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Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go where the McCleskey Court Wouldn't


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CONFRONTING RACE: HOW A CONFLUENCE OF
SOCIAL MOVEMENTS CONVINCED NORTH
CAROLINA TO GO WHERE THE *MCCLESKEY* COURT
WOULDN'T

*Barbara O'Brien & Catherine M. Grosso**

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INTRODUCTION

In *McCleskey v. Kemp*, the United States Supreme Court rejected the use of statistical evidence of racism in the criminal justice system to show a violation of the Equal Protection Clause.¹ If states are seeking or imposing

* Associate Professors of Law, Michigan State University College of Law. This piece is dedicated to the memory of Prof. David Baldus, whose scholarship set the high standards for death penalty research that we all strive to meet. He will be sorely missed. We also wish to thank the outstanding research librarians at our John F. Schaefer Law Library, the present and past editors of the Michigan State Law Review, and the many people in North Carolina who helped us understand how the Racial Justice Act came into law.

1. 481 U.S. 279 (1987).

the death penalty in a racially disparate manner, the Court noted, that is a matter for state legislatures to address.² More than twenty years later, North Carolina heeded this suggestion and passed the Racial Justice Act of 2009 (RJA).³ North Carolina was only the second state to pass legislation in response to the *McCleskey* decision despite numerous local and federal efforts to pass a racial justice act.⁴ Kentucky passed similar legislation in 1998, but the Kentucky law provides for only an almost fatally narrow claim.⁵ In this respect, North Carolina stands alone in providing capital defendants a strong claim for relief based on statistical evidence that “race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.”⁶

The paper considers why North Carolina passed the RJA when it did. North Carolina (or any state) could have accepted the Court’s invitation to expand its inquiry into the role of race in its death penalty system at any point in the past two decades. North Carolina is hardly averse to capital punishment; it has more than 150 people on death row and dozens facing capital prosecutions.⁷ It has executed forty-three people since 1976.⁸ What changed over the past two decades to prompt the North Carolina General Assembly to pass a law of this scope and magnitude?

As a starting point, simple politics cannot explain it: the balance of power between Democrats and Republicans did not undergo a dramatic shift

2. *Id.* at 319 (“McCleskey’s arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes.”).

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

4. Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 238-41 (2007).

5. The Kentucky statute is limited to pretrial claims of intentional race discrimination in that defendant’s case. KY. REV. STAT. ANN. § 532.300(1)-(5) (West 2010). The defendant bears the burden of proving by clear and convincing evidence that race was “the basis” of the decision to seek a death sentence in the case. *Id.* In practice, few claims are raised under the Kentucky Racial Justice Act. Johnson, *supra* note 4, at 243. Some evidence suggests that, despite its narrow applicability and rare invocation, “the system has become somewhat more evenhanded in its treatment of black- and white-victim cases” in some parts of Kentucky. David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 147 (2007); *see also* Johnson, *supra* note 4, at 243-44 (discussing survey results showing some evidence of a possible reduction in bias in the system, but concluding that the “actual effect” is “hard to assess”).

6. N.C. GEN. STAT. § 15A-2011.

7. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (2011), *available at* <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

8. *Id.* at 3.

during the relevant time period.⁹ In addition, no evidence suggests that the influence of race in capital punishment has grown more pernicious since *McCleskey*, reaching a tipping point that forced legislators to act. Many studies have been done on the role of race in capital punishment in the years since *McCleskey*, including at least three studies in North Carolina.¹⁰ Most of these studies show that race of victim discrimination continues to play a role in many capital punishment systems.¹¹ Likewise, evidence suggests that race continues to be a factor in jury selection.¹² Yet, we are not aware of a single instance of legislative or judicial reform in response to a finding of race discrimination.¹³ We are aware of only one case prior to the passage of the RJA in which a defendant's claim of race discrimination met with success.¹⁴ Indeed, the narrative on race and capital punishment has stagnated with each side repeating a well-practiced argument to little avail.

9. For a history of representatives' party affiliations from 1931-2011, see N.C. LEGISLATIVE LIBRARY, N.C. GENERAL ASSEMBLY PARTY AFFILIATIONS (2011), available at <http://www.ncleg.net/library/Documents/GAPartyAffiliations.pdf>.

