *Id.*

70. *See Furman*, 408 U.S. at 239 (showing that after countless cases, the Supreme Court finally decided to make a decision on the death penalty).

application of the death penalty was unconstitutional in three combined cases.[71] In *Furman*, only two Justices believed the death penalty was unconstitutional under all circumstances, however the decision was groundbreaking.[72] The Court placed a four-year moratorium on all executions until more guidance came from a court challenge.[73] This led to forty state death penalty statutes being voided and over 600 death row inmates' sentences being reduced from execution to life in prison.[74]

Although racial bias was a major issue in *Furman,* the Court did not make a final decision not.[75] Perhaps, a potential influence of race in the administration of the death penalty takes root in the broad exercise of discretion that state laws grant to prosecutors and juries in "death eligible" defendants.[76] In the 1960s, there were concerns about the broad discretion in administering the death penalty and the risk of arbitrariness.[77] Specifically, people were concerned about how this affected racial discrimination across America.[78] These concerns prompted proposals to limit the discretion of sentencing juries.[79] However, in 1971, the Supreme Court rejected the argument that the

71. *See id.* (demonstrating that the Court chose to hear Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas).

72. *See id.* at 305, 369–71 (highlighting Justice Marshall and Justice Brennan as the only members of the Supreme Court who believed that the death penalty no longer belonged in a modern, contemporary society).

73. *See id.* at 292–93 (responding to the fact that only two of the Justices believed the death penalty was unconstitutional under all circumstances).

74. *See id.* at 417 (demonstrating that because of this case, federal and state governments were barred from imposing the death penalty where there were potential alternatives).

75. *See id.* at 310 (demonstrating that although racial bias was a major concern in the case, because there was not enough evidence to prove it, the Court was unable to make a final ruling).

76. *Cf.* MODEL PENAL CODE § 210.6 (1) (AM. L. INST., Proposed Official Draft 1962) (demonstrating that the American Law Institute, a distinguished group of lawyers, judges, and academics, proposed that the Model Penal Code for the death penalty should be limited to a narrow, a statutorily defined list of categories).

77. *See Furman*, 408 U.S. at 440–41 (demonstrating that juries' views on capital punishment resulted in approximately two death sentences a week).

78. *See id.* at 364–65 (demonstrating that in addition to race, poor and underprivileged groups disproportionately face the death penalty in America).

79. *See generally id.* at 285–86 (proposing that it is a denial of human dignity for states to allow the jury to arbitrarily subject a person to the death penalty).

Constitution required limited sentencing procedures.[80] But not all hope was lost.[81]

One year later, in *Furman*, the Court invalidated the capital punishment systems in every American jurisdiction.[82] The Court found that the death penalty was unconstitutional when applied in an arbitrary or discriminatory manner.[83] The Court held that the death penalty was applied in a way that disproportionately harmed minorities and indigent people.[84] Additionally, the Court also held this discretion unacceptable under the cruel and unusual punishments provisions of the Eighth Amendment.[85] Although it was perceived that *Furman* ended the death penalty in America, the Court clarified their intent and reinstated the death penalty four years later.[86]

In a 1976 case, *Gregg v. Georgia*, the Court decided to put the death penalty discussion back on the books, but under different circumstances.[87] The Court rejected the automatic sentencing of capital punishment.[88] It stated that death sentences cannot be characterized by

80. *See* McGautha v. Cal., 402 U.S. 183, 207 (1971) (holding that the lack of legal standards by which juries used to impose the death penalty was not an unconstitutional violation of the due process clause of the Eighth Amendment).

81. *See Furman*, 408 U.S. at 417 (explaining how shortly after the Court rejected to implement limited procedures, in 1971 the Court invalidated many State and Federal laws imposing the death penalty).

82. *See id.* at 309–10 (explaining how the Court ruled death sentences were cruel and unusual punishments, which the Eighth and Fourteenth Amendment cannot tolerate).

83. *See id.* at 242 (demonstrating that the evidence found supported that the death penalty did not forbid arbitrary and discriminatory penalties, which the Eighth Amendment provided).

84. *See id.* at 364–65 (considering the fact that Black defendants were executed at higher rate than white defendants in proportion to their representation in the country).

85. *See id.* at 239–40 (denying the death penalty helps protect people from cruel and unusual punishment, as provided by the Eighth Amendment).

86. *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, 362–63 (1995) ("Some participants in the debate, both on and off the Court, no doubt believed that *Furman* was the end, not the beginning, of the Supreme Court's involvement in the issue of capital punishment").

87. *See generally* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (holding that state legislative guidelines removed the possibility that juries would "wantonly" and "freakishly" impose the death penalty).

88. *See id.* at 154 (explaining that while the jury was allowed to impose the death penalty again, under judicial review the court must consider whether the jury was influenced by passion, prejudice, or other arbitrary factors).

"arbitrariness and capriciousness."[89] While the death penalty was reinstated, this ruling led the states to impose aggravating and mitigating circumstances in determining capital sentencing.[90] This helped ensure juries were not imposing the death penalty in an "arbitrary and capricious" manner—but did it?[91]

The Court discussed another reason racial minorities were being discriminated against when imposing the death penalty—prosecutorial discretion.[92] While the Court did not explicitly consider the issue of prosecutorial discretion in *Furman*, it did in *Gregg v. Georgia*.[93] In *Gregg*, the Supreme Court ruled that the Constitution did not require limits on prosecutorial discretion.[94] The only requirements were the statutory classifications that defined the classes of cases in which the state could impose death sentences.[95] By the end of 1976, the Supreme Court had approved a series of death-penalty statutes.[96] The Court found that these statutes' newly enacted procedural standards appeared to reduce the

89. *See id.* at 198 (defining arbitrary and capricious as a manner that was uneven, infrequent, and often selectively imposed against Black people).

90. *See id.* at 153 (instructing the jury that the death sentence would apply only if it found beyond a reasonable doubt that the murders were committed under any of three possible scenarios that could be considered aggravating: (1) that they were committed in the course of committing other capital crimes, (2) that they were committed to facilitate robbery, or (3) that they were outrageously inhumane).

91. *See id.* at 188 (expressing that, under *Furman*, the Supreme Court wanted to avoid any sentencing procedures that added substantial risk of improper influences).

92. *See id.* at 199 (explaining that the petitioner argued that the prosecutor had too much power to choose who deserved the death penalty and who did not).

93. *See id.* (explaining that *Furman* was concerned with the decision to impose the death penalty and the guidelines used to reach that decision, rather than what kind of discretion the prosecutor might have).

94. *See id.* at 157 (holding that the concerns of prosecutorial discretion are a non-issue because they are addressed adequately by Georgia law).

95. *See id.* at 162–63 (establishing the six categories of crime that are subject to the death penalty in Georgia: (1) murder, (2) kidnapping for ransom or where the victim is harmed, (3) armed robbery, (4) rape, (5) treason, and (6) aircraft hijacking).

96. *See generally id.* at 591 (listing Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina, and Roberts v. Louisiana as cases that affirmed state death penalty statutes in the 1976 term).

risks of arbitrariness.[97] Thus, this reduced discrimination to constitutionally acceptable levels.[98]

Shortly after deciding *Gregg*, the Supreme Court had an opportunity to address one of the most extreme racial imbalance areas in capital punishment—the use of the death penalty in rape cases.[99] In *Coker v. Georgia*, the Court declared the death penalty an unconstitutionally disproportionate punishment for the rape of an adult woman not accompanied by homicide.[100] However, while the briefing in the case described in detail the racially biased application of capital rape statutes, the Court's opinion never mentioned race.[101] Despite many cases analyzing how race affects the imposition of the death penalty, the Court ruled the death penalty as constitutional.[102]

The death penalty debate has not only occurred in the courts.[103] There has been considerable debate involving capital punishment in the medical profession for hundreds of years.[104] Lethal injection is unique because it was designed by a physician to imitate a medical procedure—the

97. *See id.* at 155 (holding that the Georgia legislature addressed concerns of arbitrariness in death penalty sentencing).

98. *See id.* (finding that the petitioner's contentions that Georgia's new sentencing procedures did not eliminate elements of arbitrariness and capriciousness were not correct).

99. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding "although rape deserves serious punishment, the death penalty, . . . is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life").

100. *See id.* at 592 (declaring that imposing the death penalty in a non-homicide rape case would violate the Eighth Amendment for cruel and unusual punishment).

101. *See generally id.* at 584 (discussing that robbery itself is sufficient to implicate the death penalty but not rape).

102. *See id.* at 591–92 (holding that the death penalty was valid under the constitution where the imposition of the sentence was not grossly out of proportion of the crime).

103. *See generally* George Washington Peck, *On the Use of Chloroform in Hanging*, 2 THE AM. REV.: A WHIG J., DEVOTED TO POL. & LITERATURE 283, 295 (1848) (discussing that science has provided us a better method to administer the death penalty with the creation of Chloroform, rather than using the method of hanging).

