

A MODEL STATE RACIAL JUSTICE ACT:
FIGHTING RACIAL BIAS WITHOUT KILLING THE DEATH PENALTY

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INTRODUCTION

Although most Americans report that they are comfortable with the death penalty,¹ presumably they do not support a death sentencing system in which the color of a defendant's skin significantly influences whether a defendant is sentenced to die.² Yet, throughout most of the country, courts limit how defendants facing death sentences (capital defendants) can use statistical evidence to show that racial bias affected their sentences. For example, many capital defendants cannot use statistical evidence to demonstrate their sentences were significantly affected by racial bias—that is, empirical evidence showing that blacks are sentenced to death more frequently than whites who committed similar offenses.³

Resistance to this important evidence persists despite research showing that overt—or “explicit”—racism continues to affect capital sentencing.⁴ Research also shows that race can influence decision making in more subtle ways, which may influence sentencing outcomes, most notably, if—or perhaps, when—implicit biases shape how

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¹ *Death Penalty Poll*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 14, 2013).

² At least one Supreme Court Justice has asserted that if a defendant were sentenced to death because he was black, it would be per se unconstitutional. *See Furman v. Georgia*, 408 U.S. 238, 240 (1972) (Douglas, J., concurring) (voting to vacate a death sentence on the belief that the death penalty violates the Eighth and Fourteenth Amendments).

³ *McCleskey v. Kemp*, 481 U.S. 279, 294-97 (1987) (explaining that only statistical evidence providing “exceptionally clear proof” can support a claim of racial discrimination brought under the Equal Protection Clause). *But see* Campbell Robertson, *Bias Law Used to Move a Man Off Death Row*, N.Y. TIMES, Apr. 21, 2012, at A1, available at <http://www.nytimes.com/2012/04/21/us/north-carolina-law-used-to-set-aside-a-death-sentence.html> (discussing the controversial North Carolina Racial Justice Act which allows a death row inmate to introduce statistical evidence to demonstrate that racial bias influenced his or her sentence).

⁴ James D. Unnever & Francis T. Cullen, *The Racial Divide in Support for the Death Penalty: Does White Racism Matter?*, 85 SOC. FORCES 1281, 1281 (2007).

prosecutors, judges, and jurors view individual defendants and their crimes.⁵ This research suggests that many Americans continue to hold implicit racial biases against blacks, even though they might not self-report that they hold any biases toward blacks.⁶ Although implicit bias may be a product of automatic or “unintentional” cognitive processes, the impact that implicit prejudicial decision making can have on the administration of criminal justice systems may be as devastating to defendants as explicit racism.⁷ In fact, because implicit bias is harder to detect and may be more prevalent today than in the past, it may have an even more profound and pernicious effect today than overt racism.⁸ Research has also found that racial disparities exist with respect to charging decisions, convictions, and death sentences.⁹

The Supreme Court acknowledged that biased decision making may affect sentencing in its landmark *McCleskey* decision in 1987.¹⁰ But the Court suggested that the legislature, not the judiciary, was the proper branch to engineer remedies to these systemic problems.¹¹ To their credit, Kentucky¹² and North Carolina¹³ have accepted the challenge, but their experiences have been tarnished for various reasons. Kentucky’s law has provided limited protections for capital defendants because the law applies only to prosecutorial charging decisions, and it requires that the defendant must raise the claim prior to trial.¹⁴ Since its enactment, the Kentucky Racial Justice Act has not led to a

⁵ See Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 84-90 (2009).

⁶ Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 599-603 (2009).

⁷ *Id.* at 605-06, 612-13, 631-32.

⁸ *Id.*

⁹ Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211, 228-30 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

¹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (“Because of the risk that the factor of race may enter the criminal justice process, we have engaged in unceasing efforts to eradicate racial prejudice from our criminal justice system.” (internal quotation marks omitted)).

¹¹ *Id.* at 319.

¹² Kentucky Racial Justice Act of 1998, KY. REV. STAT. ANN. § 532.300 (West 2013).

¹³ North Carolina Racial Justice Act of 2009, N.C. GEN. STAT. § 15A-2010 to -2012 (2011) (amended 2012) (repealed 2013).

¹⁴ § 532.300(1), (4).

great deal of litigation.¹⁵ Meanwhile, critics argue that North Carolina's statute provides protections that are too defendant-friendly.¹⁶ North Carolina's General Assembly amended the law significantly in 2012, rendering the law significantly less defendant-friendly and more prosecution-friendly.¹⁷ Despite this amendment, critics continued to argue that the law effectively abolished the death penalty.¹⁸ It is too early to tell whether these critics were right, however, because claims under the North Carolina Racial Justice Act have not been litigated sufficiently to determine the law's impact; to date, courts have issued orders on motions under the new law in only two cases.¹⁹ And the law will not be litigated further because it was effectively repealed in June 2013.²⁰

In sum, state legislation has varied from providing (1) strong support for defendants (North Carolina 2009 Racial Justice Act),²¹ to (2) moderately strong support (North Carolina 2012 Amended Act),²² to (3) apparently very little support at all (Kentucky 1998 Racial Justice Act).²³ Some might say that all three of these state efforts have failed. They might say that, in light of the states' experiences, state legislatures should quit trying to remove the effect of racial bias in capital sentencing.

However, this reaction would be like "throwing out the baby with the bathwater." A better legislative reaction would be to refine the statutes in an effort to remove any vestiges of racial bias from death

¹⁵ Alex Lesman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project*, 13 J.L. & POL'Y 359, 386 (2005).

¹⁶ *Editorial: Paired – Racial Justice Act Repeal Won't Erase Courtroom Bias*, FAYETTEVILLE OBSERVER (Mar. 20, 2013, 12:00 AM), <http://fayobserver.com/articles/2013/03/20/1244438?sac=fo.opinion> [hereinafter *Editorial*] (discussing the argument that the law indirectly abolishes the death penalty).

¹⁷ See *infra* Part II.B.

¹⁸ See, e.g., Matt Smith, 'Racial Justice Act' Repealed in North Carolina, CNN (June 21, 2013, 3:48 AM), <http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html> ("The state's district attorneys are nearly unanimous in their bipartisan conclusion that the Racial Justice Act created a judicial loophole to avoid the death penalty and not a path to justice." (quoting North Carolina Governor Pat McCrory)).

¹⁹ See *infra* Part II.B.6. The two litigated cases are *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), and *State v. Golphin*, No. 97 CRS 47314-15 (N.C. Super. Ct. Dec. 13, 2012).

²⁰ Smith, *supra* note 18.

²¹ See *infra* Part II.B.

²² See *infra* Part II.B.

²³ See *infra* Part II.A.

sentencing. This is no easy task, but the states' experiences suggest that an effectively calibrated Racial Justice Act is possible. If North Carolina's Racial Justice Act was too defendant-friendly, and Kentucky's was too prosecutor-friendly, then perhaps a legislature can find a moderate solution. This Article proposes that states should continue to pursue moderate legislation that would allow capital defendants to use statistical evidence to show that their death sentences were affected by racial bias.

This Article will review two unsuccessful attempts to permit statistical evidence of racial discrimination in death sentencing at the federal level, as well as two successful attempts to permit this evidence at the state level—in Kentucky²⁴ and North Carolina.²⁵ It will analyze the common key features of each piece of legislation. These key features are: (1) types of conduct that may serve as a basis for a claim of discrimination, (2) burden of proof, (3) geographic regions that the defendant may use to show historical patterns of racial discrimination, (4) time limitations on the pool of cases defendants may use to show racial discrimination, (5) races that may be considered to show discrimination, and (6) overall effectiveness of the law. Based on these legislative experiences, this Article will argue that states should continue to pursue legislation that scrubs the death penalty to remove as many contaminants of racial bias as possible. Lastly, this Article will propose A Model Racial Justice Act, with analysis of the proposed Act's key provisions.

I. FEDERAL FAILURES: ATTEMPTS TO USE STATISTICAL EVIDENCE OF RACIAL DISPARITIES IN DEATH PENALTY SENTENCING AT THE FEDERAL LEVEL

A. *McCleskey v. Kemp*

In *McCleskey v. Kemp*,²⁶ the Supreme Court of the United States rejected statistical evidence that purported to show capital sentencing disparities based on race.²⁷ Warren McCleskey had been convicted of armed robbery and murder.²⁸ After he was convicted and sentenced

²⁴ KY. REV. STAT. ANN. § 532.300 (West 2013).

²⁵ N.C. GEN. STAT. § 15A-2010 to -2012 (2011).

²⁶ 481 U.S. 279 (1987).

²⁷ *Id.* at 286-87.

²⁸ *Id.* at 279.

to death, he argued that the Georgia capital sentencing system was corrupted by racism.²⁹ He relied on a sophisticated statistical study to argue that the Georgia capital sentencing system violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution.³⁰ The study, known as the Baldus study,³¹ exposed severe racial disparities in the Georgia capital punishment system.³² Not only were blacks more likely than whites to be sentenced to the death penalty, but also defendants of any race were more likely to be sentenced to death when their victim was white.³³ These disparities were especially stark in cases involving an African-American defendant and a white victim.³⁴

The Court rejected McCleskey's claim, finding that statistical studies could not prove an Equal Protection claim unless the studies showed "exceptionally clear proof" of discrimination.³⁵ The Court explained that "exceptionally clear proof" was necessary in the death penalty context because (1) capital cases involve too many independent variables to create reliable statistical evidence, (2) the state does not have a fair opportunity to rebut claims of discrimination because jurors cannot testify about how they reached their verdict and prosecutors should not be asked to explain their decisions years after the fact, and (3) discretion is a critical part of the criminal justice system.³⁶ This standard functionally blocks virtually all statistical evidence.³⁷

In his dissent, Justice Brennan famously accused the Justices in the majority of being unwilling to hold in favor of McCleskey because they were concerned about flooding the courts with similar challenges brought by other defendants:

The Court next states that its unwillingness to regard petitioner's evidence [showing statistical evidence of racial discrimination in death

²⁹ *Id.*

³⁰ *Id.*

³¹ David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

³² 481 U.S. at 286-87 (discussing Baldus, et al., *supra* note 31.)

³³ *Id.* at 286.

³⁴ *Id.* at 286-87.

³⁵ *Id.* at 297, 313.

³⁶ *Id.* at 294-97.