10. See generally U.S. GOV'T. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) [hereinafter GAO Report], available at <http://archive.gao.gov/t2pbat11/140845.pdf> (summarizing capital charging and sentencing studies between 1972 and 1990 and finding consistent evidence of race of victim discrimination); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004) (updating the GAO Report and reaching similar conclusions). Three North Carolina studies include Isaac Unah, *Empirical Analysis of Race and the Process of Capital Punishment in North Carolina*, 2011 MICH. ST. L. REV. 609; Amy R. Stauffer, et al., *The Interaction Between Victim Race and Gender on Sentencing Outcomes in Capital Murder Trials: A Further Exploration*, 10 HOMICIDE STUD. 98 (2006); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119 (2011).

11. Baldus & Woodworth, *supra* note 10, at 1425-26 (quoting and updating the review of death penalty studies by the General Accounting Office published in the GAO Report, *supra* note 10).

12. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2011) (finding race to be a factor in the exercise of peremptory challenges); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (finding race to be a factor in the exercise of peremptory challenges).

13. See generally Baldus, Woodworth & Grosso, *supra* note 5 (reviewing courts and legislators for evidence of reform based on a finding of race discrimination).

14. See Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 179-80 (2007) (reporting on the case of Theodore Kelly in South Carolina); John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1807-08 (1998) (reporting that a survey of post-*McCleskey* racial discrimination claims in capital cases failed to identify a single capital case where a claimant prevailed on a racial discrimination claim). As discussed below, on April 20, 2012, a North Carolina trial court vacated Marcus Robinson's death sentence on the grounds that race had been a significant factor in the state's decision to exercise peremptory strikes. *North Carolina v. Robinson*, No.

So what changed in North Carolina? And, what can the remarkable passage of the RJA tell us about future efforts to address racism in capital punishment regimes or the criminal justice system? In Part II, we consider the litigation strategy that led to the landmark decisions in *Furman v. Georgia* (1972)¹⁵ and *McCleskey v. Kemp* (1987).¹⁶ While the primary goal of these movements was the abolition of capital punishment, a strong secondary goal concerned addressing the impact of race in criminal justice.¹⁷ This section contrasts the results of the litigation strategy to the RJA and highlights the ways the RJA expands opportunities to inquire into the role of race in criminal justice that exceed the limits of *McCleskey v. Kemp*.¹⁸ In Part III, we draw on the work of socio-legal scholars examining the ways in which social movement organizations have effected change in other domains, such as civil rights and environmental reform, to consider the strengths of a united social movement (the RJA movement) that emerged from the confluence of the North Carolina Legislative Black Caucus, the North Carolina branch of the National Association for the Advancement of Colored People (NAACP), and the wide group of organizations loosely organized under the umbrella of the North Carolina Coalition for a Moratorium (NCCM). The RJA movement was instrumental in passing the RJA. This social movement has drawn together a diverse array of associations and individuals interested in limiting the impact of race on the criminal justice system. We then look, in Part IV, at how the social and political landscape in North Carolina, and nationally, changed in the years preceding the RJA's passage to understand how external changes may have facilitated North Carolina's receptivity to reforms like a racial justice act. In Part V, we look more closely at key aspects of the 2009 campaign to pass a racial justice act. The racial justice act campaign, itself, provides useful information on RJA's potential impact. In conclusion, we consider what the passage of the RJA may tell us about the potential for the RJA to succeed in opening a broader discussion on the role of race in capital punishment in North Carolina, concluding that there are reasons to be optimistic.

91 CRS 23143, at *45, available at http://www.aclu.org/files/assets/marcus_robinson_order.pdf.

15. 408 U.S. 238 (1972).

16. 481 U.S. 279 (1987).

17. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 290 (2002) (noting that racism had been the early reason for involvement in death penalty litigation for the Legal Defense Fund); Anthony G. Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 41 (2007) ("Evidence of caste discrimination and capricious inequality played a significant part in [the *Furman*] argument."); HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT* 37-38 (1996) (noting the historical basis for discrimination claims by the Legal Defense Fund).

18. 481 U.S. 279.

I. THE LONG STRUGGLE TO CONFRONT RACE IN CAPITAL PUNISHMENT

Few would argue that race has never influenced decision making in capital punishment in the United States. Indeed, the historical role of race in capital punishment is legendary. Consider, for example, the history of lynching¹⁹ or the legacy of openly racist criminal laws under which black defendants faced a death penalty for certain crimes for which white defendants received a lesser penalty.²⁰ Confronting this sordid history has been no simple task,²¹ and many recognize ways in which its legacy persists.²² In this section, we seek to juxtapose the potential of the RJA to address this legacy with the constitutional law that emerged from a concerted litigation strategy in the late twentieth century.