104. *See id.* (writing, "Our ancestors abolished torture. . .; why should not we, now that science has found a means of alleviating extreme physical suffering, follow their example by allowing the benefit of it to the miserable wretches whom we simply wish to cast contemptuously out of existence? If we have a right to hang a man at noon-day . . . then it follows that we have a right to give him Chloroform at noon-day, and hang him immediately afterwards, while under its operation . . . By this means we avoid for him, not only the pain of the actual killing, but the agonizing instant of certain apprehension").

intravenous induction of general anesthesia.[105] Thus, unlike other execution methods, lethal injection not only simulates medical practice, but also uses materials and expertise ordinarily used for healing.[106] The ordinary use of healing has required medical professionals to become active participants in executions.[107] However, many physicians deem this process unethical.[108]

The American Medical Association (AMA) is the largest and best known medical professional organization in the United States.[109] The association carefully crafted a statement opposing participation in capital punishment, specifically lethal injection.[110] The AMA's code of ethics states that:

> An individual's opinion on capital punishment is the personal moral decision of the individual. However, as a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution. Physician participation in execution is defined as actions that fall into one or more of the following categories: (a) Would directly cause the death of the condemned. (b) Would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned. (c) Could automatically cause an execution to be carried out on a condemned prisoner.[111]

105. *See* Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs. Medical Ethics*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/lethal-injection-and-physicians-state-law-vs-medical-ethics [https://perma.cc/QV8Q-ZHDT] (involving medical professionals in creating a cause for death was designed with the goal to eliminate the risk of unnecessary suffering).

106. *See id.* (requiring medical professionals to be a part of the lethal injection process creates an ethical dilemma for those who swore to do no harm).

107. *See id.* at 27 (stating that medical professionals are required to be present during executions to ensure a painless death occurs, despite it violating ethical codes).

108. *See* Jonathan I. Groner, *Lethal Injection: The Medical Charade*, 20 ETHICS & MED. 25, 27 (2004) (lamenting the fact that medical professionals participating in state-sanctioned killings fail to follow core values of the medical field).

109. *See About*, AMA, https://www.ama-assn.org/about [https://perma.cc/67UF-54VN] (boasting that the AMA is able to convene in more than 190 states and specialty societies).

110. *See* AM. MED. ASS'N, PRINCIPLES OF MED. ETHICS § 9.7.3 (2016) (explaining that physicians should protect and preserve life regarding capital punishment based on numerous ethical factors including proper observation, determining a prisoner's competence, and monitoring vital signs).

111. *See id.* (showing that due to capital punishment remaining an ongoing issue amidst volatile social and political debate, AMA's ethical reasoning for not allowing medical

Further, the American Society of Anesthesiologists' President issued the most prescient statement about lethal injection and the medical profession:

> Lethal injection was not anesthesiology's idea. American society decided to have capital punishment as part of our legal system and to carry it out with lethal injection. The fact that problems are surfacing is not our dilemma. The legal system has painted itself into this corner and it is not our obligation to get it out.[112]

The lethal injection debate continued in the medical field while the Court's 1986 decision in *Turner v. Murray* was issued.[113] In *Turner*, the Court finally acknowledged a jurors' ability to act with racial prejudice due to the broad discretion granted to jurors in capital cases.[114] In this case, a Virginia jury sentenced Turner, an African American man, to death for killing a White man.[115] Additionally, the judge denied the defense counsel's request to question potential jurors about racial prejudice during jury selection.[116] The Supreme Court reversed and Justice Byron White, writing for four justices, stated:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that

professionals to take part in the death penalty process is based on several factors rooted in their ethical duties to protect and preserve life).

112. *E.g.*, Orin F. Guidry, *Message from the President: Observations Regarding Lethal Injection*, 70 AM. SOC'Y ANESTHESIOLOGISTS 6 (2006) (stating the American Society of Anesthesiologists' position on this issue and providing guidance to other anesthesiologists asked to "personally participate" on the issue of lethal injection).

113. *See* Turner v. Murray, 476 U.S. 28, 38 (1986) ("It is becoming increasingly clear that the courts will require reasonable assurance that the inmate is adequately anesthetized prior to these injections."). *But cf. id.* (asserting generally that racial bias plays a role in death penalty sentencing shown through the Turner opinion holding).

114. *See id.* at 28, 35, 37 (acknowledging that jurors in capital cases have broader discretion which makes it easier to act, even if subtly, with racial prejudice and pointing out this as an "unacceptable risk of racial prejudice infecting the capital sentencing proceeding.")

115. *See id.* at 28 (discussing the facts of the case and stating that the Petitioner, a Black man, allegedly murdered a White storekeeper. After the judge refused jurors to be questioned about potential racial bias, the defendant received the death penalty).

116. *See id.* ("During voir dire, the state trial judge refused petitioner's request to question the prospective jurors on racial prejudice. The jury convicted petitioner, and, after a separate sentencing hearing, recommended that he be sentenced to death, a recommendation the trial judge accepted").

> blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[117]

One year later, in *McCleskey v. Kemp*, the Court reached a landmark decision involving race and the death penalty.[118] The Court discussed an advanced statistical study, demonstrating and challenging racial impact on death sentencing.[119] Despite statistical evidence, Georgia prosecutors argued that there was no discernible relationship between racial disparities in death penalty administration and prejudice.[120] Rather, they asserted the racial disparities were caused by higher homicide rates committed by African Americans.[121] Professor David Baldus, along with his colleagues, conducted two studies reviewing more than 2,000 murder cases in Georgia that occurred in the 1970s.[122] When controlling 230 variables related to the crime and characteristics of the offender, Baldus found a victim's race to be a strong predictor of who would receive the

117. *Id.* at 35 (stating how jurors may unconsciously use racial prejudice in ruling in favor of the death penalty and the gravity of this issue due to the "finality" of the death penalty for sentenced individuals).

118. *See generally* McCleskey v. Kemp, 481 U.S. 279, 283, 320 (1987) (emphasizing that the Supreme Court came within one vote of eliminating capital punishment in Georgia based on evidence of racial disparities).

119. *See id.* at 286 ((relying on a study that showed, from raw data, differing results of death penalty sentences based on defendants' race).

120. *See id.* at 288 n. 6 (connecting the fact that the statistical study McCleskey presented failed to assert a prima facie case to support the contention that the death penalty was imposed because of his race).

121. *See id.* at 290 (involving data relating to the victim's race, the defendant's race, and various combinations of such persons' races and further failed to show adequate correlation to death penalty sentences).

122. *See id.* at 286–87 (reviewing the Baldus study to prove racial bias in relation to death penalty sentences and finding that prosecutors "sought the death penalty" more often in cases involving Black defendants than in cases involving White defendants).

death penalty.[123] In cases involving White victims, there was a 4.3 times greater chance the murder defendant would receive the death penalty.[124]

The Court claimed to accept Baldus' findings.[125] However, the Court refused to give constitutional relevance to the race effects and rejected McCleskey' claim by a slim, five to four majority.[126] The Court majority required a defendant to prove "particularized" racial animus and dismissed the statistical evidence as the basis for proving discrimination in McCleskey's case.[127] This ruling allowed the death penalty's racially disproportionate imposition to continue with no significant constitutional checks in place.[128]

Later, Justice Powell identified *McCleskey* as one of his most regretted votes during his court tenure.[129] Justice Powell expressed his concern by stating "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[130] In an internal memo to the Court, Justice Scalia went even further and wrote: "I do not

123. *See id.* at 287 (showing, based on analyzing 230 variables, increased racial inequalities by enforcing harsher sentences on communities of color existed).

124. *See id.* at n.5 ("If there's ever room for exercise of discretion, then the [racial] factors begin to play a role." This is indicating that Black defendants, such as McCleskey, who kill White victims have the greatest likelihood or receiving the death penalty).

125. *See id.* at 287–88 ("[The court] concluded that McCleskey's 'statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern'").

126. *See id.* at 288–89 (explaining that McCleskey's Fourteenth Amendment claim failed due to flawed methodology in the Baldus study, and the court held that the Baldus study "fail[ed] to contribute anything of value").

127. *But see id.* at 281, 302, 307–08 (explaining that because Georgia sentencing procedures focus "discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,' it may be presumed that his death sentence was not 'wantonly and freakishly' imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment").

128. *See id.* at 289 (showing that the Baldus' comprehensive scientific study is insufficient at the court of appeals to mitigate a death penalty determination without showing a "racially discriminatory purpose" despite assuming the study's validity).

129. *See Justice Powell's New Wisdom*, N.Y. Times (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html?smid=url-share [https://perma.cc/HY5D-ME6H] (discussing Powell's concerns about the effect of the McCleskey decision on America because Justice Powell acknowledges that he would change his vote).