³⁷ See John H. Blume & Sheri Lynn Johnson, *Unholy Parallels between McCleskey v. Kemp and Plessy v. Ferguson: Why McCleskey (Still) Matters*, 10 OHIO ST. J. CRIM. L. 37, 43-44 (2012).

penalty sentencing] as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.³⁸

As it turns out, Justice Brennan may have been right. The Justices in the majority may have feared that by holding in favor of McCleskey, they would unravel the entire criminal justice system. During deliberations of the case, Justice Powell wrote the following note to his law clerk expressing concerns about opening the floodgates to discrimination litigation: "What if one accepts the study as reflecting sound statistical analysis? Would this require that no blacks be sentenced to death where victim was white?"³⁹ Perhaps the Justices in the majority of *McCleskey* did not want to look at statistics because they were afraid that they might find a pervasive influence of racial bias on death sentencing. The Justices would be forced to confront this influence and consider a remedy for the defendants who suffered from racial discrimination.

Today, federal law still sets a high—if not insurmountable—bar for defendants hoping to use statistical evidence to show racial disparities.⁴⁰ To prove an Equal Protection Clause violation in the context of capital punishment, the petitioner must show that (1) the state acted with purposeful discrimination, (2) the state's action had a discriminatory effect on the petitioner, and (3) that the actors in the petitioner's specific case acted with a discriminatory purpose.⁴¹ "Thus, to prevail . . . , [a petitioner] must prove that the decision-makers in *his* case acted with discriminatory purpose."⁴² The Court explained that a "discriminatory purpose" is "more than intent as volition or intent as awareness of consequences."⁴³ The petitioner's proof must be exceptionally clear.⁴⁴ But if there is any legitimate reason for the state's

³⁸ 481 U.S. at 339 (Brennan, J., dissenting) (citations omitted).

³⁹ Supplemental Statement to Preliminary Memo (no date provided), at 1, in *McCleskey v. Kemp* Basic File 16, 17, available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

⁴⁰ Alec T. Swafford, Note, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 163 (2012).

⁴¹ *Id.*

⁴² *McCleskey*, 481 U.S. at 292 (emphasis added).

⁴³ *Id.* at 298.

⁴⁴ *Id.* at 297.

action, the court will not infer that the state acted with a discriminatory purpose.⁴⁵

However, the Court provided a glimmer of hope for future defendants seeking to use statistical evidence of racial bias. The Court expressly invited legislatures to reconsider how courts should treat claims of racial discrimination supported by statistics:

McCleskey's arguments are best presented to the legislative bodies . . . It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."⁴⁶

Over twenty-five years later, Congress and state legislatures have accepted the invitation by working to change the effect of the *McCleskey* decision. However, legislatures still struggle with the repercussions of post-conviction challenges using evidence of racial discrimination.⁴⁷ Although some commentators are concerned about giving too much credit to statistics,⁴⁸ others have labeled *McCleskey* as one of the worst decisions since *Dred Scott* and *Plessy v. Ferguson*.⁴⁹ Later in life, when Justice Powell's biographer asked him whether he would change his vote in any case if he could, he replied, "Yes, *McCleskey v. Kemp*."⁵⁰

B. *The Proposed Federal Racial Justice Act*

After the Court announced its decision in *McCleskey*, members of Congress responded quickly. Representative John Conyers of Michigan and Senator Edward Kennedy of Massachusetts began working on legislation that would address the problems of racial dis-

⁴⁵ See *id.* at 299 n.21.

⁴⁶ *Id.* at 319 (citations omitted).

⁴⁷ See *infra* Part II.

⁴⁸ See Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES, Apr. 29, 2008, at A10, available at <http://www.nytimes.com/2008/04/29/us/29bar.html>.

⁴⁹ See Blume & Johnson, *supra* note 37.

⁵⁰ Liptak, *supra* note 48.

crimination that were exposed in *McCleskey*.⁵¹ These deliberations created an Act that would have allowed defendants to present evidence that race played a statistically significant role in capital sentencing in the defendant's particular jurisdiction.⁵² Defendants could prevail on a claim of racial discrimination if they could show that race played a role in sentencing based on the defendant's race or the victim's race.⁵³ In 1994, the House passed the bill,⁵⁴ which is printed in the Appendix of this Article. The bill passed during the national debate over President Clinton's crime legislation, which expanded the federal death penalty and increased penalties for some non-capital crimes.⁵⁵ But during a heated battle in Conference, President Clinton—a death penalty supporter⁵⁶—encouraged Congress to back away from the Racial Justice Act.⁵⁷ As a result, the Racial Justice Act provisions failed.⁵⁸ Shortly after, Democrats lost control of Congress and the Act lost its primary supporters.⁵⁹

When Democrats regained control of both Houses in January 2007, they did not pursue the legislation any further, perhaps because they perceived a better opportunity for success at the state level.⁶⁰ They may have perceived two advantages at the state level. First, legislators would be less concerned about applying a one-size-fits-all solution to the problem of racial discrimination in capital cases.⁶¹ At

⁵¹ See Racial Justice Act, S. 1696, 101st Cong. (1989) (sponsored by Senator Kennedy); Racial Justice Act, H.R. 4442, 100th Cong. (1988) (sponsored by Congressman Conyers). Congressman Conyers' remarks introducing the House bill can be found at 134 CONG. REC. E1174 (daily ed. Apr. 21, 1988).

⁵² See H.R. 4442, § 3(a)(1); S. 1696, § 3(a) (proposing to amend title 28 of the United States Code by appending a new chapter, section 2922 (a)(1) of which incorporates H.R. 4442 § 3(a)(1)).

⁵³ See H.R. REP. NO. 103-458 § 2, at 7 (1994).

⁵⁴ Racial Justice Act, H.R. 4017, 103d Cong. (1994).

⁵⁵ See Violent Crime Control and Law Enforcement Act, H.R. 3355, 103d Cong. § 60003 (1994) (enacted).

⁵⁶ Alexander Nguyen, *Bill Clinton's Death Penalty Waffle*, AM. PROSPECT (Dec. 19, 2001), <http://prospect.org/article/bill-clintons-death-penalty-waffle>.

⁵⁷ Carolyn Skorneck, *Clinton Backs off Crime Bill Proviso: Racial Justice Act Hinders Passage*, BANGOR DAILY NEWS, July 15, 1994, at A4.

⁵⁸ See Paul Schoeman, Note, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 551-52 (1995).

⁵⁹ Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 240-41 (2007).

⁶⁰ *Id.* at 241.

⁶¹ See Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 173 (2009) (discussing why the United States Supreme Court is far more constrained than a state supreme court in tackling constitutional legal issues).

the federal level, Republican legislators who supported the idea of the Racial Justice Act might have hesitated to pass a law that would apply to all fifty states, because of concerns about federalism.⁶² State legislators would not face this problem. Second, state legislators might have recognized the unique need for this type of legislation within their states. Notably, the two states that have succeeded in passing state legislation of this kind are Southern states—Kentucky and North Carolina.⁶³ When Kentucky passed its Racial Justice Act, the state’s legislature looked to a recent comprehensive study that found pervasive racial discrimination in death penalty sentencing.⁶⁴ Similarly, when North Carolina passed its version, its General Assembly may have also been aware of the state’s embarrassing history of racial discrimination.⁶⁵ Aware of this unfortunate history, the legislators from these states may have felt compelled to enact legislation that would minimize the effect of racism. At the federal level, however, legislators may have felt that the evidence was less clear.

Looking back at the Racial Justice Act’s experience at the federal level, the greatest weakness of the Act might have been uncertainty about whether the law would indirectly abolish the death penalty.⁶⁶ But these concerns have proven to be unwarranted. Several state incarnations of the law show that Racial Justice Acts can provide protections for capital defendants with varying degrees of strength.⁶⁷ The state legislative experiences show that it is possible for a legislature to pass moderate legislation that fights racial discrimination without killing the death penalty.

⁶² See *id.* (labeling this type of consideration the application of the “federalism discount” in the context of judicial construction of the United States Constitution).

⁶³ See KY. REV. STAT. ANN. § 532.300 (West 2013); N.C. GEN. STAT. § 15A-2010 to -2012 (2011).

⁶⁴ See Gennaro F. Vito, *The Racial Justice Act in Kentucky*, 37 N. KY. L. REV. 273, 274-77 (2010).

⁶⁵ See Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2070-71.

⁶⁶ See, e.g., 136 CONG. REC. S6885 (daily ed. May 24, 1990) (statement of Sen. Bob Graham) (“[T]his act would effectively end the ability of States to constitutionally apply the death penalty.”)

⁶⁷ Lesman, *supra* note 15, at 386; *Editorial*, *supra* note 16.

III. STATE SUCCESSES? STATE LAWS THAT ALLOW DEFENDANTS TO USE STATISTICAL EVIDENCE OF DISCRIMINATION

Eleanor Roosevelt said “[I]earn from the mistakes of others. You can’t live long enough to make them all yourself.”⁶⁸ For years, legislators have followed her advice by looking to the laws passed by other states.⁶⁹ When states experiment with new laws, other states benefit by observing the experimenting state’s successes and failures.⁷⁰ Kentucky and North Carolina have “served as laboratories” by passing laws that allow the statistical evidence that McCleskey had hoped to use.⁷¹

A. *Kentucky*

In 1992, the Kentucky General Assembly commissioned researchers to study Kentucky’s capital sentencing system.⁷² The researchers found that, from 1976 to 1991, prosecutors and jurors sought the death penalty more frequently when the victim was white and the perpetrator was black.⁷³ In 1998, the Kentucky legislature responded by passing the Racial Justice Act.⁷⁴ This law aims to block racial discrimination in capital sentencing.⁷⁵ The entire statute can be found in the Appendix to this Article. There are several notable aspects of this statute, including the following specific provisions.

⁶⁸ *Quotations by Author: Eleanor Roosevelt*, QUOTATIONS PAGE, http://www.quotationspage.com/quotes/Eleanor_Roosevelt (last visited Oct. 10, 2012).

⁶⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country If we would guide by the light of reason, we must let our minds be bold.”); Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 706-07 (2011) (discussing how states are not mere independent microcosms of constitutional values, but “laboratories [of] practical experience with constitutional rules”).

⁷⁰ *New State Ice*, 285 U.S. at 311.

⁷¹ *Racial Justice Act Passed in North Carolina House and Senate*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/racial-justice-act-passed-north-carolina-house-and-senate> (last visited Oct. 10, 2013). This article will not address New Jersey’s proportionality review project because New Jersey’s project is not guided by statute.

⁷² See KY. REV. STAT. ANN. § 17.1531 (West 2013) (repealed 2007).

⁷³ Vito, *supra* note 64, at 276.

⁷⁴ *Id.* at 276-77.