A. The Constitutional Litigation Strategy Disappoints When the Court Won't Bite

Faced with hostile state legislators and public opinion that favored capital punishment and tolerated racism, death penalty activists in the 1960s implemented a strategy of constitutional litigation to challenge racism in the death penalty regime.²³ *McCleskey v. Kemp* (1987) represents the bitter end to that strategy.²⁴ The NAACP Legal Defense and Educational Fund, Inc. (LDF) played an essential role in the framing and implementation of this strategy.²⁵

19. See generally FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (collecting articles on the history of lynching in the United States and the link between that history and the modern death penalty).

20. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 272-73 (2007) (documenting disparate laws (citing RANDALL KENNEDY, RACE, CRIME AND LAW (1997); BANNER, *supra* note 17)); Amsterdam, *supra* note 17, at 35 (documenting disparate laws (citing KENNEDY, *supra*, at 84-85; BANNER, *supra* note 17, at 140-42)).

21. Amsterdam, *supra* note 17, at 35-37 (discussing efforts to end systemic discrimination through the federal Civil Rights Act of 1866 and the Fourteenth Amendment). For a review of the racially charged history of capital punishment in North Carolina, 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, 2043-77 (2010).

22. Roberts, *supra* note 20, at 262 (noting the persistence of racism); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

23. HAINES, *supra* note 17, at 25-26 (describing a "new strategy of attacking capital punishment through the courts" beginning in the 1960s).

24. *Id.* at 76 (noting that *McCleskey* "represented the last gasp" for the litigation-centered approach to abolition).

25. *Id.* at 25; see also Eric Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158, 158 (1985).

LDF has used carefully crafted litigation in the struggle for racial justice since 1940²⁶ and shepherded the litigation strategy intended to challenge the constitutionality of the death penalty on racial grounds.²⁷ While LDF and others advanced race claims primarily as part of a death penalty abolitionist strategy, claims challenging racism resonated and gained credence in part because of the LDF's history of defending blacks in southern rape cases.²⁸ Observers widely believed race played a significant role in determining the allocation of death sentences in all kinds of rape and murder cases.²⁹

Even before race litigation took center stage, the Supreme Court had addressed the issue indirectly in *Furman v. Georgia*.³⁰ In *Furman*, the Supreme Court posited that the "arbitrary" nature of the death penalty resulted from allowing key decision makers, i.e., prosecutors and jurors, too much discretion in identifying which cases warranted a death sentence.³¹ The Court held that Georgia's death penalty system was flawed in that it failed to limit the death penalty's application to the most deserving offenders.³² The Court, therefore, required states seeking to keep the death penalty as a sentencing option to enact systems to narrow its application.³³ Four years after *Furman*, the Court recognized that a state could comply with this mandate by identifying aggravating factors that must exist in addition to the crime to render it death-eligible.³⁴

26. *Who We Are*, NAACP LEGAL DEFENSE AND EDUC. FUND, INC., <http://naacpldf.org/about-ldf> (last visited Sept. 23, 2011); see generally JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT (2004).

27. HAINES, *supra* note 17, at 25-26.

28. *Id.* at 25, 27-28.

29. *Id.* at 27-28, 76.

30. 408 U.S. 238 (1972). Several scholars have noted that while concerns about racial equality likely motivated many of the Court's most important criminal procedure decisions, the Court rarely addressed race explicitly. See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156-59 (1998) (arguing that the "context that gave rise to modern criminal procedure was institutionalized racism" but observing the Court's strategy of "fight[ing] it indirectly through general constitutional standards that did not explicitly address race but that were nonetheless calculated to constrain racially motivated policies"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 964-65 (1999) (noting that the Court's analysis in *Terry v. Ohio*, 392 U.S. 1 (1968) was entirely race neutral but for one footnote dismissing concerns about the disparate impact allowing police to stop and frisk based on reasonable suspicion would have on racial minorities); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982).

31. See, e.g., 408 U.S. at 255-56 (Douglas, J., concurring).

32. *Id.*; 408 U.S. at 256-57 (Douglas, J., concurring).