130. *See id.* at 315–16 (noting Justice Powell's concerns that McCleskey's claim rests upon the "irrelevant factor of race" which could be extended to other claims based upon "unexplained discrepancies that correlate to membership in other minority groups").

share the view, implicit in the opinion, than an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. . . . I cannot honestly say that all I need is more proof."[131]

McCleskey illustrates race's unique treatment in the death penalty context.[132] The Court refused to credit evidence routinely accepted in Equal Protection Cases involving employment, education, and housing discrimination.[133] The *McCleskey* decision took a serious blow to challenging racial discrimination in capital punishment—a huge setback for America.[134]

During this time, racial discrimination still existed in America due to implicit bias stemming from America's discriminatory history.[135] Determining whether a defendant is "death-eligible," the individual must be charged with first-degree murder and one of the statutorily defined

131. *See* Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1461 n. 19 (2018) (quoting Memorandum from Justice Antonin Scalia to the Conference published on Jan. 6, 1987) (located in Justice Powell's *McCleskey* Case File on file with Washington & Lee University School of Law Library) ("But, [Justice] Scalia wrote, racism is 'ineradicable' from the U.S. criminal legal process, and thus, not a good reason to reverse Mr. McCleskey's death sentence").

132. *See generally McCleskey*, 481 U.S. at 282–83 ("This case presents the question whether a complex statistical study that indicates a risk that racial consideration enter into capital sentencing determination proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment").

133. *See id.* at 293–94, 295 n.14, 347 n.2, 348, 362 (stating that to prevail under the Equal Protection Clause, McCleskey needed to prove that his case's decisionmakers acted with discriminatory purpose, and McCleskey failed to do so based on "fundamental differences" in capital murder cases compared to Title VII employment cases).

134. *See generally* John Charles Boger, *McCleskey v. Kemp: Field Notes from 1977-1991*, 112 NW. U. L. REV. 1637, 1637–38 (2018) ("The Supreme Court eventually heard and decided this case, ruling five to four against Warren McCleskey's claims in 1987. Justice Lewis Powell's opinion purported to accept in theory, but appears grievously to have misunderstood or disregarded in fact, McCleskey's powerful and unrebutted evidence of racial discrimination") (discussing how the McCleskey case emerged from subsequent review of post-Furman sentencing patterns in the State of Georgia and attempted to demonstrate incorrect assumptions made by the Court in 1976).

135. *See McCleskey*, 481 U.S. at 332 (Brennan J., dissenting) ("[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness" (citing Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 327, 327 (1987))).

"special circumstances" or "enumerated aggravating factors."[136] Illinois' death penalty statute demonstrated all that was wrong in America.[137]

> The Illinois experience is a wonderful example of the power of innocence. In 1978, Illinois reinstated the death penalty with the overwhelming support of the public. By the early 1990s, Illinois had the fourth largest death row in the United States. Between 1978 and the mid-1990s, the legislature had acted on several occasions to expand the class of murderers eligible for the death penalty. No one would ever have imagined that Illinois was about to play a central role in transforming American views on the death penalty.[138]

In a series of discoveries, over a dozen people sentenced to death row were found to be innocent.[139] These wrongful convictions were discovered after extensive investigations by journalists, lawyers, students, volunteers, and many others.[140] These cases involved a multitude of issues: false and coerced confessions, faulty eyewitness identifications, and cases where evidence of guilt was primarily established through jailhouse informant testimony.[141]

136. *See* Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1312–13 (2010) (discussing that when a defendant is "death-eligible, the individual can opt for a bench trial, or the case will be tried by a 'death-qualified' jury chosen through 'a set of complicated procedural standards'").

137. *See* Lawrence C. Marshall, *Walter C. Reckless Memorial Lecture: The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 579 (2004) ("[Governor Ryan] understood that the system's error rate in determining guilt has implications not only on the accuracy of convictions, but also on the trustworthiness of capital sentences") (questioning how a proven, flawed criminal justice system could be properly trusted to determine whether someone should be sentenced to death).

138. *Id.* at 577–78 (stating the procedural history of Illinois regarding the death-penalty leading up to its role in transforming American views on the death penalty).

139. *See id.* at 578 (demonstrating the impact of a flawed system by highlighting a "series of thirteen death row exonerations with fifty percent of cases being resolved through execution or exoneration exposed as wrongful convictions").

140. *See generally* Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 388–99 (2005) (discussing how a change in justices on the Illinois Supreme Court affected the outcome in *People v. Lewis*, the first death penalty challenge with the new court and because of stare decisis holding the death penalty to be constitutional).

141. *See generally* Marshall, *supra* note 140, at 574–75 (leading to reform through DNA testing and providing insight into the fallibility of particular evidence once assumed trustworthy, and further noting other lessons applicable to cases unsusceptible to forensic testing).

In 2000, due to the accumulating evidence of wrongfully convicted persons on death row, Illinois Governor Ryan—a longstanding supporter of the death penalty—imposed a moratorium.[142] This was the first statewide execution moratorium in the county, and it provoked considerable comment, which was not all favorable.[143]

Simultaneously, the use of lethal injection was picking up steam.[144] For these reasons, several states implemented a temporary prohibition until a unanimous solution was implemented across the country.[145] Governor Ryan's execution moratorium demonstrated an instrumental reform of the nation's eighth largest death row population.[146]

Pursuant to the Code of Federal Regulations, the death penalty is enforced by lethal injection.[147] As of December 31, 2010, statistics indicate all states imposing the death penalty authorized legal injection.[148] Other execution methods existed: "[Sixteen] states authorized an alternative method of execution[;] [n]ine states authorized

142. *See id.* at 578–79 (explaining that the Illinois Governor appointed a blue-ribbon commission assessing the state's capital justice system in Illinois).

143. *See* Austin Sarat, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J. CRIM. L. 273, 273 (2005) (describing how death penalty supporters "demonized Ryan," while death penalty opponents considered Ryan "an instant hero" and the decision "a signal moment in the evolution of new abolitionist politics"); *see also* Ken Armstrong et al., *Ryan Suspends Death Penalty*, CHIC. TRIB. (Jan. 31, 2000, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-2000-01-31-0002010058-story.html [https://perma.cc/WT7L-E6UH] (noting the Illinois moratorium marks the first time any state has taken such dramatic action and reflects an effort to ensure only individuals who are "truly guilty" are being sentenced to the death penalty).

144. *See generally* Deborah W. Denno, *The Lethal Injection Debate: Law and Science*, 35 FORDHAM URB. L. J. 701, 701–02 (2008) (discussing that Baze v. Rees upheld the constitutionality of Kentucky's method of executing inmates by lethal injection and showing that there are "many more litigation miles to go").

145. *See id.* at 703–04 (discussing that after the Supreme Court's grant of certiorari in Baze, other states were hesitant to set execution dates and execute); *see generally* Marshall, *supra* note 140, at 578 (noting that the Illinois moratorium was imposed in 2000, thus Illinois did not have a lethal injection challenge pending in the courts).

146. *See* Warden, *supra* note 143, at 381 ("[T]he Illinois General Assembly completed what the Chicago Tribune called [a] 'historic reform of death penalty procedures in a state embarrassed by its penchant for choosing the wrong people to die'").

147. *See generally* 28 C.F.R. § 26.3 (2020) (outlining the procedures required for death sentences under federal law and specifically, "by intravenous injection of a lethal substance…to cause death").

148. *See* BUREAU OF JUST. STAT., NCJ 236510, CAPITAL PUNISHMENT, 2010–STATISTICAL TABLES 1–2 (2011) (indicating thirty-six states with death penalty statutes authorizing legal injections with capital statutes).

electrocution; three states, lethal gas; three states, hanging; and two states, firing squad."[149]

> Five of the sixteen states stipulated which method must be used depending on either the date of the offense or sentencing. One state authorized hanging only if lethal injection could not be given. Five states authorized alternative methods if lethal injection is ruled to be unconstitutional: one authorized hanging, one state authorized electrocution, one authorized electrocution or firing squad, one authorized firing squad, and one authorized lethal gas.[150]

While other states in the nation authorized various death penalty methods, what was going on in Texas?[151]

B. Texas was ground zero for capital punishment, and perhaps, it still continues to be.

In 2010, while eleven other states collectively carried out twenty-nine executions collectively, Texas executed seventeen people alone.[152] Texas history demonstrates a higher rate of using of the death penalty compared to the entire nation.[153] Since 1982, Texas accounted for thirty-eight percent of the national total of executions, leading the nation in the number of individuals executed since 1977.[154] While Texas led the nation in executions, Texas had the lowest number of new death sentences since the official reinstatement of the death penalty in 1976.[155] Nevertheless, Texas had the third largest death row population in the

149. *Id.*

150. *Id.* at 2–6 (showing that Delaware, Illinois, Oklahoma, and Tennessee authorize alternative methods of capital punishment if lethal injection is unconstitutional such as hanging, lethal gas, and electrocution).

151. *See generally Texas Death Penalty Fact Sheet*, TEX. COAL. TO ABOLISH THE DEATH PENALTY (Jan. 1, 2011), https://tcadp.org/wp-content/uploads/2011/01/TXDPFactSheet01-11.pdf [https://perma.cc/6BY8-8RTS] (explaining Texas history pertaining to capital punishment between 1923-1964).