⁷⁵ See KY. REV. STAT. ANN. § 532.300(1) (West 2013).

1. Types of Conduct That May Serve as a Basis for a Claim of Discrimination

Kentucky's law allows defendants to challenge only the prosecutor's *charging decision*.⁷⁶ The law does not allow defendants to argue that the *jury* discriminated against them, or that the prosecutor discriminated when exercising peremptory strikes.⁷⁷ Furthermore, defendants cannot rely upon the statute to challenge a prosecutor's actions during trial, such as the prosecutor's use of peremptory strikes from the jury.⁷⁸

2. Burden of Proof

Under the Kentucky Racial Justice Act, a defendant must show "clear and convincing evidence" that the prosecutor sought the death penalty because of race.⁷⁹ If the defendant successfully presents this evidence, then the prosecution is given an opportunity to rebut the defense's evidence.⁸⁰

3. Geographical Regions That the Defendant May Use to Show Historical Patterns of Racial Discrimination

Kentucky's law allows defendants to use statistical evidence to show statewide disparities, but not disparities at the county, judicial district, or prosecutorial district level.⁸¹ It is unclear whether this feature helps or hurts defendants. On one hand, the law limits the scope of comparative evidence that defendants can use.⁸² However, the law gives defendants a fair chance to present statistically significant evidence because the state is larger than a county. Defendants may face an even tougher challenge if they can only present evidence at the

⁷⁶ See *id.* at (2) ("A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions *to seek the sentence of death in the Commonwealth at the time the death sentence was sought.*" (emphasis added)).

⁷⁷ See *id.*

⁷⁸ See *id.* at (4) ("The claim shall be raised by the defendant *at the pre-trial conference.*" (emphasis added)).

⁷⁹ *Id.* at (5).

⁸⁰ *Id.*

⁸¹ See *id.* at (2)-(3).

⁸² For example, the defendant may have evidence that race is a statistically significant factor in sentencing outcomes at the local level, but may lack comparable evidence at the state level.

county level, where there may not be enough death sentences for comparison to show a statistically significant disparity.⁸³ Therefore, it remains to be seen what effect the scope of the geographical limit has on defendants raising claims under this law.

It is also unclear whether the “particularity requirement” will hurt defendants. The statute provides that the “defendant shall state *with particularity* how the evidence supports” a claim of racial discrimination “in his or her case.”⁸⁴ As a result, the defendant must show how a general pattern of racially discriminatory sentencing affects his or her personal case. However, it is unclear whether the statute requires a defendant to show merely that the prosecutors were part of the overall pattern of disparity—that is, whether the prosecutors were a part of an office that followed the statewide trend. Alternatively, the statute could be interpreted to require that defendants must produce case-specific evidence to succeed on a claim brought under the law. This case-specific evidence could include, for example, notes from a prosecutor indicating a decision to seek the death penalty because the defendant is black. This interpretation would be devastating for defendants because it would render their statistical evidence useless without additional corroborating evidence of discrimination.

Although Kentucky case law has not yet clarified what this requirement demands, a North Carolina decision interpreted similar language in a way that is favorable to defendants.⁸⁵ The North Carolina court held that this language requires only that the defendant show that the prosecutor worked within the geographical region where the statistical disparity appeared.⁸⁶ But the language of the North Carolina statute does not require that the defendant show evidence of discrimination in the defendant’s case.⁸⁷

⁸³ See *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1353 n.1 (6th Cir. 1992) (explaining how the “power” of any study—the study’s probability of detecting a difference in outcomes between exposed and non-exposed groups—is less where the sample size of the study is small than where it is large).

⁸⁴ KY. REV. STAT. ANN. § 532.300(4) (West 2013).

⁸⁵ *State v. Golphin*, No. 97 CRS 47314-15, slip. op. at 15 (N.C. Super. Ct. Dec. 13, 2012).

⁸⁶ *Id.*

⁸⁷ See *id.* at 17.

4. Time Limitations on the Pool of Cases Defendants May Use to Show Racial Discrimination

The Kentucky statute does not place any time limitations on the pool of cases that defendants may use to show racial disparities.⁸⁸ This omission seems to help defendants, because presumably defendants could use evidence of sentencing discrimination during whatever time period that is helpful to the defendant's case. If a defendant cannot find a statistically significant pattern of disparate death sentencing in the last ten years, he or she could simply expand the study to the last fifteen years, or twenty years, and so on until there is a time period that shows a statistically significant disparity. However, prosecutors would be able to argue that statistics from many years ago cannot show clear and convincing evidence that race influenced the sentence "in [the defendant's] case"⁸⁹ because this evidence has little probative value.⁹⁰ Judges would likely see through any attempt by a defendant to claim that twenty-year old evidence supports a claim of racial discrimination today. Consequently, the "clear and convincing" burden of proof would minimize the risk that older, less probative evidence could support a successful claim under the Kentucky law.

5. Races That May Be Considered to Show Discrimination

Courts may provide relief to defendants who present evidence of two types of statistical disparities. First, defendants can provide evidence of traditional discrimination: evidence that blacks receive the death penalty disproportionately.⁹¹ Second, defendants can provide evidence that blacks who committed crimes against whites are sentenced to death more frequently than defendants who committed crimes against blacks.⁹² Therefore, Kentucky's law confronts the two types of discrimination that McCleskey's evidence purportedly showed: evidence that the death penalty was sought against black defendants more frequently than white defendants and against defendants who committed crimes involving white victims more fre-

⁸⁸ See § 532.300.

⁸⁹ *Id.* at (4).

⁹⁰ *Id.* at (5).

⁹¹ *Id.* at (3)(a).

⁹² *Id.* at (3)(b).

quently than defendants who committed crimes involving black victims.

6. Overall Effectiveness of Kentucky's Law

Kentucky's law provides important protections to defendants by granting relief when defendants show clear and convincing evidence of statewide charging discrimination. Even before defendants bring a claim on the merits, the law may deter prosecutors from pursuing the death penalty. For example, defense attorneys from Kentucky have reported that after the Kentucky Racial Justice Act passed, defendants received more plea offers after requesting statistical information. In one case, the Jefferson County Assistant Commonwealth's Attorney charged a black man with the murder of a white victim.⁹³ The prosecutor initially declined to make a plea offer, saying that he was prohibited from doing so because of an unspecified policy.⁹⁴ The attorney for the defendant prepared to argue that the reason why the defendant did not receive an offer was because the victim was white.⁹⁵ Defense counsel moved to discover the policy of the Commonwealth's Attorney's office regarding plea bargaining in capital cases, subpoenaing the county Commonwealth's Attorney and the Assistant Commonwealth's Attorney on the case.⁹⁶ The court quashed the subpoenas, but the prosecutors eventually offered the defendant life imprisonment without the possibility of parole.⁹⁷ Other public defenders in the state reported similar experiences.⁹⁸ Pursuant to the Kentucky Racial Justice Act, defense counsel moved to discover the prosecutors' charging histories in potential capital cases, and the prosecutors then made non-capital plea offers, which the defendants accepted.⁹⁹

These experiences suggest that the Kentucky Racial Justice Act has influenced prosecutorial charging decisions, even though the law has not been litigated as frequently as its North Carolina counterpart.

⁹³ Lesman, *supra* note 15, at 383.

⁹⁴ *Id.*

⁹⁵ *Id.* at 384.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Lesman, *supra* note 15, at 384. The prosecutors in these cases did, however, comply with the discovery requests. *Id.* n.153. In one case, the prosecutor even did so before the court ruled on the motion for discovery. *Id.*

Still, the Kentucky Racial Justice Act's protections are slightly weaker than those provided by the North Carolina law because (1) jurors' decisions—as opposed to prosecutors'—cannot be challenged, (2) claims must be raised before the trial, and (3) the “clear and convincing” burden of proof imposes a higher burden on defendants.¹⁰⁰ Overall, most Kentucky prosecutors and judges agree that the law has not yet had a major impact on capital proceedings.¹⁰¹

B. *North Carolina*

In 2009, North Carolina passed a similar law¹⁰² that allows death row inmates to use statistical evidence to show that racial discrimination influenced their death sentence.¹⁰³ Defendants are not required to show evidence of purposeful discrimination to prevail.¹⁰⁴ The law's original form provided strong protections for criminal defendants.¹⁰⁵ However, the General Assembly revised the law in 2012.¹⁰⁶ Although these revisions significantly limited the protections for defendants, the revised law was the most defendant-friendly state Racial Justice Act in the nation. In June 2013, the North Carolina General Assembly repealed the law.¹⁰⁷ Nonetheless, this law can serve as an experiment worth considering. There are several interesting aspects of North Carolina's Racial Justice Act.¹⁰⁸ Again, this Article will address these aspects individually.

¹⁰⁰ See Robertson, *supra* note 3; *infra* Part II.B.

¹⁰¹ Lesman, *supra* note 15, at 386.

¹⁰² N.C. GEN. STAT. § 15A-2010 to -2012 (2011).

¹⁰³ See Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 116-17 (2012).

¹⁰⁴ *Id.* at 105 n.13 (“[W]hile claims under *Batson* may require purposeful discrimination . . . the RJA does not theoretically or practically impose such a requirement.”).

¹⁰⁵ North Carolina Racial Justice Act, No. 464, 2009 N.C. Sess. Laws 1213.

¹⁰⁶ See Craig Jarvis, *Lawmakers Override Veto of Racial Justice Act Revamp*, NEWS & OBSERVER (July 3, 2012), <http://www.newsobserver.com/2012/07/03/2174838/senate-overrides-veto-of-racial.html>.

¹⁰⁷ Smith, *supra* note 18.

¹⁰⁸ See *infra* Appendix for the text of the law.

1. Types of Conduct That Served as a Basis for a Claim of Discrimination

Under the North Carolina law, defendants could claim that race affected any aspect of the “decisions to seek *or impose* the death penalty.”¹⁰⁹ Therefore, defendants could challenge both the prosecutor’s decision to seek the death penalty and the death penalty sentence. Presumably, this allowed defendants to use statistics to challenge any entity’s imposition of the death penalty, including the jury’s.¹¹⁰ These aspects of the law provided the relief that McCleskey sought. That is, defendants could use statistical evidence to challenge a sentencing decision made by either the prosecutor or the jury.¹¹¹

One aspect of the law provided a novel protection for defendants beyond the protections that Warren McCleskey sought. Unlike the Kentucky law or the proposed federal Racial Justice Act, the North Carolina law allowed defendants to effectively challenge a prosecutor’s use of peremptory challenges.¹¹² The law specified that a defendant was permitted to present evidence that “race was a significant factor in decisions to exercise peremptory challenges during jury selection” in the county or prosecutorial district where the defendant was sentenced to death.¹¹³

Defendants receive protection from racially discriminatory peremptory challenges via the Fourteenth Amendment to the United States Constitution.¹¹⁴ In *Batson v. Kentucky*, the Supreme Court held that a state may not use peremptory challenges to strike black venire members based on the assumption that black venire members would favor a black defendant.¹¹⁵ The Court explained that if the defendant makes a prima facie showing that a peremptory challenge was based on race, then the government must offer a race-neutral explanation.¹¹⁶ Ultimately, the trial court must decide whether the

¹⁰⁹ N.C. GEN. STAT. § 15A-2011(a) (2011) (emphasis added).