33. See, e.g., *id.* at 309-10 (Stewart, J., concurring), 314 (White, J., concurring).

34. *Gregg v. Georgia*, 428 U.S. 153, 196-97 (1976). North Carolina's statute lists eleven such factors. N.C. GEN. STAT. § 15A-2000(e) (2011). At least one of these factors must be proven for a defendant convicted of capital murder to be eligible for the death penalty. § 15A-2000(b)(1).

Limiting the cases eligible for capital punishment theoretically constrains the decision makers' discretion, and, therefore, the potential for bias to influence decision making. Activists and scholars have questioned whether this kind of structural reform achieves its goals.³⁵ Looking to the North Carolina system as an example, some of the aggravating factors that render a murder death eligible in that system are straightforward and clear in their application.³⁶ However, the statute defines, and the Supreme Court has permitted, others, like the requirement that a murder be "especially heinous, atrocious, or cruel,"³⁷ that do little to narrow the field of contenders for death eligibility.³⁸ The North Carolina Supreme Court has interpreted this factor quite broadly,³⁹ upholding a finding that a particular murder was heinous, atrocious, and cruel based on circumstances ranging from prolonged physical or sexual torture,⁴⁰ to suffering more psychological in nature, such as when a victim pleaded for his life or was conscious that death was imminent.⁴¹ The wide range of circumstances that render a murder heinous, atrocious, and cruel means that those assessing the presence or ab-

35. See, e.g., Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1675 (1986) ("We have a system of capital punishment that results in infrequent, random, and erratic executions, one that is structured to inflict death neither on those who have committed the worst offenses nor on defendants of the worst character."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 438 (1995) ("We are left with the worst of all possible worlds: the Supreme Court's detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts—much less 'sober' ones—our profoundly failed system of capital punishment."); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1151-52, 1194 (2003) (reviewing the inherent contradiction in the Supreme Court death penalty jurisprudence and raising questions about whether it achieves any of its goals); RICHARD C. DIETER, DEATH PENALTY INFO. CTR., STRUCK BY LIGHTENING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTALEMENT IN 1976 (2011), available at <http://www.deathpenaltyinfo.org/documents/StruckByLightning.pdf>.

36. N.C. GEN. STAT. § 15A-2000(e)(2) (prior capital offense); § 15A-2000(e)(11) (multiple victims).

37. § 15A-2000(e)(9).

38. *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) (upholding Florida's especially heinous, atrocious, or cruel aggravator (quoting *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975))); see also *Arave v. Creech*, 507 U.S. 463, 465, 471 (1993) (approving an Idaho aggravator that asked whether "'the defendant exhibited utter disregard for human life'" (quoting IDAHO CODE § 19-2515(g)(6) (1987))).

39. See Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 975-77 (1986).

40. See, e.g., *State v. Sexton*, 444 S.E.2d 879, 909, 911 (1994) (upholding a finding of heinous, atrocious, and cruel when the victim was sexually assaulted and strangled with her stockings).

41. Rosen, *supra* note 39, at 976 (citing *State v. Oliver*, 307 S.E.2d 304 (1983)).

sence of this factor retain a great deal of discretion in deciding who deserves to die.

Moreover, the procedural reform addressed only jury decision making—whether to impose a death sentence at trial; it only tangentially constrained the decision to charge a case capitally. A number of states, including North Carolina, first responded to *Furman*'s mandate by instituting a mandatory death sentencing scheme in which a death sentence was automatic upon a conviction of first-degree murder.⁴² The Court struck down this system in *Woodson v. North Carolina* as providing too little discretion to juries.⁴³ North Carolina also attempted to limit prosecutorial discretion by requiring prosecutors to seek the death penalty in every statutorily death-eligible case.⁴⁴ This system failed to eradicate prosecutorial discretion because prosecutors could simply stipulate to the absence of a statutory aggravating factor, a practice unlikely to be challenged by defendants.⁴⁵

Thus, despite the *Furman* Court's mandate to constrain and guide capital decision makers so that only the most deserving are sentenced to death, the new process still afforded substantial discretion. With this discretion came the opportunity to exercise mercy and vindictiveness, as well as to discriminate based on both legitimate and illegitimate factors.⁴⁶ Furthermore, movement activists and others remained convinced that racism had an ongoing influence on capital punishment regimes.⁴⁷

42. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

43. 428 U.S. 280, 301 (1976).