152. *See id.* (reporting that Texas has a total of 464 executions out of 1,234 nationwide since 1977).

153. *See id.* ("Texas leads the nation in the number of individuals executed (out of 1,234 nationwide since 1977)").

154. *See id.* (comparing nationwide statistics of number of individuals executed in 1977).

155. *See id.* (emphasizing Texas charts new death sentences between 2003–2010).

United States.[156] According to a chart compiled by the Texas Department of Criminal Justice, there is a noticeable trend—while the number of executions of Black inmates has declined, the number for Hispanic criminals has.[157]

> Despite that trend, the number of black inmates on death row continues to exceed any other. There are [ten] inmates who have been on Texas' death row for [thirty] years or longer. Of those men, six are black, including the longest-serving death row inmate, Raymond Riles, who was convicted in 1976 of robbing and murdering a used-car salesman.[158]

Texas discovered the death penalty in 1835.[159] Manila rope was instrumental in the initiation of the death penalty—demonstrating various uses including landscaping, hauling, towing and execution of convicted murderers.[160] During the commencement of the death penalty, individuals would gather in public to watch "the hangman's fracture."[161] The hangman's fracture was "said to cause instantaneous death by forcefully snapping the jaw and rupturing the spinal cord."[162] Texas continued using this method of execution for eight decades.[163] In 1923, a state bill changed the method of capital punishment from hanging to

156. *See id.* (informing that California leads with 713 inmates on death row, while Florida has the second largest population with 393 inmates).

157. *See* Ryan Murphy, *Three Decades of Capital Punishment in Texas*, TEX. TRIBUNE (Jan. 17, 2012, 5:00 AM), https://www.texastribune.org/2012/01/17/35-years-texas-executions/ [https://perma.cc/A4JX-WTG8] (demonstrating the last three decades of the death penalty in Texas. The first graph charts both the frequency of executions and the racial makeup of the executed individuals. The graph is broken into five-year segments starting in 1980 through 2011).

158. *See id.* ("In 1985, Riles tried to commit suicide by setting fire to his death row cell, according to TDCJ records").

159. *See* Jennifer White, *The Death Penalty*, TEX. MONTHLY (Dec. 2002), https://www.texasmonthly.com/articles/texas-history-101-45/ [https://perma.cc/6PF4-ANAW] ("The Death Penalty in Texas began in 1835 with a piece of five-strand manila hemp rope").

160. *See id.* (describing that a man named Joseph Clayton was hanged for the murder of Abner Kuykendall); *see also Ravenox's Many Manila Rope Uses—What is Manila Rope*, RAVENOX, https://www.ravenox.com/blogs/news/manila-rope-history-and-uses [https://perma.cc/5P49-XGM4] (explaining common uses of manila rope).

161. *See id.* (discussing how executions were once publicized and provided a form of entertainment for townspeople to view).

162. *See id.* (explaining the gruesome death that follows execution by hanging).

163. *See id.* (passing Senator J.W. Thomas' 1923 requiring the state to take control of the means of capital punishment).

electrocution.[164] Additionally, the state bill outlawed public executions.[165]

In the late 1960s, capital punishment was at its lowest in Texas and across the entire nation.[166] The Supreme Court decided the landmark case, *Furman v. Georgia*, that caused the "moratorium" of the death penalty.[167] During the moratorium, lethal injection was used as a moral and humane alternative to electrocution.[168] This led to the revision of the 1973 Texas Penal Code and capital punishment laws.[169] While Texas made a small progress by revising the penal code, the death penalty was reinstated one year later in 1974.[170] In 1977, Oklahoma shifted its execution style by being the first state to switch their method from electrocution to lethal injection.[171] Surprisingly, Texas followed .[172]

Throughout the years, Texas has significantly changed its capital punishment procedures and guidelines.[173] During this period, lawmakers attempted to alter and modernize an inhumane practice.[174] However, "[d]espite significant changes it remain[ed] a passionately debated topic and Texas continue[d] to make headlines by leading the nation in executions." [175] In less than three decades, Texas—"[o]ut of the thirty-

164. *See id.* (explaining that during this period, capital punishment laws were significantly revised).

165. *See id.* (requiring that the State carry out the death sentence, rather than the county).

166. *See id.* ("arguing that the death penalty inflicted cruel and unusual punishment and was therefore in violation of the [Eighth] [A]mendment of the Constitution").

167. *See id.* (holding states' discretion to inflict the death penalty should be limited).

168. *See id.* ("[S]tates had too much discretion when handing down death sentences, and so states were forced to revise their capital punishment laws").

169. *See id.* (explaining the change in methods used for the death penalty and noting that the state legislatures played a role in using lethal injection instead of electrocution, despite problems with lethal injection).

170. *See id.* (recounting that while the last electrocution took place in 1964, there was a total of 361 individuals executed in Texas between 1924 and 1964).

171. *See id.* (discussing how California governor Ronald Reagan was one of the first American politicians to suggest lethal injection as a means of execution).

172. *See id.* (addressing that Charlie Brooks was executed by lethal injection in 1982 for kidnapping and murder in Tarrant County, Texas).

173. *See id.* (considering changes, lethal injection in Texas is still widely debated and used as a method of execution by the Criminal Justice System).

174. *See id.* (explaining the evolution of capital punishment in Texas, voyaging from hanging to electrocution and finally, to lethal injection).

175. *See id.* (recognizing the effects of the 1973 revision to the Texas Penal Code, reinstating the death penalty in Texas).

eight states authorizing the death penalty"—carried out the most executions since its statutory reinstatement in 1974.[176] "[S]entencing 2-3 convicts to death each month[,]" Texas is the most avid practitioner of this inhumane exercise.[177] "Of the 807 executions in the U.S. since 1976, 285 of those have taken place in Texas."[178]

II. ANALYSIS

A. Race–has and always will–play a decisive role in who lives and who dies.

The American death penalty is racist.[179] Statistics support this blatant assertion.[180] For example, almost half of death row inmates are African American.[181] Unfortunately, these racial disparities penetrate the entire criminal justice system and the judicial process.[182] Although African Americans are the most affected, they have little to no voice in the conviction process.[183]

Public opinion stems from the everlasting outcomes of racial disparities.[184] While a slim majority of Americans support the death penalty, sixty-three percent of whites support the death penalty, whereas

176. *See id.* (comparing Texas' track record to those of other states with the death penalty).

177. *Id.*

178. *See id.* (providing perspective on how Texas' death penalty practices overwhelm those of the United States).

179. *See* Lind, *supra* note 6 (criticizing America's criminal justice system for the disparate impact it has on communities of color).

180. *See id.* ("African Americans are vastly overrepresented on death row: 42% of death row inmates are African American, which is more than three times higher than their share of the U.S. population").

181. *See id.* ("It's the racial disparities throughout the entire process: African Americans are simultaneously the people most affected by death-penalty cases, and the people least likely to have a say in them").

182. *See id.* (noting how racial disparities and biases that exist in public opinion and the jury selection process work together to feed the vicious cycle that is the American death penalty).

183. *See id.* ("In 2009, North Carolina passed the Racial Justice Act to uncover some of these racial discrepancies—and allow death-row inmates to have their cases reconsidered if they found enough evidence that their initial trial was racially skewed. The law was repealed in 2013, and the only inmates who got off death row under the law are in danger of having their death sentences reinstated. But as a result of the legislation, researchers and the public now know more about the racial dynamics behind jury selection in death-penalty cases").

184. *See id.* (suggesting that "calling attention to the racial disparities might not make whites more wary of supporting the death penalty [but] it might make them more enthusiastic").

sixty-four percent of African Americans do not.[185] These statistics, coupled with others, supports the theory that the existing racial disparities increases the likelihood that white people exhibit support for the death penalty.[186] "One 2007 study looked at whether poll respondents were less likely to support the death penalty after hearing various arguments against it[, and] found that whites 'actually become more supportive of the death penalty upon learning that it discriminates against blacks.'"[187]

Racial disparities in public opinion have bled into the jury selection process.[188] .[189] The more willing you are to consider every option during sentencing, the more likely you will be chosen as a juror—meaning "where the death penalty is an option, [the juror] ha[s] to be willing to consider sending the defendant to death row."[190] Therefore, "[i]f a juror isn't death qualified' because he or she opposes the death penalty, he or she automatically get tossed from the jury pool."[191] Thus, many potential black jurors will be disqualified from the jury selection process in death penalty cases.[192] In 2014, the Virginia Quarterly Review wrote:

> Death qualification is one reason behind racial disparities on juries. More than three decades of research have shown that capital juries tend to be less representative of the general population because women and African Americans are more likely to disapprove of the death penalty than white men. In the early 1980s, University of California, Berkeley, sociologist Robert Fitzgerald and Stanford (now University of Michigan) psychologist Phoebe Ellsworth found that, among 811 eligible jurors in Alameda County, California, about 25 percent of blacks were automatically

185. *See id.* (breaking down portions of the American population that support the death penalty into racial demographics).