¹¹⁰ *See id.* at (d).

¹¹¹ *See McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).

¹¹² § 15A-2011(d). *See also* Mosteller, *supra* note 103, at 127.

¹¹³ § 15A-2011(d).

¹¹⁴ *See Batson v. Kentucky*, 476 U.S. 79, 88-89 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race, or on the assumption that black jurors, as a group, will be unable to impartially consider the State’s case against a black defendant).

¹¹⁵ *Id.* at 97.

¹¹⁶ *Id.*

government has articulated a legitimate race-neutral explanation for its conduct or whether the defendant has established purposeful discrimination.¹¹⁷

The North Carolina law offered protections to defendants beyond those recognized by the Supreme Court in *Batson* in four ways.¹¹⁸ First, the law recognized that evidence of racially discriminatory peremptory challenges could be used to show that race was a significant factor in decisions to seek or impose the death penalty.¹¹⁹ Therefore, it prevented prosecutors from arguing that although race was used for peremptory challenges, the prosecutors' consideration of race in this context did not "affect" the prosecutor's decision to seek or impose the death penalty. The law explicitly linked the peremptory challenge to the sentencing outcome so that if a prosecutor exercised a peremptory strike in a discriminatory manner, then the defendant's sentence would be commuted to life without the possibility of parole. Second, the law allows defendants to use a broader pool of evidence to show that prosecutors had discriminated.¹²⁰ While *Batson* only allowed a defendant to rely on statistics from within his or her small group of jurors,¹²¹ the North Carolina Racial Justice Act allowed defendants to use evidence of peremptory strikes from the entire county or prosecutorial district.¹²² This gave defendants a greater chance of proving discrimination. Third, the law ensured that courts would give significant weight to patterns of peremptory strikes in the determination of whether race was a significant factor in decisions to seek and impose the death sentence.¹²³ It allowed defendants to use evidence of patterns of discriminatory peremptory strikes. Fourth, the law allowed defendants to prevail when they showed that the prosecutor had made a decision *affected by* racial discrimination.¹²⁴ The defendant did not need to show that the prosecutor specifically intended to discriminate based on race. Therefore, this aspect of the law followed other civil rights legislation by prohibiting discrimination, regardless of whether it was intentional or unintentional.¹²⁵

¹¹⁷ *Id.* at 98.

¹¹⁸ Mosteller, *supra* note 103, at 127.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 476 U.S. at 95-97.

¹²² Mosteller, *supra* note 103, at 129-30.

¹²³ *Id.* at 131.

¹²⁴ *Id.*

¹²⁵ *Id.* at 127.

2. Burden of Proof

Defendants in North Carolina also faced a lower burden of proof. In order to satisfy their burden they were required to show that “race was a significant factor in decisions to seek or impose the sentence of death.”¹²⁶ Case law has clarified that race is a “significant factor” when “race had or likely had an influence or effect on decisions”¹²⁷ To guide their understanding, courts used—and still use—the Federal Judicial Center’s *Reference Manual on Scientific Evidence*¹²⁸ as an aide to determine whether the statistical evidence shows that race “had or likely had an influence or effect on decisions.”¹²⁹ Furthermore, defendants did not need to show that they were prejudiced by considerations of race.¹³⁰ Instead, if race affected the decision to seek or impose the death penalty, prejudice was automatically inferred.¹³¹

Finally, the law explicitly named two ways that the government could rebut the defendant’s evidence by providing a reason that would explain the decision to seek or impose the death penalty.¹³² First, the nature of the crime could be a reason for a prosecutor’s decision.¹³³ Consequently, if a defendant were convicted of a felony murder of *two* victims, and the defendant introduced evidence of other felony murders involving *one* victim where defendants were not sentenced to death, then the prosecution could distinguish the previous cases based on the number of victims. Second, the government could rebut the defendant’s evidence by showing that the government had “any program the purpose of which is to eliminate race as a factor in seeking or

¹²⁶ N.C. GEN. STAT. § 15A-2011(c) (2011).

¹²⁷ *State v. Golphin*, No. 97 CRS 47314-15, slip. op. at 11-12 (N.C. Super. Ct. Dec. 13, 2012).

¹²⁸ David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211 (3d ed. 2011).

¹²⁹ *Golphin*, No. 97 CRS 47314-15, slip op. at 12.

¹³⁰ *Compare id.* at 28-29 (“[A] defendant need not show prejudice in order to establish a claim for relief”), with Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, 29-JUN CHAMPION 16, 18 (2005) (discussing how petitioners in procedural default in a federal habeas petition brought under 28 U.S.C. § 2254 must show both cause and prejudice to receive relief, despite an otherwise valid procedural bar).

¹³¹ *But see infra* Model Racial Justice Act § 6 in the Appendix which proposes a harmless error provision.

¹³² Mosteller, *supra* note 103, at 123; N.C. GEN. STAT. § 15A-2011(b)-(c) (2011).

¹³³ Mosteller, *supra* note 103, at 123; § 15A-2011(b).

imposing” the death penalty.¹³⁴ Therefore, if a prosecutor’s office creates a program designed to eliminate racial discrimination in charging, then this fact may rebut the inference of discriminatory intent.¹³⁵

3. Geographical Regions that the Defendant May Use to Show Historical Pattern of Racial Discrimination

Under the original North Carolina law, defendants could introduce evidence of statistical disparities within their county, judicial district, region, or the entire state.¹³⁶ However, in 2012 the legislature removed the state and regional options.¹³⁷ The revised law permitted defendants to introduce only evidence of disparity within the county or judicial district where the crime occurred.¹³⁸

Furthermore, the General Assembly amended the law to require that a defendant show the statistical disparity had an impact “in the defendant’s case.”¹³⁹ Initially, it was unclear what this language meant.¹⁴⁰ But the first court to consider this language interpreted this sentence to mean that defendants must prove that the statistical evidence relates to their case within the temporal statutory window and the specified geographical areas, but it did not require that the defendant present evidence of purposeful discrimination within the defendant’s case.¹⁴¹ Therefore, the amended law does not force defendants to show evidence of purposeful discrimination in their own cases.

4. Time Limitations on the Pool of Cases Defendants May Use to Show Racial Discrimination

Unlike the Kentucky law, the North Carolina law placed time restrictions on the cases that may be used to show disparities. The law allowed defendants to use only statistical evidence during “the period

¹³⁴ § 15A-2011(c).

¹³⁵ See Mosteller, *supra* note 103, at 123.

¹³⁶ See North Carolina Racial Justice Act, No. 464, 2009 N.C. Sess. Laws 1213.

¹³⁷ Act of July 2, 2012, No. 136, sec. 3, available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S416v6.pdf>.

¹³⁸ *Id.* See also Michael Hewlett, *N.C., Ky. Diverge on Racial Justice*, WINSTON-SALEM J. (Dec. 25, 2011, 12:00 AM), http://www.journalnow.com/news/local/article_5f179bf0-ab2e-5c45-a89b-339c7e2dbbf6.html.

¹³⁹ § 15A-2011(a), (f)-(g).

¹⁴⁰ See *State v. Golphin*, No. 97 CRS 47314-15, slip. op. at 16-17 (N.C. Super. Ct. Dec. 13, 2012).

¹⁴¹ *Id.* at 17.

from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence” to show racial discrimination.¹⁴² This restriction may have reflected a fear that defendants would point to evidence of racial discrimination from many years ago, when racial discrimination may have been easier to prove.¹⁴³

5. Races That Could Be Considered to Show Discrimination

Perhaps most significantly, the North Carolina law no longer allowed for statistical consideration of the race of the victim. Instead, it allowed race to be considered with respect to only (1) the defendant, and (2) the prosecutor’s decision to strike jurors on a peremptory basis during jury selection.¹⁴⁴ Therefore, the amended version of the law prohibited evidence that defendants who commit crimes against white victims were disproportionately sentenced to death—the same evidence that McCleskey had attempted to use to support his claim of discrimination.

6. Overall Effectiveness of North Carolina’s Law

The North Carolina law sparked an abundance of litigation. More than ninety five percent of the state’s 158-person death row population has filed claims under the new law as of December 2011.¹⁴⁵ In April 2012, Marcus Robinson became the first inmate to succeed on a claim brought under the law.¹⁴⁶ His death sentence was commuted to a sentence of life without the possibility of parole¹⁴⁷ in part because prosecutors had eliminated black jurors more than twice as often as white jurors.¹⁴⁸ However, the strength of the *amended* law was

¹⁴² § 15A-2011(a).

¹⁴³ See *supra* Part II.A.4.

¹⁴⁴ § 15A-2011(d).

¹⁴⁵ Hewlett, *supra* note 138.

¹⁴⁶ Paul Woolverton, *Capital Punishment Under Close Scrutiny in Fayetteville, Statewide*, FAYETTEVILLE OBSERVER (Dec. 10, 2012, 3:45 PM), <http://www.fayobserver.com/articles/2012/12/09/1218287>.

¹⁴⁷ *Id.*

¹⁴⁸ Emery P. Dalesio, *Marcus Robinson, Death Row Inmate, Wins Racial Justice Act Appeal*, HUFFINGTON POST (Apr. 20, 2012, 12:05 PM), http://www.huffingtonpost.com/2012/04/20/marcus-robinson-death-row-greg-weeks-racial-justice-act_n_1440242.html.

unclear after Robinson's case because he was permitted to file his claim under the 2009 version.¹⁴⁹

But on December 13, 2012, three more death row inmates successfully challenged their death sentences under the new version of the law.¹⁵⁰ The inmates relied on statistical, anecdotal, and documentary evidence such as handwritten attorney notes to prove that racial discrimination affected their death sentences.¹⁵¹ The court held that even under the amended law, the defendants were entitled to life without the possibility of parole.¹⁵²

These cases also clarified what happens after a single defendant shows that the death penalty has been sought or imposed in a discriminatory manner within his prosecutorial district.¹⁵³ One successful claim does not automatically commute all death row inmates' sentences to life without parole.¹⁵⁴ Instead, each defendant raising a claim pursuant to the law must demonstrate that racial discrimination had an impact on his or her respective case.¹⁵⁵ These cases also showed that North Carolina's Racial Justice Act stood as the most defendant-friendly racial justice act of its kind nationally.

Although the law was repealed in June 2013,¹⁵⁶ the experience in North Carolina provides a good source of information for other states that are interested in pursuing similar legislation. For example, in January 2013, the District Attorney of Dallas County, Texas said that he planned to advocate for a state law based on North Carolina's law that would allow criminals to challenge a sentence or even a conviction because race impacted the outcome.¹⁵⁷

To review, below is a side-by-side comparison of the Kentucky and North Carolina laws:

¹⁴⁹ *Id.* See also Woolverton, *supra* note 146.

¹⁵⁰ Brittany Tom, *Judge Overturns 3 Death Sentences Under Racial Justice Act*, THE GRIO (Dec. 14, 2012, 3:45 PM), <http://thegrio.com/2012/12/14/judge-overturns-3-death-sentences-under-racial-justice-act/>.

¹⁵¹ *Id.*

¹⁵² State v. Golphin, No. 97 CRS 47314-15, slip op. at 210 (N.C. Super. Ct. Dec. 13, 2012).

¹⁵³ See Mosteller, *supra* note 103, at 129.

¹⁵⁴ See *Golphin*, No. 97 CRS 47314-15, slip. op. at 207.

¹⁵⁵ See *id.*

¹⁵⁶ Matt Smith, 'Racial Justice Act' Repealed in North Carolina, CNN (June 21, 2013, 3:48 AM), <http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html>.

¹⁵⁷ Scott Goldstein, *Dallas DA Craig Watkins to Push for Law Allowing Appeals Based on Racial Factors*, DALLAS MORNING NEWS (Jan. 21, 2013, 11:13 PM), <http://www.dallasnews.com/news/community-news/dallas/headlines/20130121-dallas-da-craig-watkins-to-push-for-law-allowing-appeals-based-on-racial-factors.ece>.

	Kentucky Racial Justice Act (1998)	North Carolina Racial Justice Act (revised 2012)
Types of Conduct that May Be Considered	Prosecutor's charging decision only (pre-trial challenge).	Any aspect of decisions to seek or impose the death penalty, including charging decisions or peremptory challenges by the prosecutor, as well as discrimination by the jury.
Burden of Proof	Defendant must show "clear and convincing evidence" of racial disparity. Defendant must also show <i>with particularity</i> that pattern of disparity affected his or her case.	Defendants bear burden to show that race was a <i>significant factor</i> in decisions to seek or impose the sentence of death.
Geographical regions	Only the state level.	County or judicial district where crime occurred. Evidence of statewide or regional discrimination is not permitted.
Time Limitations	No limits.	Ten years prior to the commission of the offense to two years after sentencing.
Races That May Be Considered	Race of the defendant or race of the victim.	Race of the defendant or race of jurors removed during voir dire.

III. DRAFTING A MODEL RACIAL JUSTICE ACT

By remembering the successes and failures of the Kentucky and North Carolina Racial Justice Acts, other states can move forward with a more sophisticated understanding of the challenges inherent in this type of legislation. This section analyzes the key features of the proposed Model Racial Justice Act, which can be found in the Appendix.

A. *Types of Conduct That May Serve as a Basis for a Claim of Discrimination*

Some might argue that defendants should only be able to challenge a prosecutor's actions, but not other sentencing decision makers, such as the judge or jury. They might argue that prosecutors are repeat actors in the criminal justice system, so their decisions can be recorded over time and their behaviors can be deterred. Furthermore, if a defendant shows that a particular prosecutor has sought the

death penalty in a racially discriminatory manner, the claim would be more powerful than a claim of statewide statistical significance.¹⁵⁸

Meanwhile, critics might argue that the nature of the jury does not lend itself to this sort of challenge. For example, in *McCleskey*, the Court refused to recognize McCleskey's claim of racial discrimination in part because, as a practical matter, jurors cannot have an opportunity to explain the statistical disparity.¹⁵⁹ The Court stated that "the State has no practical opportunity to rebut the Baldus study" because "controlling considerations of public policy dictate that jurors cannot be called to testify to the motives and influences that led to their verdict."¹⁶⁰ Furthermore, each jury is different.¹⁶¹ Because a claim of racial discrimination would necessarily challenge different actors, the Court pointed out that any inference that can be drawn from statistics is not comparable to the types of inferences based on statistics that the Court has been willing to accept in other contexts.¹⁶² For example, the Court has been receptive to jury selection decisions made by a single prosecutor¹⁶³ and employment discrimination claims made by a single manager.¹⁶⁴

The Court's approach, at its core, was that because of the unique circumstances of juries in capital sentencing, appellate courts should treat capital outcomes decided by a jury deferentially.¹⁶⁵ This conclusion seems to be at odds with the notion that "death is different" because the death penalty permanently imposes the ultimate deprivation of liberty.¹⁶⁶ In *McCleskey*, the Court breezed by the notion that

¹⁵⁸ Lesman, *supra* note 15, at 421.

¹⁵⁹ 481 U.S. 279, 296 (1987).

¹⁶⁰ *Id.* (citations omitted).

¹⁶¹ *Id.* at 294.

¹⁶² *Id.* at 294-95.

¹⁶³ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977).

¹⁶⁴ See *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring in part).

¹⁶⁵ See 481 U.S. 279, 337 (1987) ("[T]he unique characteristics of particular prospective jurors may raise concern on the part of the prosecution or defense, despite the fact that counsel may not be able to articulate that concern in a manner sufficient to support exclusion for cause. As with sentencing, therefore . . . we presume that such challenges normally are not made on the basis of a factor such as race.").

¹⁶⁶ See *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that '[d]eath is different' . . .") (citation omitted). See also *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination . . ."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long . . ."); *Furman v. Georgia*, 408 U.S.

capital cases require a “correspondingly greater degree of scrutiny”¹⁶⁷ than non-capital cases.¹⁶⁸ But one cannot help but wonder whether the severe consequences of death sentencing should prompt the law to give the benefit of the doubt to the person who has been sentenced to die.

Furthermore, judges hearing claims under the Racial Justice Act could consider the practical problems associated with the impossibility of summoning a jury to explain its reasoning. A judge could weigh this flaw against the petitioner when the judge decides whether the petitioner has shown clear and convincing evidence that race was a factor in sentencing. However, if the law were to preclude judges from considering any evidence that a jury’s decision making had been infected by racial bias, then a judge would be forced to ignore evidence that could be highly probative. For example, if a statistical study found that juries sentence black defendants to death ten times more frequently than white defendants who had committed crimes that involved virtually identical factual circumstances, then this study would provide highly probative support for the defendant’s claim. If the law blocked judges from considering this evidence, then the court would be forced to put its head in the sand and ignore evidence suggesting that racial bias affected the death sentence. Conversely, if a second study found a correlation between race and the imposition of the death penalty that was significantly weaker, a judge could consider the practical problems associated with summoning juries, in addition to the less probative statistical evidence. The judge could then conclude that the defendant has not shown clearly and convincingly that the sentence was based on race. The law should provide judges with discretion to weigh problems associated with the jury against the probative value of the statistical evidence. If the law were to allow judges to consider this type of evidence, then judges would not be restricted on the—likely rare—occasion when defendants present persuasive statistical evidence that jury decision making was affected by racial bias.

Additionally, by allowing defendants to bring Racial Justice Act claims against prosecutors, defendants could raise their claims before

238, 289 (1972) (Brennan, J., concurring) (“The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.”).

¹⁶⁷ *Ramos*, 463 U.S. at 998-99.

¹⁶⁸ *See* 481 U.S. at 348 (Blackmun, J., dissenting).

the trial. If defendants could succeed in deterring discriminatory prosecutorial conduct during pre-trial proceedings, then the high costs associated with capital litigation, and corresponding appellate litigation, would be mitigated.¹⁶⁹ For example, in North Carolina, the estimated added cost of capital prosecutions is \$216,000 more than non-capital prosecutions.¹⁷⁰ It is unclear whether these savings to a state would outweigh the costs of administering Racial Justice Act claims.¹⁷¹ For example, the North Carolina Office of Fiscal Research Division completed a legislative fiscal note for the North Carolina Racial Justice Act that concluded the fiscal impact of the bill would be “indeterminate.”¹⁷² The legislative fiscal note predicted costs associated with additional work performed by judges, clerks, court reporters, prosecutors, and indigent defense counsel.¹⁷³ However, the note also predicted that if a defendant raised a claim before the trial and succeeded, then the state would save significantly because the state would no longer need to pay the extreme costs of proceeding with a capital trial.¹⁷⁴ Although it is possible that the costs associated with this proposal would be significant, the state would also benefit from significant savings if the state were to save \$216,000 in each of those cases that proceeded non-capitally because of a successful pre-trial claim.¹⁷⁵ Furthermore, if the law applied prospectively—and therefore current death row inmates could not raise claims under the law—then the cost to the state would be even lower.¹⁷⁶ Consequently, a prospective law would be more likely to result in a net positive fiscal impact.

¹⁶⁹ PHILLIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* 78 (1993) (explaining that in North Carolina, the average capital prosecution costs an extra \$2.16 million per execution).

¹⁷⁰ *Id.*

¹⁷¹ N.C. Gen. Assemb. Fiscal Research Div., SB 461 (2009) Legislative Incarceration Fiscal Note, at 4 (5th ed. July 14, 2009), available at <http://www.ncleg.net/Sessions/2009/FiscalNotes/Senate/PDF/SIN0461v5.pdf>.

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 3.

¹⁷⁴ *Id.* at 4.

¹⁷⁵ See COOK & SLAWSON, *supra* note 169, at 78.

¹⁷⁶ See *infra* Part III.D for additional discussion about whether the law should apply prospectively or retrospectively.

B. *Burden of Proof*

The burden of proof is a critical element of the legislation. If the burden on the petitioner is too high, or the burden on the government is too low, then the law would be rendered ineffective because inmates could not use good evidence to show discrimination. However, if the burden on the petitioner is too low, or the burden on the government is too high, then inmates could win meritless claims of racial discrimination, and the law would probably be revised or repealed. Therefore, the burden should allow inmates to succeed with meritorious claims only and the burden should give the government a chance to rebut the defendant's evidence.