186. *See id.* (realizing that shedding light on the issue may create an even worse issue).

187. *See id.* (comparing this conclusion to other studies, "which have shown white people are more likely to support harsh prison policies if they believe that black people are overrepresented in prisons").

188. *See id.* ("You can't get seated on a jury in a death-penalty case if you oppose the death penalty").

189. *See id.* (stressing that someone who opposes the death penalty will not be seated on the jury).

190. *See id.* (specifying how public opinion on the death penalty penetrates the jury selection process).

191. *See id.* (demonstrating how those who are most affected by the American criminal justice system's approach to the death penalty do not have a seat at the table to affect its change).

192. *See id.* (deducing that "this means a lot of potential black jurors get disqualified").

> excluded from capital-jury pools because of their disapproval, compared to 15 percent of whites.[193]

During the jury selection process, prosecutors and defense attorneys are given a certain number of peremptory challenges.[194] However, the prosecutors are placed at an advantage because these preemptory challenges are given *after* jurors have already been "death qualified."[195] Multiple researchers reviewed the jury composition of those who sent inmates to death row in the wake of North Carolina's Racial Justice Act (RJA).[196] These studies revealed that:

> [o]ver the twenty-year period, prosecutors were more than twice as likely to strike qualified candidates who were black, and that the disparity persisted "statewide, by judicial division, by prosecutorial district."… . . . The factors often used to explain the dismissal of black (potential jurors)—reservations about the death penalty, economic hardships, past run-ins with the law—had no significant effect on the strike-rate disparity. That is: When these factors were accounted for and held constant, a black potential juror was still more than twice as likely to be struck. The researchers also found that more than 40 percent of the inmates on death row had been sentenced by juries that were either all-white or included only one person of color.[197]

Thus, even a black juror who does support the death penalty is likely to be stricken from a jury.[198] Let's not forget—it's illegal to strike a potential juror based on race.[199] However, after North Carolina repealed

193. *See id.* (citing decades of research to support the idea of "death qualification" and the inequitable affects it has on the perpetuation of the death penalty).

194. *See id.* (explaining that a peremptory challenge is a counselor's ability to veto peoples' service on the jury "without having to give a reason why").

195. *See id.* ("If a potential juror seems overly enthusiastic about the death penalty, the defense attorney will have to spend a challenge to strike him, but a potential juror who is anti-death penalty will be bounced before he even gets in front of the lawyers").

196. *See id.* (reviewing both those who had been selected for and excluded from death row juries).

197. *Id*.

198. *See id.* (summarizing the data provided by the Virginia Quarterly Review on North Carolina's Racial Justice Act and its implications).

199. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986) ("Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors . . . so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black"); *see also* Lind, *supra* note 6 (resulting from the 1986 Supreme Court decision in *Batson*).

the RJA, attorneys discovered how prosecutors got away with striking jurors due to racial bias.[200] Attorneys began reconsidering the death-row cases executed under the RJA and discovered that:

> A "cheat sheet" (was) acquired from one of the trainings overseen by the NCCDA. Formally titled "BATSON Justifications: Articulating Juror Negatives," the document lists nine specific race-neutral explanations—such as appearance, attitude, dress, and body language—and a tenth catchall—"any other sign of a defiance, sympathy with the defendant or antagonism to the State"—that "courts have approved as neutral explanations," according to Duke University law professor James Coleman.[201]

In effect, this "cheat sheet" provided prosecutors with a road map to striking black veniremen for illegal purposes.[202] The training document showed prosecutors how to deflect their reasoning for striking a juror.[203] In effect, providing them an avenue to discriminate in the court room.[204] Prosecutors were only required to substantiate their striking of a potential juror if defense counsel requested a "Batson challenge", which alleges that the decision was raced based."[205] In the absence of a "Batson challenge," no explanation was required.[206] The "cheat sheet" is one of the many mechanisms that accommodates African Americans' absence in death penalty juries, leading to their vast overrepresentation on death row.[207]

200. *See* Lind, *supra* note 6 (shedding light on the intentional and systematic discrimination of black veniremen through trained practices).

201. *Id.*

202. *See id.* ("The training document didn't instruct prosecutors to strike jurors based on race and then pretend there was another reason. But if prosecutors wanted to do that, the document showed them how to get away with it").

203. *See id.* (describing the cause of undetected, systemic discrimination in voir dire specific to death penalty cases).

204. *See id.* (training made it easy to strike jurors on a decision that was race-based).

205. *See id.* (explaining that prosecutors must use one of the judicially approved "race-neutral explanations" in the face of a *Batson* challenge).

206. *See id.* (providing an example of how a prosecutor could disguise striking a juror based on racial bias—by stating the prosecutor is relying on his or her "gut feelings").

207. *See id.* (supporting the idea that a black defendant is unlikely to be tried by a jury of his racial peers when facing the death penalty).

In contrast, one study found that black defendants were more likely to get sentenced to death regardless of the jury composition.[208] While diverse juries tended to send black defendants to death row, all-white juries have proven to have the highest death-sentence rate of all:

> In Philadelphia, juries, no matter their racial composition, sentenced black defendants to die at higher rates than nonblack defendants. Moreover, predominately non-black juries were significantly more punitive toward black defendants than were black-majority juries. In other words, the racial makeup of the jury and of the defendant heavily influenced the sentencing outcome.[209]

A separate study analyzed the likely outcomes of guilty verdicts—not sentencing—and found "that black defendants weren't disproportionately likely to get convicted, as long as their juries were diverse."[210] [211]

These studies, however, can exist simultaneously because they focus on racial bias at different junctures in the criminal prosecution process.[212]

Implicit bias has been shown to have an enormous impact on who is sentenced to death and who is not.[213] Psychologist Jennifer Eberhardt analyzed the effect of implicit bias on death penalty cases.[214] She

> "looked at the facial features of death penalty defendants, and found that "the more stereotypically black a person's physical features are perceived to be, the more that person is perceived as a criminal . . .. Even in death penalty cases, the perceived blackness of a defendant is related to sentencing: the blacker, the more deathworthy."[215]

208. *See id.* (citing to Philadelphia statistics—representing a higher mortality rate of black defendants).

209. *Id*.

210. *See id.* (showing that "between 2000 and 2010, all-white juries in Florida were 16% more likely to convict black defendants than white defendants, and the conviction gap was "nearly eliminated" when the jury pool included at least one black member").

211. *See id.* (compelling empirical research is designed to estimate the effect of race in areas).

212. *See id.* ("A diverse jury might not be any more likely to find black defendants guilty than white ones, but once they're convicted, the jury might still be more likely to sentence black defendants to death").

213. *See id.* (citing to a study conducted by award-winning psychologist Jennifer Eberhardt, revealing that the "association of blackness with criminality affects death penalty cases").

214. *See id.* (researching the subconscious connection in peoples' minds between Black faces and crime, and how those associations may pervert justice).

215. *Id*.

While statistics are constantly used to show the phenomena across multiple American states, it is nearly impossible to use these findings to challenge any one specific case.[216] For example, after North Carolina found evidence of racial disparities throughout the jury selection process, the state struggled in crafting ways to dismantle these widespread challenges case by case.[217]

> [As] one opponent of the law said, the Constitution strictly requires judges to look at each case on the merits. That makes it very hard to set rules for an individual case based on a general phenomenon. From the V[irginia] Q[uarterly] R[eview]: The problem is, constitutionally, we can't use statistics when picking a jury," said Silver, one of the few black prosecutors in the state. "You're evaluating the jurors on the statistics. So, in a very real sense the only way to remedy that is to have proper statistics. But to remedy by proper statistics is per se unconstitutional. Thus, there is no way to comply with the statute.[218]

These racial disparities do not exist because an individual prosecutor is racist.[219] America's problem stems from various overlapping issues—issues that may appear to be fair on their face—but cumulatively add up to a racial prejudice that no one wants to address.[220] This makes it nearly impossible to pinpoint the problem without looking at the big picture and aggregate multiple levels over long extensive research.[221] Thus, facially apparent bias cannot be proven even when it is immediately apparent in any individual case.[222]

216. *See id.* (describing the all too familiar challenge of reversing systemic prejudice on a case-by-case basis when awareness of that wrong can only be obtained by studying its widespread existence).

217. *See id.* (reporting that once North Carolina "collected statistics about jury selection, it had to figure out how those statistics related to individual cases").

218. *Id.*

219. *See id.* (admitting that even if a prosecutor has a racial bias, "they've learned how to cover their tracks"—evidenced by the training document aforementioned).

220. *See id.* ("A bunch of overlapping phenomena, which look neutral in any one case, add up to a general disparity in who's on juries and who's sentenced to die").

221. *See id.* (understanding the cause of unequal treatment requires researchers to be sensitive to the statistic complexities associated with race).

222. *Cf. id.* ("It's only possible to see that disparity once you zoom out to the level of statistics or aggregate research. But those statistics don't say much about what to do in an individual case—where, again, bias isn't immediately apparent").