An effective Racial Justice Act would place the burden on the defendant to prove by clear and convincing evidence that race was a significant factor in decisions to seek or impose the sentence of death in the county, prosecutorial district, or state at the time the death sentence was sought or imposed. If a defendant is unable to state a sufficient claim of racial discrimination, then the government will not be forced to attend a hearing. However, if the defendant has persuasive evidence, then the government would have an opportunity to rebut the evidence by showing that non-racial reasons support the sentencing disparity. The court would ultimately decide whether the petitioner carried his or her burden. This proposed burden of proof would mitigate the costs of litigation because the government would not need to respond to the weakest claims of discrimination.

This standard would be similar to Title VII's dynamic burden in the employment discrimination context.¹⁷⁷ There, a plaintiff bears the burden of establishing by a preponderance of the evidence a prima facie case of discrimination—that is, a presumption of discrimination.¹⁷⁸ If the plaintiff establishes a prima facie case, an inference of discrimination arises.¹⁷⁹ The burden of proof then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge.¹⁸⁰ Once established, the burden shifts back to the plaintiff to prove that the employer's articulated nondiscriminatory reason for its action was merely pretext for unlawful discrimination.¹⁸¹

¹⁷⁷ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988).

¹⁷⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 804.

Like the Title VII standard, the proposed burden would strike the proper balance by allowing meritorious claims of racial discrimination while providing the government an opportunity to rebut the statistical evidence. This burden would support the goal of this legislation: to commute defendants' sentences only when defendants could show that race was a significant factor in the sentencing outcome.

Critics of this type of legislation contend that statistics are inherently incapable of proving discrimination.¹⁸² Critics have argued that statistics can only predict the probability that one factor influenced an outcome; *probability* cannot be used to conclusively *show* discrimination.¹⁸³ This argument reaches the core of the debate surrounding Racial Justice Act legislation. But the argument glosses over the context in which these claims arise: death sentencing. Because rejecting these claims will result in more people being executed, legislators should not dismiss statistical evidence lightly. Instead, a legislature should allow judges to consider the evidence, especially given the high stakes of death sentencing and the "complete finality of the death sentence."¹⁸⁴ Because statistics are not perfect, in civil law or noncapital sentencing, the government is correctly presumed to have acted in good faith. But in the context of death, where punishment is irreversible, the presumption should not be so strong that judges are *prohibited* from considering statistics. In this context, statistics are too critical to ignore.

As this Article discussed previously in Section I.B., critics have argued that Racial Justice Acts indirectly abolished the death penalty.¹⁸⁵ They argue that proponents are seeking to introduce the law to obstruct the imposition of the death penalty.¹⁸⁶ These critics might be right, at least with respect to some proponents of Racial Justice Act litigation. However, these critics also argue that the overall purpose of the Racial Justice Act is to indirectly abolish the death penalty, and that consequently, Racial Justice Act legislation should be abandoned.¹⁸⁷ This second argument misses the mark in several respects.

¹⁸² See Kent Scheidegger, *Rebutting The Myths About Race and the Death Penalty*, 10 OHIO ST. J. CRIM. L. 147, 164 (2012).

¹⁸³ See *id.* at 151-52.

¹⁸⁴ *McCleskey v. Kemp*, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting).

¹⁸⁵ See *supra* text accompanying note 66. See also *Editorial, supra* note 16.

¹⁸⁶ *Editorial, supra* note 16 (criticizing North Carolina State Senator Thom Goolsby's claim that the Act is a "moratorium" on executions).

¹⁸⁷ *Id.*

First, perhaps the most prominent supporter of the Racial Justice Act is *in favor* of the death penalty.¹⁸⁸ Second, the claim is not supported by the experience of the state's legislation. Finally, and more fundamentally, if capital defendants can easily show discrimination by "clear and convincing" evidence—thereby blocking many capital prosecutions—then the death penalty should be banned temporarily from that region.

It seems that critics of this legislation fear that although the legislation has a noble intent, it will lead to unintended results. They fear that the guilty will be spared from the death penalty based on their race. They also worry that if a convicted murderer, who is actually guilty, is charged in a jurisdiction where a disproportionate number of black defendants have been charged capitally, the convicted murder may spend the remainder of his life in prison, rather than dead.

These concerns are understandable. But the ultimate issue is whether these concerns outweigh the countervailing concerns. If a defendant can show, through clear and convincing evidence, that the death penalty has been affected by racial bias, then an injustice has occurred. It is impossible to say how many defendants will be able to meet this burden, but uncertainty provides another reason to pass this legislation and allow litigation to reveal how widespread discrimination really is. Although a few guilty defendants may be "spared" by serving a term of life imprisonment, legislators must decide whether this risk, and other risks, outweighs the risk that defendants will be killed in part because of their race.

C. *Geographical Regions that the Defendant May Use to Show Historical Pattern of Racial Discrimination*

Defendants should be able to rely on evidence of sentencing disparities based on the county, state judicial appellate district, or state. However, the law should acknowledge that the probative value of statistical evidence becomes lower if inmates can only show a statistically significant disparity at the state level, but not the local level.

¹⁸⁸ See, e.g., Gary D. Robertson, *Beverly Perdue, North Carolina Governor, Vetoes Repeal of Racial Justice Act*, HUFFINGTON POST (Dec. 14, 2011, 6:06 PM), http://www.huffingtonpost.com/2011/12/14/racial-justice-act-bev-perdue-death-penalty-north-carolina_n_1148776.html (explaining that North Carolina Democratic Governor Beverly Perdue, who supported the Act originally and vetoed a bill that would have essentially repealed the original law, supports capital punishment but believes that it should be applied fairly).

Sinister opponents to racial justice legislation may argue in favor of a smaller pool of cases, so that defendants can only work with a small sample size. As the sample size shrinks, the defendant's chances of showing statistically significant disparity would also shrink.¹⁸⁹ Those who support a smaller region might also argue—without sinister goals—that their approach makes sense given the practical realities of criminal prosecutions. Prosecutions are typically handled at the local level. They would argue that most of the disparity is a natural result of different prosecutors deciding whether to pursue the sentence.¹⁹⁰ Communities elect their local prosecutors, so it should not be surprising that some prosecutors seek the death penalty more than others.¹⁹¹ For example, in North Carolina, the socially conservative Robeson County, composed of 136,000 residents, has sentenced twenty-one people to death since the modern death penalty law was enacted in 1977.¹⁹² During the same time period, Orange County, a liberal area, has not imposed the death penalty.¹⁹³ However, sophisticated statistical models could account for this political variance and could determine whether disparities actually persist within these districts.

D. *Time Limitations on the Pool of Cases Defendants May Use to Show Racial Discrimination*

Time limitations are beneficial because they allow courts to consider only recent evidence, which is more likely to show whether discrimination currently exists. A 50 year-old study which purportedly shows that racial bias affected death sentencing hardly informs whether racial discrimination exists in the same region today. Although Kentucky did not include a time limitation in its statute, the North Carolina version wisely provided a range from ten years before the commission of the crime to two years after the sentence.¹⁹⁴ This limitation ensures that only recent evidence is used to show discrimination, and that prosecutors are not punished for conduct that

¹⁸⁹ See *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1353 n.1 (6th Cir. 1992); David H. Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH. L. REV. 1333, 1346 (1986).

¹⁹⁰ See Scheidegger, *supra* note 182, at 160-61.

¹⁹¹ *Id.*

¹⁹² Woolverton, *supra* note 146.

¹⁹³ *Id.*

¹⁹⁴ See *supra* Part II.B.4.

occurred ten years ago. The ideal Racial Justice Act would adopt a similar timeframe.

Critics of a limitation period may argue that it is unnecessary. First, they would argue, the defendant bears the burden to show that discrimination is pervasive in the region. If the defendant introduces evidence that is several years old, and therefore less likely to reflect current discrimination, then a judge may consider the evidence to be less probative of—or even irrelevant to—the question of whether discrimination is pervasive in the region. Therefore courts would apply the same limiting principle by relying on the burden of proof rather than any explicit time limitation. Second, they would argue that many crimes that occurred more than ten years ago could provide useful comparative evidence. Consider the following example: a prosecutor brought charges in a murder-rape case eleven years ago. Although the offense was heinous, he sought a life sentence without the possibility of parole rather than the death penalty for the defendant, who was white. Today, the same prosecutor charges a defendant who is black with a nearly factually identical crime. If the prosecutor seeks the death penalty rather than life without the possibility of parole, then this case would provide a useful comparison. Of course, one prior charging decision would not automatically cause a judge to find racial discriminatory charging decisions. But this comparative charging decision would serve as an indicator of possible discrimination. If the law provided a defined ten-year limitation on evidence, then courts could not rely on this type of indicator.

However, the law should include a time limit to ensure that judges do not reverse convictions because of prosecutorial misconduct that occurred in the distant past. Even if the law does not provide a specific term of years, then the law could provide that “relevant evidence must be within a reasonable period of time from the alleged misconduct.” Regardless of the type of limitation—specific, such as a period of ten years, or standards-based, such as “within a reasonable period of time”—the law must direct judges to disfavor older statistical evidence.

Legislators should seriously consider limiting claims to future defendants. If a Racial Justice Act were structured to apply prospectively, but not retroactively, then this would significantly reduce the cost of administering claims brought under the law. For example, North Carolina’s law, which applied retroactively, involved high costs

in part because all 152 death row inmates were eligible to raise claims under the law, and 144 pursued these claims.¹⁹⁵ Additionally, prospective application of the law would enhance the accuracy of cases brought under the new law. On the other hand, if the law applied retroactively, then prosecutors would be forced to investigate earlier cases to determine why they charged the current death row inmate capitally. As memories fade, prosecutors might not be able to identify all of the reasons why a given case was pursued capitally. Finally, political realities may demand that the law passes, if at all, as a prospective policy. Recent trends in death penalty legislation suggest that prospective legislation is much more likely to be enacted than retrospective legislation. For example, three states—Connecticut,¹⁹⁶ Maryland,¹⁹⁷ and New Mexico¹⁹⁸—have recently repealed the death penalty, and all three have applied these reforms prospectively.

E. *Types of Conduct that May Be Considered*

The proposed Model Racial Justice Act should allow inmates to use evidence of three types of racial discrimination: (1) disparities in the race of venire members who are removed from juries via peremptory strikes, (2) disparities based on the defendant's race and (3) disparities based on the victim's race. In states that have passed Racial Justice Acts, legislators have viewed disparities based on the defendant's race to be relatively uncontroversial.¹⁹⁹ Therefore, the following analysis focuses only on the two controversial types of racial discrimination: racial peremptory challenges and disparities based on the *victim's* race.

¹⁹⁵ Paul Woolverton, *N.C. Senate Moves to Resume Executions, Repeal Racial Justice Act*, FAYETTEVILLE OBSERVER (Apr. 4, 2013, 6:27 AM), <http://fayobserver.com/articles/2013/04/03/1247993>.

¹⁹⁶ David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012, 5:41 PM), <http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed>.

¹⁹⁷ Mark Morgenstein, *Maryland Legislature Votes to End Death Penalty*, CNN (Mar. 15, 2013, 2:36 PM), <http://www.cnn.com/2013/03/15/justice/maryland-death-penalty-ban>.

¹⁹⁸ *New Mexico Governor Repeals Death Penalty in State*, CNN (Mar. 18, 2009, 11:06 PM), <http://www.cnn.com/2009/CRIME/03/18/new.mexico.death.penalty/>.

¹⁹⁹ For example, the North Carolina Racial Justice Act was amended in 2012 to bar claims based on the race of the victim, but defendants could continue to bring claims of discrimination based on the race of the defendant. See Act of July 2, 2012, No. 136, sec. 3, § 15A-2011(b), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S416v6.pdf>.

1. Challenging Prosecutors' Peremptory Challenges

The law should allow defendants to challenge a prosecutor's discriminatory use of peremptory challenges. Although debates regarding the use of statistical evidence have traditionally focused on jurors' sentencing decisions and prosecutors' charging decisions,²⁰⁰ when a prosecutor exercises peremptory challenges in a discriminatory manner, the effect is comparably devastating.

The peremptory challenge provision could provide additional protections to defendants by expanding the pool of jurors who can be compared to the jurors from the defendant's case. In this regard, the Model Racial Justice Act would follow the North Carolina version of the law.²⁰¹ It would give defendants a meaningful opportunity to evaluate a sufficiently large group of jurors. Although *Batson* itself was positive doctrinal development, critics have complained that the *Batson* standard has proven to be ineffectual in practice.²⁰² By expanding the availability of evidence for defendants, a state's Racial Justice Act could give defendants a legitimate chance to expose discrimination.

At the same time, if the law allows defendants to compare jurors from different trials, then the comparisons become more difficult for the court to administer. The government already argued that administrative burdens would be onerous in *Batson*, which addressed the comparably simple task of comparing treatment of jurors within the same jury.²⁰³ By expanding the comparison pool to other jurors within the same county and prosecutorial district, the administrative burden—that is, the defendant's private counsel or public defender's duty to research and compare similar cases, and the prosecutor's corresponding need to respond to this data—would become more demanding.²⁰⁴

²⁰⁰ Neither the proposed Federal Racial Justice Act nor the Kentucky Racial Justice Act addressed the use of peremptory challenges in a racially discriminatory manner. See Racial Justice Act, H.R. 4017, 103d Cong. (1994); KY. REV. STAT. ANN. § 532.300 (West 2013).

²⁰¹ See N.C. GEN. STAT. § 15A-2011(d) (2011).

²⁰² See, e.g., Mosteller, *supra* note 103, at 107-16; Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 126-31 (1996).

²⁰³ See *Batson v. Kentucky*, 476 U.S. 79, 97-100 (1986).

²⁰⁴ Additionally, comparative evidence is somewhat flawed in that prosecutors may treat potential jurors differently as the composition of the jury changes. *People v. Johnson*, 767 P.2d 1047, 1220 (Cal. 1989) ("It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a

Additionally, the written records that courts would evaluate do not lend themselves to clear-cut decisions about whether a prosecutor discriminated against one juror but not the other. Written records of voir dire do not provide information about tone, body language, and other subtleties that prosecutors rely upon to decide whether to use peremptory challenges.

A state Racial Justice Act could account for these weaknesses by assigning the proper burden to defendants challenging a prosecutor's decision. By requiring that the defendants show, by clear and convincing evidence, that race was a significant factor in the prosecution's decision, defendants would be forced to overcome the problems of proof inherent in evaluating written records and comparisons across trials. Although problems of proof would pose challenges for defendants, the defendants would receive a more realistic chance of exposing discrimination under this proposed standard than they currently have under *Batson*.

However, if peremptory challenge provisions would be too controversial to include in a bill, legislators should be willing to move forward with the legislation without the peremptory challenge provisions. Even if North Carolina had not passed the peremptory challenge provisions, its law would still have provided the greatest protections to capital defendants.

2. Challenging Discrimination Based on Victim's Race

The North Carolina Racial Justice Act was amended to prohibit the use of evidence of disparities based on the victim's race. However, by eliminating consideration of these disparities, the General Assembly prohibited courts from considering a pervasive form of racism. Researchers found this type of disparity in both the statistical study relied upon in *McCleskey*²⁰⁵ and the study that motivated the Kentucky Racial Justice Act.²⁰⁶ If a legislature were to ignore this form of discrimination, it would ignore a significant source of discrimination in modern death sentencing.

lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors."'). Further, a prosecutor's priorities may change as he or she exercises more strikes and therefore "runs low" on peremptory challenges. *Id.* at 1292.

²⁰⁵ 481 U.S. 279, 286-87 (1987).

²⁰⁶ Vito, *supra* note 64, at 276.

Some may argue that disparities based on the race of the victim do not indicate racial discrimination; instead, these disparities are a natural result of prosecutions taking place at the local level.²⁰⁷ They may argue that because white communities tend to be more conservative, a white community would be more likely to elect a “tough-on-crime” prosecutor.²⁰⁸ And because crimes are likely to occur where a victim lives, a tough-on-crime prosecutor would be more likely to prosecute crimes involving white victims.²⁰⁹ Therefore, some would say that the law should block judges from considering this form of evidence because it does not show discrimination. Even if this were true, it does not necessarily follow that the law should *block* this evidence from being heard. Instead, the government should be able to present this argument to the judge, who could determine whether or not the local prosecutor accounted for the disparity.

Critics have also argued that this law would open the floodgates to claims that other irrelevant factors affected sentencing disparities.²¹⁰ For example, defendants may claim that their defense attorney²¹¹ or judge²¹² affected their death sentence. Some may even argue that their sentences should be commuted on the basis of discrimination based on physical attractiveness,²¹³ facial characteristics,²¹⁴ sexual orientation,²¹⁵ or gender.²¹⁶ In *McCleskey*, the Court expressed concerns about these potential claims, saying that “[a]s these examples

²⁰⁷ See CHARLES LANE, *STAY OF EXECUTION: SAVING THE DEATH PENALTY FROM ITSELF* 47-48 (2010).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *McCleskey*, 481 U.S. at 314.

²¹¹ See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1635 n.115, 1635-36 (1985).

²¹² See Darrell Steffensmeier, *Effects of Judge's and Defendant's Sex on the Sentencing of Offenders*, 14 PSYCHOL. J. OF HUM. BEHAV. 3 (1977); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749 (2001).

²¹³ See John E. Stewart II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. OF APPLIED SOC. PSYCHOL. 348 (1980).

²¹⁴ See Norbert L. Kerr, et al., *Effects of Victim Attractiveness, Care and Disfigurement on the Judgements of American and British Mock Jurors*, 24 BRIT. J. SOCIAL PSYCH. 47 (1985); Johnson, *supra* note 211, at 1638 n.128.

²¹⁵ See Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309 (2001). *But see* *Lingar v. Bowersox*, 176 F.3d 453, 458 (8th Cir. 1999) (holding that even if admission of evidence of petitioner's homosexuality during the sentencing phase of his trial was unconstitutional, the error was harmless for purposes of habeas relief).

illustrate, there is no limiting principle” to claims of discrimination based on factors irrelevant to sentencing.²¹⁷

The Court missed an important opportunity on this topic. The Court acknowledged that sentences could be affected by numerous irrelevant factors,²¹⁸ but rather than engaging with this problem in any meaningful way, the Court accepted the sentences. Rather than consider the possibility of future claims of discrimination based on sexual orientation or gender, the Court used discrimination claims as an example of the types of claims the Court would not want to be confronted with in the future.²¹⁹ But the Court should not avoid slippery slope questions like these. Courts should grapple with these questions in a thoughtful manner because “[j]udges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”²²⁰

The Court also failed to recognize an important practical factor that makes it unlikely for these additional claims to be taken seriously: neither Courts nor legislators are likely to allow claims of gender discrimination to reverse a death sentence. This is because, as a practical matter, accepting such claims would actually lead to abolition of the death penalty—as long as the law applied retroactively.²²¹ Men are sentenced to death disproportionately more than women in most states.²²² For example, Ohio has executed over 450 convicted killers since 1792, but only four have been women.²²³ Because of this, any male defendant who challenged his death sentence under a Gender Justice Act would succeed, and the death penalty would be abolished indirectly. This practical reality would discourage courts and legisla-

²¹⁶ See JERRY GOLDMAN & KENT E. PORTNEY, *THE ROLE OF GENDER IN DETERMINING THE CRIMINAL SANCTION: RESULTS FROM MULTIMEDIA EXPERIMENTS IN CRIMINAL SENTENCING* (1997).

²¹⁷ 481 U.S. 279, 318 (1987).

²¹⁸ *Id.* at 319.

²¹⁹ *Id.* at 316-17.

²²⁰ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 169 (1990).

²²¹ See *supra* Parts I.B, III.B.

²²² *Women and the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/women-and-death-penalty> (last visited Oct. 13, 2013) (featuring state-by-state breakdown of death sentences for females).

²²³ Laura James, *Women and the Death Penalty in Ohio, An Historical Review: Proving Pearson's Theorem*, CLEWS YOUR HOME FOR HISTORIC TRUE CRIME (Oct. 11, 2005), http://www.laurajames.com/clews/2005/10/women_and_the_d.html; VICTOR L. STREIB, *THE FAIRER DEATH: EXECUTING WOMEN IN OHIO* 132 (2006).

tures from accepting claims of gender discrimination in capital sentencing.²²⁴

The law should be carefully drafted so that white prisoners who receive death sentences for killing black victims cannot claim protection under the Racial Justice Act. Therefore, the law should be written to only prohibit sentences that were “sought or imposed on the basis of race.”²²⁵ The law should not feature language prohibiting “all sentences sought or imposed *under law administered* in a racially disproportionate pattern.” By limiting the Racial Justice Act to the sentences that were imposed based on race, the law would avoid shutting down the death penalty in jurisdictions where racial disparities are found. For example, supposed that North Carolina’s statute had provided that “no death penalty shall be sought or imposed under law administered in a racially disproportionate pattern.” Then, the first defendant who successfully brought a claim under the Act would cause all other defendants sentenced under the Act to receive commutations of their sentences, including white defendants who have not shown that prosecutors used peremptory challenges in a discriminatory manner.²²⁶ Any sentence that was sought or imposed under the law would be protected, regardless of whether the sentence was part of the pattern of discrimination.²²⁷ At the federal level, during the 1994 revisions, Congress wisely amended the Racial Justice Act to avoid this sort of accidental exodus from death row.²²⁸ By narrowing the protections of the law in a similar manner, supporters of the Racial Justice Act would appease critics who are concerned with indirect abolition of the death penalty. The net result would be a politically feasible Racial Justice Act that avoids unintended consequences.