Efforts have been made to combat this form of racial inequality.[223] In 2012, a group of community organizations released *Facing Race*—a report assessing Washington state voting records—in the hopes of promoting racial justice in Washington, including ending the death penalty.[224] At the time of the report, African Americans were only four percent of Washington's total population but represented half of the male population on death row.[225] While these findings proved a massive overrepresentation in Washington, it also paralleled America's national pattern: "African Americans represent nearly forty-two percent of death row inmates across the country yet represent only thirteen percent of the U.S. population.[226]

The statistics presented by *Facing Race* cannot be explained by African Americans committing more "death-eligible" crimes in Washington.[227] Between 1981, when Washington reinstated capital punishment, and 2012, "African Americans comprised 18% of all "death-eligible" cases, yet African Americans have received over 25% of the death sentences imposed since 1981."[228]

The research uncovered in this report also showed how the race of the victim affects whether the death sentence will be imposed.[229] *Facing Race* found that "prosecutors asked for the death penalty in 28% of cases with one white victim, but only 18% of cases involving a victim of color."[230] Unfortunately, the inequality is aggravated when the case presents a white defendant and a non-white victim, where prosecutors ask for the death penalty thirteen percent of the time.[231]

223. *E.g.*, Mishi Faruqee, *Facing Race and the Death Penalty*, ACLU (Dec. 11, 2012), https://www.aclu-wa.org/blog/facing-race-and-death-penalty [https://perma.cc/ND7J-2SRT] (covering efforts made in Washington to promote racial equality, including abolishing the death penalty).

224. *See id.* ("Notably, the report recognizes ending the death penalty is one change that our state representatives should make to advance the goal of racial justice in").

225. *See id.* (comparing Washington proportions to those of the nation).

226. *See id.* (clarifying that this disparity cannot be justly explained).

227. *See id.* (explaining that Washington has only one "death eligible" crime—first degree aggravated murder).

228. *Id*.

229. *See id.* (examining whether prosecutors are more likely to seek, and juries more likely to impost, the death penalty in cases involving black defendants).

230. *Id.*

231. *See id.* (showing the failure of contemporary death penalty statutes—designed to reduce arbitrariness and discrimination in capital sentencing).

In the state of Washington, prosecutors statistically appear to seek the death penalty fairly—regardless of race—; however, juries still exhibit racial bias when imposing the death penalty against African American defendants.[232]

> In a recent dissenting opinion for the Washington Supreme Court, Justice Charles Wiggins expressed concern regarding this statistical trend. Judge Wiggins opinion presented an analysis of seventy-three cases in which prosecutors sought the death penalty and found that juries ultimately imposed the death penalty in 40% of cases involving white defendants and in 62% of cases involving African American defendants. In addition, Judge Wiggins pointed out that African American defendants sentenced to death on average had less aggravating factors than white defendants; and all but one of the African American defendants had a single victim while most of the white defendants had multiple victims. Significantly, Judge Wiggins asserted that the racial disparities in death penalty cases may be rooted in unconscious bias: I emphasize that this opinion does not accuse anyone in the criminal justice system of racism, whether they are police, prosecutors, defense counsel, witnesses, jurors, or judges. The African American experience in this country has been complex and frequently tragic. Attitudes about race can be so deeply buried in our individual and collective unconscious that it is difficult to evaluate their effect on our judgments or the judgments of others. The point is not that African-Americans have been deliberately treated differently with respect to the death penalty; the point is that they have in fact been treated differently.[233]

While the racial disparities reflected in *Facing Race* are only a reflection of one state, there are racial disparities across America.[234] The explanation is not that people of color are committing more crimes—it is that the criminal justice system is failing them.[235] *Facing Race* demonstrates that we need to end the death penalty and alter every other

232. *See id.* (noting that "juries are more likely to impose the death penalty for African American defendants").

233. *See id.* (quoting State v. Davis, 175 Wn.2d 287 (Sept. 20, 2012) (Wiggins, J. concurring in dissent).

234. *See id.* ("The racial disparities in death penalty cases in Washington reflect the racial disparities that exist at every stage of the criminal justice system").

235. *See id.* (debunking the misconception that African Americans are sentenced to death more often because they commit deserving crimes more often).

stage of the American criminal justice system that disproportionally affects people of color.[236]

Studies and reports prove that America is nowhere near achieving racial justice but repealing the death penalty can be a start to a better future for the criminal justice system.[237]

> Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death.[238]

"The death penalty has always been, and continues to be, disproportionately wielded against Black people."[239] To make matters worse, the Violent Crime Control and Law Enforcement Act of 1994, also known as the crime bill, deemed sixty new offenses worthy of the death penalty.[240] Following the crime bill, several smaller jurisdictions disproportionately applied the death penalty—causing the bill's unequal impact.[241] In conclusion, despite new legislation being passed, race disparities play a role in who lives and who dies.[242]

236. *See id.* (revealing how racial disparities affect society generally and influence who is determined to die).

237. *See generally Deep Divisions in Americans' Views of Nation's Racial History—and How to Address It*, PEW RSCH. CTR. (Aug. 12, 2021), https://www.pewresearch.org/politics/2021/08/12/deep-divisions-in-americans-views-of-nations-racial-history-and-how-to-address-it/ [https://perma.cc/33XX-ZKM8] (reporting divided national perception of racial history makes us no closer to addressing racial inequality).

238. *Race and the Death Penalty*, NAT'L. ASS'N. OF CRIM. DEF. LAWS (Nov. 18, 2021), https://www.nacdl.org/Content/Race-and-the-Death-Penalty [https://perma.cc/RZ6G-ZX6G] (quoting Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J. dissenting)).

239. *See id.* (emphasizing the death row population is over 41% Black, even though Black people make up about 13% of the United States).

240. *See id.*(resulting in 74% of defendants given death penalty recommendations by federal prosecutors being people of color in the five years post-passage of the crime bill, whereas 44% of these defendants were Black).

241. *See id.* ("More than a third [of the individuals on death row in the years after the implementation of the crime bill] are from Texas, Virginia, and the Eastern District of Missouri, and in these jurisdictions, more than 90% of individuals on death row are people of color").

242. *See id.* (studying criminal justice disparities at the state and local levels and the impact of racism on death penalty outcomes. A 2017 study in Oklahoma found that "cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with non-white male victims." A 2014 study in Washington State found that jurors are three times more likely to

B. Supporters and opponents of the death penalty agree its application is racially discriminatory and patterns of racial discrimination persist because of the United States Criminal Justice System.

Since its origin, the death penalty has created significant debate—not only about the morals of enforcing it, but the effect it has on society.[243] While there have been multiple attempts to abolish capital punishment, each has been unsuccessful.[244] Although many countries have abolished the death penalty, far too many continue this inhumane practice.[245] For example, thirty-five countries still make available the death penalty for drug-related offenses.[246]

The current death penalty processes and procedures are racially discriminatory.[247] Efforts have been made to decrease arbitrary and discriminatory impositions of the death penalty.[248] However, these

recommend a death sentence for a black defendant than for a white defendant in a similar case. In Louisiana, the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black. A 2006 study on 600 death-eligible cases from Philadelphia between 1979 and 1999 found that "in cases involving a White victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death." A 2005 study in California found that homicides with white victims are 3.7 times as likely to result in the death penalty as homicides with African American victims and 4.73 times as likely as homicides with Hispanic victims).

243. *See Arguments for and Against Capital Punishment*, *supra* note 8 (arguing for and against capital punishment via moral, utilitarian, and practical thought processes).

244. *See The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline [https://perma.cc/T3P5-VLGN] (illustrating the history of the death penalty, including failed abolition efforts).

245. *See Amnesty International: Mixed Global Trends on Death Penalty As More Nations Abolish and Record Few Conduct Executions, But Extreme Practices, Widespread Secrecy Reported in Outlier Nations*, DEATH PENALTY INFO. CTR. (Jun. 6, 2022), https://deathpenaltyinfo.org/news/amnesty-international-mixed-global-trends-on-death-penalty-as-more-nations-abolish-and-record-few-conduct-executions-but-extreme-practices-widespread-secrecy-reported-in-outlier-nations [https://perma.cc/V3BX-VPVN] ("More countries abandoned the death penalty and a record low number carried it out, but extreme practices in a few outlier nations caused global executions to rise in 2021 . . .").

246. *See Death Penalty for Drug Offences: Global Review 2020*, HARM REDUCTION INT'L, https://www.hri.global/death-penalty-2020 [https://perma.cc/FKR8-HWWK] (reporting that there were at least 3,000 people sitting on death row worldwide for drug-related offenses as of 2020).

247. *See* Julie Vitale, *The Racial Justice Act: Its Origin and State Interpretations*, Interrogating Justice (Mar. 9, 2021), https://interrogatingjustice.org/death-sentences/the-racial-justice-act-its-origin-and-state-interpretations/ [https://perma.cc/7Y6T-GVT4] ("One way racism shows up today is through criminal cases involving the death penalty.").

248. *See generally* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post* Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*,

reformations have garnished support for the death penalty rather than create a following for its abolition—particularly in the South.[249]individual states.[250] Opponents of these RJAs argue that legislatures should not enact them because it would require abolishing the death penalty.[251] In other words, these opponents imply that we cannot have a death penalty system that does not systematically discriminate by race.[252]

Alternatively, supporters of the enactment of RJAs provide various steps that can be taken to effectively deal with racial discrimination in imposing the death penalty.[253] These steps include proving a connection between the empirical data and particular cases that illustrate racism in death penalty implementation.[254] For example, in a rare Georgia state capital offense case, the defendant, William Hance, did not face an all-white jury.[255] Instead, one African American—Gayle Lewis Daniels—sat on the jury.[256] In reporting on the jury's vote however, the foreman

83 CORNELL L. REV. 1638 (1998) (analyzing the *Furman* decision and its statistical impact on the existence of discrimination in imposing the American death penalty).

249. *See id.* (stating the surprising result of the Supreme Court decision Furman v. Georgia—requiring certain procedures to be followed in death penalty cases to insulate from discrimination—: generating legislative support for the death penalty, particularly in the South).

250. *See generally* Vitale, *supra* note 251(explaining that a Racial Justice Act usually "allow[s] for evidence of racism in a judicial system to be used in a defendant's [death penalty] case").

251. *Cf. id.* ("[RJA opponents] believed that the act was a way to backhandedly end the death penalty.").

252. *Cf. id.* ("When our justice system applies the law equally only for some, it is an injustice to all. Systematic inequality persists because even if all actors play by the rules, the system itself has not accounted for unequal and unjust outcomes.").

253. *See* Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 790-92 (1990-1991) (suggesting the death row inmate could have the burden to demonstrate racial discrimination, the state could then either attack the credibility and accuracy of that demonstration or rebut that evidence).

254. *See generally* Baldus ET AL., *supra* note 252, at 1731–33 (providing examples of Petitioners coming to the Court with constitutional challenges to their death sentence based upon empirical data).

255. *See* Hance v. State, 268 S.E.2d 339 (Ga. 1980) (reciting the factual background); *see also* Bill Rankin, Motion: Prosecutors Exclude Black Jurors in Seven Death-Penalty Cases, Atlanta J.-Const. (Mar. 19, 2018), https://www.ajc.com/news/local/motion-prosecutors-excluded-black-jurors-seven-death-penalty-cases/dvj9X4fW4Rtz8hFDOgoQpJ/ [https://perma.cc/46W6-L7DT] (theorizing as to why Hance v. State did not involve an all-white jury).

256. *See* Bob Herbert, *The 'Perfect Punishment' How a Juror was Stampeded to Vote for Death*, BALT. SUN (Mar. 28, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-03-29-

fallaciously represented that the jury had voted unanimously for the death penalty.[257] When the judge polled the jury, Daniels was too afraid to contradict the foreman.[258] Over a decade later, Daniels came forward with the truthful events that occurred in the jury's deliberation—shortly before Hance's scheduled execution.[259] Hance's counsel tried to secure relief based on these overwhelming revelations; however, the state denied clemency and consequently Georgia executed him.[260]

The United States criminal justice system is the largest in the world. At yearend 2015, over 6.7 million individuals were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails. The U.S. is a world leader in its rate of incarceration, dwarfing the rate of nearly every other nation. Such broad statistics mask the racial disparity that pervades the U.S. criminal justice system, and for African Americans in particular. African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every six Latinos—compared to one of every seventeen white boys. Racial and ethnic disparities among women are less substantial than among men but remain prevalent. The source of such disparities is deeper and more systemic than explicit racial discrimination. The United States in effect operates two distinct criminal justice systems: one for wealthy people and another

1994088197-story.html [https://perma.cc/6HC7-R3FC] (reporting the difficulties faced by the sole African American juror).

257. *See id.* (providing Ms. Daniels' testimony as to the pressure she received from the other jurors to vote for the death sentence and her refusal to further participate in jury voting).

258. *See id.* ("Afraid that she could be charged with perjury for having said that she could vote for a death sentence, and afraid she would get in trouble for not participating in the jury's final votes, Ms. Daniels said yes—'just like all the others'—when the jurors were polled on their verdict.").

259. *See* Jill Smolowe, *Doubts on Death Row*, TIME (Apr. 11, 1994), https://content.time.com/time/subscriber/article/0,33009,980479,00.html [https://perma.cc/CWB8GUVC] (reporting Daniels swore in an affidavit that "she did not vote for execution because she 'did not believe ((Hance)) knew what he was doing at the time of his crimes.'"; whereas such an account was corroborated by other jurors).

260. *See* Peter Applebome, *Georgia Executes Murderer After Brief Stay from Court*, N.Y. TIMES, Apr. 1, 1994, at Al4 (executing Hance in 1994) (stating the Georgia Board of Pardons and Paroles denied the clemency petition, partly because "[t]he law in this country has long been a juror cannot come along after the rendition of a verdict and challenge [it] . . .").

for poor people and people of color. The wealthy can access a vigorous adversary system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model due to a number of factors, each of which contributes to the overrepresentation of such individuals in the system. As former Georgetown Law Professor David Cole states in his book No Equal Justice,

> These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional rights in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black.[261]

III. SOLUTION

A. Current laws fail to provide a remedy for the racist administration of the death penalty, and they need to be changed.

Under our current laws, proof of a disparate impact is generally insufficient to demonstrate the denial of equal protection.[262] If a law is facially neutral—meaning that it does not, in its text, distinguish its effects on the basis of race— there must be a discriminatory purpose behind the law for it to constitute a violation of equal protection.[263]

261. *Report to United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/XX44-E8WF].

262. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

263. *See id.* ("[T]he fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. 'A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by inequal

While this is a heightened burden to satisfy, cases have shown ways of demonstrating impermissible intent.[264] This is certainly not a new or novel proposition, but we must find a way to implement these findings in our current laws.[265]

For example, in *Arlington Heights v. Metropolitan Development Corporation*, the Supreme Court expressly recognized that a statistical pattern may sometimes be so stark that it leaves no other explanation.[266] But *Arlington Heights* was not the only case to recognize this.[267] For instance, in *Mayor of Philadelphia v. Educational Equality League*, the Court flatly declared: "Statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination . . ."[268] Moreover, in *Bazemore v. Friday*, the Court concluded that statistical evidence could be used to prove discriminatory purpose and an equal protection violation by the North Carolina Agricultural Extension Service in setting salaries for black and white employees.[269]

> Therefore, in light of the statistics proving racism in the administration of the death penalty, it was to be expected that the Supreme Court would be asked to find that there is a denial of equal protection if the defendant can show a statistical pattern so stark as to leave no other explanation than that the death penalty was administered in a racially discriminatory manner However, in *McCleskey v. Kemp*, the Supreme

application of the law to such an extent as to show intentional discrimination.'") (*quoting* Akins v. Texas, 325 U.S. 398, 403–04 (1945)).

264. *E.g., id.* (forbidding public officials from enacting intentionally discriminating policies that are not in furtherance of a compelling governmental interest).

265. *See id.* at 229 (challenging a violation of the Equal Protection Clause and of Title VII of the Civil Rights Act of 1964).

266. *See* Arlington Heights v. Metro. Dev. Co., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

267. *E.g.*, Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620 (1974) (reviewing the procedural history below—where both the Supreme Court and Court of Appeals below relied heavily on statistical data to arrive at their conclusion as to whether racial discrimination was present).

268. *Educational Equality League*, 415 U.S. at 620.

269. *See* Bazemore v. Friday, 474 U.S. 385, 387 (1986) (finding error in the lower court's determination that statistical evidence was unacceptable evidence of discrimination); *see also* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 526 (1995) (reviewing the history of the role of statistical proof in equal protection challenges).

> Court, by a five to four decision, held that statistics are insufficient to prove race discrimination in death penalty sentence. . . . In other words, despite the stark statistical pattern and a study that controlled for every other variable, the Court still was unwilling to find that the data proved racial discrimination.[270]

Following *McCleskey*, a memorandum by Justice a was made public.[271] This memorandum written to Justice Thurgood Marshall revealed that "Scalia accepted that the statistics proved discrimination."[272] Scalia's memorandum stated:

> I plan to join Lewis's opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately to make these points, but not until I see the dissent.[273]

This memorandum gives insight into Justice Scalia's belief that the Baldus study reveals the racial discrimination asserted by the death penalty.[274] Justice Scalia also reveals his belief that implicit racial bias affects every stage of the sentencing process.[275] But despite Justice

270. Chemerinsky, *supra* note 274, at 526–27.

271. *See id.* (describing how Justice Scalia's memorandum was found among the papers provided to the Library of Congress after Thurgood Marshall's death).

272. *See id.* at 526 (citing Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 14 MERCER L. REV. 999 (1994)).

273. *See id.* at 528.