F. *Harmless Error*

States could also considering adding a “harmless error” provision. For example, the statute could provide that “a defendant is entitled to relief only if there is a reasonable probability that, but for the racial

²²⁴ The difference between the concern for indirect abolition in the context of gender-based claims as opposed to the context of race-based claims is that, statistically, race is unlikely to shut down the death penalty, while gender would almost certainly do so. See *supra* Parts I.B, III.B.

²²⁵ See *infra* Appendix for Model Racial Justice Act (1).

²²⁶ See Schoeman, *supra* note 58, at 552-53.

²²⁷ *Id.*

²²⁸ See Racial Justice Act, H.R. 4017, 103d Cong. (1994).

discrimination, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”²²⁹ This provision would enable a judge to determine whether a prosecutor’s or jury’s racial discrimination truly corrupted the sentencing process so that the court should vacate the sentence.

For example, if the defendant were to provide clear and convincing evidence that the prosecutor sought the death penalty three times more frequently for black defendants than white defendants who had committed factually similar crimes, then this evidence would undermine confidence in the outcome of the death sentence. Consequently, the court would commute the sentence to life without the possibility of parole. However, if a defendant were to provide evidence that the prosecutor discriminated by exercising a peremptory strike against one prospective juror, but the prosecution presented extremely strong evidence of an especially heinous capital crime—one which would have led to a death sentence regardless of the discrimination—then the discrimination might not undermine confidence in the outcome of the death sentence. As a result, the court would allow the death sentence to stand.

There are two reasons why this type of a harmless error provision should be included. First, and perhaps most importantly, this provision would ensure that the law protects only the defendants who receive a harsher sentence because of racial discrimination. However, the law would not protect defendants who would have clearly received the death penalty even if they had not suffered from racial discrimination. Second, this provision would encourage skeptical legislators to support the legislation because the “harmless error” provision would ensure that the law is not over-inclusive as to the pool of defendants who are protected.

However, a harmless error provision could weaken the protections provided by this proposed legislation. This is because a court may hesitate to interfere with a conviction unless it is clear that the outcome was unacceptable. If the law authorizes courts to engage in harmless error analysis, then courts could botch the analysis by classi-

²²⁹ See *infra* Model Racial Justice Act § 6 in the Appendix. See also *Strickland v. Washington*, 466 U.S. 668, 694-700 (1984) (discussing harmless error in context of ineffective assistance of counsel claims); *United States v. Bagley*, 473 U.S. 667, 682-84 (1985) (discussing harmless error in context of constitutional discovery from the prosecution).

fyng racial discrimination as “harmless” simply because an appellate judge does not want to overturn the conviction. Although this risk is palpable, a Racial Justice Act with a harmless error provision may be better than no Racial Justice Act at all.

CONCLUSION

This Article does not answer all of the questions posed by laws aiming to eliminate racial discrimination in capital sentencing. Nor does this Article claim to provide the best answers for a state’s Racial Justice Act. Rather, this Article attempts to design the basic structure of an effective and politically feasible Racial Justice Act. Death penalty supporters should favor this law. After all, a death penalty that is scrubbed of racial bias would be easier to keep than a death penalty that is infected by racial bias. Of course, the challenges facing this legislation are formidable. Some legislators may share the concerns expressed by Justice Powell and wonder whether acknowledgement of racial discrimination in death sentencing would threaten the entire criminal justice system. But these uncomfortable questions provide reasons to *confront* racial bias and the challenges raised by statistical evidence, and not reasons to avoid these problems.

APPENDIX

*Federal Racial Justice Act*²³⁰

Chapter 177 – Racially Discriminatory Capital Sentencing

§ 2921. Prohibition against the execution of a sentence of death imposed on the basis of race.

- (a) In General.—No person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race.
- (b) Inference of Race as the Basis of the Death Sentence.—An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that, at the time the death sentence was imposed, race was a statistically significant factor in decisions to seek or to impose the sentence of death in the jurisdiction in question.
- (c) Relevant Evidence.—Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were, at the time pertinent under subsection (b), being imposed significantly more frequently in the jurisdiction in question—
 - (1) upon persons of one race than upon persons of another race; or
 - (2) as punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.
- (d) Validity of Evidence Presented to Establish an Inference.—If statistical evidence is presented to establish an inference that race was the basis of a sentence of death, the court shall determine the validity of the evidence and if it provides a basis for the inference. Such evidence must take into account, to the extent it is compiled and made publicly available, evidence of the statutory aggravating factors of the crimes involved, and shall include comparisons of similar cases involving persons of different races.
- (e) Rebuttal.—If an inference that race was the basis of a death sentence is established under subsection (b), the death sentence may

²³⁰ H.R. 4017, 103d Cong. (1994).

not be carried out unless the government rebuts the inference by a preponderance of the evidence. Unless it can show that the death penalty was sought in all cases fitting the statutory criteria for imposition of the death penalty, the government cannot rely on mere assertions that it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty.

*Kentucky Racial Justice Act*²³¹

Prohibition against death sentence being sought or given on the basis of race; procedures for dealing with claims

- (1) No person shall be subject to or given a sentence of death that was sought on the basis of race.
- (2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.
- (3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently;
 - (a) Upon persons of one race than upon persons of another race; or
 - (b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.
- (4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

²³¹ KY. REV. STAT. ANN. § 532.300 (West 2013).

- (5) The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

*North Carolina Racial Justice Act*²³²

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

- (a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty in the defendant's case at the time the death sentence was sought or imposed. For the purposes of this section, "at the time the death sentence was sought or imposed" shall be defined as the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence.
- (a1) It is the intent of this Article to provide for an amelioration of the death sentence. It shall be a condition for the filing and consideration of a motion under this Article that the defendant knowingly and voluntarily waives any objection to the imposition of a sentence to life imprisonment without parole based upon any common law, statutory law, or the federal or State constitutions that would otherwise require that the defendant be eligible for parole. The waiver shall be in writing, signed by the defendant, and included in the motion seeking relief under this Article. If the court determines that a hearing is required pursuant to subdivision (3) of subsection (f) of this section, the court shall make an oral inquiry of the defendant to confirm the defendant's waiver, which shall be part of the record. If the court grants relief under this article, the judgment shall include a finding that the defendant waived any objection to the imposition of a sentence of life imprisonment without parole
- (b) Repealed by S.L. 2012-136, § eff July 2, 2012.

²³² N.C. GEN. STAT. § 15A-2010 to -2012 (2011).

- (c) The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.
- (d) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection. The evidence may include, but is not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, judicial officials, jurors, or others involved in the criminal justice system. A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.
- (e) Statistical evidence alone is insufficient to establish that race was a significant factor under this Article. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including, but not limited to, statistical evidence.
- (f) In any motion filed under this Article, the defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the defendant's case in the county or prosecutorial district at the time the death sentence was sought or imposed.
 - (1) The claim shall be raised by the defendant at the pretrial conference required by the General Rules of Practice for the Superior and District Courts or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.

- (2) If the court finds that the defendant's motion fails to state a sufficient claim under the Article, then the court shall dismiss the claim without an evidentiary hearing.
 - (3) If the court finds that the defendant's motion states a sufficient claim under this Article, the court shall schedule a hearing on the claim and may prescribe a time prior to the hearing for each party to present a forecast of its proposed evidence.
- (g) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the defendant's case at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

Model Racial Justice Act

- (1) No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or imposed on the basis of race.
- (2) The defendant has the burden of proving clearly and convincingly that race was a significant factor in decisions to seek or impose the sentence of death in the county, prosecutorial district, or state at the time the death sentence was sought or imposed. For the purposes of this section, "at the time the death sentence was sought or imposed" shall be defined as the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence.
- (3) In any motion filed under this Section, the defendant must state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, prosecutorial district, or state at the time the sentence was sought or imposed. The defendant may raise a claim under this Section at the pretrial conference or in post-conviction proceedings.
 - (a) If the court finds that the defendant's motion fails to state a sufficient claim under the Section, then the court shall dismiss the claim without an evidentiary hearing.

- (b) If the court finds that the defendant's motion states a sufficient claim under this Section, then the court shall schedule a hearing on the claim and may prescribe a time prior to the hearing for each party to present a forecast of its proposed evidence.
- (4) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, prosecutorial district, or state at the time the death sentence was sought or imposed may include statistical evidence derived from the county, prosecutorial district, or state where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor, (ii) the race of the victim was a significant factor, or (iii) race was a significant factor in decisions to exercise peremptory challenges during jury selection. The evidence may include, but is not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, judicial officials, jurors, or others involved in the criminal justice system. A juror's testimony under this subsection shall be consistent with [the state's evidentiary section addressing confidentiality of a jury's deliberations]. Statistical evidence alone may be sufficient to show clearly and convincingly that race was a significant factor in decisions to seek or impose the sentence of death.
- (5) The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.
- (6) A court may conclude that although a defendant's sentence was affected by racial bias, the defendant is not entitled to relief because the bias did not affect the sentencing outcome. A defendant is entitled to relief only if there is a reasonable probability that, but for the racial discrimination, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
- (7) It shall be a condition for the filing and consideration of a motion under this Article that the defendant knowingly and voluntarily waives any objection to the imposition of a sentence to life imprisonment without parole based upon any common law, statutory law, or the federal or State constitutions that would other-

wise require that the defendant be eligible for parole. The waiver shall be in writing, signed by the defendant, and included in the motion seeking relief under this Section. If the court determines that a hearing is required pursuant to subdivision (3) of subsection (f) of this section, the court shall make an oral inquiry of the defendant to confirm the defendant's waiver, which shall be part of the record. If the court grants relief under this article, the judgment shall include a finding that the defendant waived any objection to the imposition of a sentence of life imprisonment without parole.

- (8) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the defendant's case at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