274. *See* Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 Mercer L. Rev. 1035, 1088 n.183 (1994) (noting Justice Scalia's potential faith in the Baldus study); *see also* Chemerinsky, *supra* note 274, at 528 (deconstructing Justice Scalia's beliefs regarding statistical studies being used to prove racial discrimination in the administration of the death penalty).

275. *See* Dorin, *supra* note 274, at 1067 ("Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones] is real, acknowledged in the decisions of this court, and ineradicable, I cannot

Scalia's acknowledgement of this systemic issue's presence, he found no denial of equal protection in McCleskey.[276] This makes it evident that regardless of what proof Justice Scalia would have received; he still would have denied finding a denial of equal protection.[277] The implications of this are that

> in *McCleskey,* five of the Justices – the four dissenting Justices and Justice Scalia – believed that McCleskey successfully proved racial bias in the imposition of the death penalty. Nonetheless, McCleskey's sentence was affirmed and ultimately, he was executed.[278]

After *McCleskey*, proof of racial disparities through statistical data was insufficient to shift the burden to the prosecutor to provide a non-racial explanation for the effects.[279] This leaves defendants with only one option to challenge a death sentence as a denial of equal protection: by providing "specific evidence that the jury in his or her case consciously used race as a basis for its decision-making."[280] Thus,

> It will be extremely difficult for defendants to successfully challenge a death sentence on equal protection grounds. Even though a majority of the Justices on the Supreme Court have recognized that racism seriously infects the capital process, current law simply fails to provide any remedy.[281]

Thus, under our current laws, proof of a disparate impact is insufficient to demonstrate the denial of equal protection; therefore, we must alter and adjust the law to help decrease the prevalence of racial disparities.[282]

honestly say that all I need is more proof.") (citing Justice Scalia's memorandum to Justice Marshall).

276. *See* McCleskey v. Kemp, 481 U.S. 279, 282 (1987) (stating Justice Scalia joined the majority opinion of the Court, delivered by Justice Powell); *see also* Chemerinsky, *supra* note 274, at 528 (noting Justice Scalia's recognition that "unconscious racism infects the capital sentencing process. But he nonetheless concludes that there is not a denial of equal protection even though statistics prove racism and even though he believes that the process is inherently racist.").

277. *See* Chemerinsky, *supra* note 274, at 528 ("Justice Scalia stated that, no matter what the statistical proof, he would not find a denial of equal protection.").

278. *Id.*

279. *See id.* at 529 (compounding the impact of Scalia's findings in *McCleskey*).

280. *Id*.

281. *Id*.

282. *Id*.

Racially discriminatory administration of the death penalty will continue to pervade our criminal justice system until the laws are changed.[283]

B. The Racial Justice Act needs to be reinstated because it was the start to the change we need in America.

The enactment of Racial Justice Acts purported to serve the purpose of preventing racial biases in death penalty cases.[284] RJAs like the one enacted in North Carolina in 2009, "would allow death row inmates to bring challenges to their death sentences based on statistics showing that racial bias was a factor at the time of their trial."[285] If the inmate prevailed in showing racial bias, "his or her death sentence would be converted to life in prison without parole," but the RJA was not long—the law lasted merely one legislative session and was unfortunately repealed in 2011.[286] Perhaps, we may never.

During the two years the RJA was applied, researchers from Michigan State University found statewide discrimination across North Carolina.[287] This supported death penalty inmates' RJA applications.[288]

> [T]he mass of evidence of discrimination uncovered by defendants—underscores the need for the law, not its repeal. When the evidence shows that prosecutors in almost every county in North Carolina are striking qualified African-American citizens from jury service based on their race, it is clear that our juridical system needs reform.[289]

North Carolina is just one of many states in America that fails to implement the necessary civil rights laws to prevent these injustices from continuing.[290] The RJA was a step in the right direction to reform racial

283. *Id*.

284. *See* Stubbs, *supra* note 12 (intending to reform racial discrimination in that state's death penalty cases).

285. *See id.* (prohibiting seeking or imposing the death penalty on the basis of race).

286. *Id.*

287. *See id.* ("From the west to the east, in cities and in rural counties, and in cases with black and white defendants alike, prosecutors overwhelmingly discriminated against qualified African-American citizens during jury selection, rejecting qualified African American jurors at a far greater rate than qualified white jurors.").

288. *See id.* (helping two death row inmates' RJA applications to be confirmed for hearing in early 2012).

289. *Id*.

290. *See generally In New Round of Racial Justice Act Litigation, North Carolina Judge Orders Prosecutors to Disclose Data on Decades of Jury Strikes*, Death Penalty Info. Ctr., (May

discrimination.[291] The RJA can give defendants who are discriminated against the fairness they are rightfully owed as American citizens.[292] Our current laws have failed to provide justice for all.[293]

CONCLUSION

Minorities are vastly overrepresented in death penalty sentencing and are unjustly discriminated against in the United States every single day.[294] Racial discrimination in the implementation of the death penalty has been a problem for nearly a century.[295] Despite various attempts to afford justice for all—the current laws in America have failed to preserve and protect the civil rights of its minorities.[296]

How can we be expected to respect a criminal justice system that constantly fails us?[297] How can we justify the continued mistreatment of African Americans in America today?[298] Slavery ended years ago—has

28, 2021), https://deathpenaltyinfo.org/news/in-new-round-of-racial-justice-act-litigation-north-carolina-judge-orders-prosecutors-to-disclose-data-on-decades-of-jury-strikes [https://perma.cc/C5HM-7AHC] ("The Racial Justice Act is a really a unique law . . . [T]here aren't very many states that have the courage to enact something like [it] that's really going to take a hard look at our criminal punishment system in our most serious cases and deal with the history of racism and the death penalty.") (quoting Gretchen Engel, executive director of the Center for Death Penalty Litigation).

291. *See generally* Stubbs, *supra* note 12 (describing the positive reactions to the passage of North Carolina's RJA: research revealing statewide discrimination and the majority of death row inmates seeking relief pursuant to the RJA's remedies).

292. *See In New Round of Racial Justice Act Litigation, North Carolina Judge Orders Prosecutors to Disclose Data on Decades of Jury Strikes*, *supra* note 297 (describing the RJA as a "promising piece of legislation" capable of fixing centuries of race discrimination).

293. *Cf. id.* (asserting the death penalty is wrongfully biased).

294. *See* David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 8-9 (1999) (showing racial disparities not just in isolated instances, but in many state studies over many years); *see also* NDULUE, *supra* note 2, at 28 ("Throughout the modern era of capital punishment, people of color have been overrepresented on death row").

295. *Cf.* Baldus ET AL., *supra* note 252, at 1643("Racial discrimination and the death penalty has been a matter of scholarly interest since the 1930s.").

296. *See generally* Marc Mauer, Addressing Racial Disparities in Incarceration, PRISON J. 87 (Supp. to 91(3)) (Aug. 19, 2011) (compiling various studies and statistics to illuminate the many avenues of racial disparity in the administration of the American death penalty).

297. *See* Baldus ET AL., *supra* note 252, at 1643 (noting that the American legal system has been on notice of problems with racial discrimination and the death penalty since the 1960s).

298. *Cf. id.* ("The potential influence of race in the administration of the death penalty takes root in the broad exercise of discretion that state laws grant prosecutors and juries. State laws give prosecutors and juries the power to treat similarly situated "death-eligible" defendants different because of either their race or the race of the victim in the case.").

a new form of controlling African Americans emerged?[299] It seems that our criminal justice system is now used as a means to control minorities.[300] Our times are just as Sister Prejean, a death penalty abolitionist, said,

> [W]hen people of color are killed in the inner city, when homeless people are killed, when the "nobodies" are killed, district attorneys do not seek to avenge their deaths. Black, Hispanic, or poor families who have a loved one murdered not only don't expect the district attorney's office to pursue the death penalty-which of course, is both costly and time consuming-but are surprised when the case is prosecuted at all.[301]

So now, I ask you: when are we going to end this cycle of hate?[302] What are we going to do so there is finally justice for all?[303]

299. *Cf. In New Round of Racial Justice Act Litigation, North Carolina Judge Orders Prosecutors to Disclose Data on Decades of Jury Strikes*, *supra* note 297 (asking "[h]ow do we undo 300, 400 years of race discrimination?"—suggesting the answer to be the passage of RJAs).

300. *See generally* David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 8 (1999) (comparing the treatment of whites and racial minorities throughout various points in the criminal justice system).

301. Sister Helen Prejean, *Death Penalty, Would Jesus Pull the Switch?*, DOCEST, https://docest.com/would-jesus-pull-the-switch-sister-helen-prejean [https://perma.cc/44YY-54FB].

302. *E.g.*, Marc Mauer, *Addressing Racial Disparities in Incarceration*, PRISON J. 87, 96 (Supp. to 91(3)) (Aug. 19, 2011) (describing the disproportional treatment of defendants and inmates in the American criminal justice system and arguing that such evidence reduces its legitimacy).

303. *Cf. id.* (proposing several options for policy makers to consider in reducing the disproportionate numbers of incarcerated minorities while still ensuring public safety).