44. *See* State v. Case, 410 S.E.2d 57, 58 (N.C. 1991) (stating that “[i]f our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional”); *see also* Kotch & Mosteller, *supra* note 21, at 2079 (discussing the unique attempt of North Carolina to limit the discretion of prosecutors).

45. The legislature ultimately changed this requirement in 2001 by granting prosecutors discretion to try a death eligible first-degree murder case without seeking the death penalty. N.C. GEN. STAT. § 15A-2004 (2011).

46. *McCleskey v. Kemp*, 481 U.S. 277, 297 (1987) (explaining that “[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused,” and it therefore held that “the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*'s case acted with discriminatory purpose”). The current regime not only permits but requires discretion. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (requiring that capital sentencers be allowed to consider a “full range” of mitigating factors before determining the proper sentence).

47. HAINES, *supra* note 17, at 76 (documenting the frustration among movement activists and lawyers); *see also* Justice Harry Blackman famously declared in his dissent from a denial of writ of certiorari:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, . . . despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

While the movement continued to be dominated largely by a litigation strategy, it began to focus more directly on challenges to the influence of race.⁴⁸ Litigators recognized that changes in the courts and the political climate after *Furman* in the late 1970s and early 1980s made litigation a more difficult avenue for reform.⁴⁹ They believed, nonetheless, that compelling empirical evidence might support a successful Eighth Amendment challenge.⁵⁰ At this time, Professor David Baldus and his colleagues at the University of Iowa had begun preliminary work on the impact of *Furman* on death eligibility in Georgia.⁵¹ The LDF asked them to conduct a second study on the role of race and helped secure funding for the study (the Baldus Study).⁵²

The Baldus Study represented the state of the art in statistical methods for isolating the role of race in the complex arena of capital murder cases.⁵³ Yet, when presented in *McCleskey* with strong statistical evidence that decision makers in Georgia's capital sentencing system were indeed influenced by the race of the victim, the Court demurred.⁵⁴ The Court again acknowledged that consideration of improper factors is always a risk when decision makers have discretion.⁵⁵ But given the important role discretion plays in our system, the Court required "exceptionally clear proof" before it would infer that discretion had been abused and the Constitution had been violated.⁵⁶

To the Court, "exceptionally clear proof" meant direct evidence from the defendant's own case of decision makers' discriminatory purpose.⁵⁷ Showing that the statutory scheme had a racially disparate impact would establish a constitutional violation only if the defendant proved that the leg-

Callins v. Collins, 510 U.S. 1141, 1143-44 (1994).

48. HAINES, *supra* note 17, at 76.

49. *Id.*

50. *Id.* at 76-77.

51. David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 43-44 (1990) (explaining the Procedural Reform Study).

52. *Id.* at 44-46 (introducing the Charging and Sentencing Study).

53. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1399-1400 (1988) (summarizing reviews of the Baldus study by leading scholars and researchers who praised the study methodology calling it "the most complete and thorough analysis of sentencing that[has] ever been done" and "among the best empirical studies on criminal sentencing ever conducted" (alteration in original) (citations omitted)); Amsterdam, *supra* note 17, at 52 (urging that new statewide charging and sentencing studies "should come as close as possible to being as comprehensive and meticulous as the Baldus team's Georgia studies").

54. *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987) (denying *McCleskey's* appeal).

55. *Id.* at 297.

56. *Id.*

57. *Id.* at 297-98.

islature enacted or maintained it “because of an anticipated racially discriminatory effect.”⁵⁸

The Court’s ruling in *McCleskey* signaled an abrupt end to the litigation strategy that had dominated death penalty abolition and criminal justice reform since the 1960s.⁵⁹ Movement activists recognized the costs of the narrow litigation strategy and directed efforts more broadly.⁶⁰ *McCleskey* may even have galvanized the grassroots movement.⁶¹

McCleskey’s impact, however, reached far beyond the community of death penalty activists. *McCleskey* not only failed to advance a reform agenda, it virtually eliminated the possibility of using empirical evidence in challenging the role of race in capital punishment or in the criminal justice system as a whole.⁶² Justice Powell’s opinion suggested that race discrimination may be “inevitable, widespread, and ineradicable” and, therefore, “must be tolerated to retain the benefits of capital punishment.”⁶³ If this discrimination is to be tolerated in *McCleskey*, then “race discrimination in matters less momentous than life or death can be shrugged off.”⁶⁴ As a result, the decision “insulat[ed] systemic racial discrimination from attack”⁶⁵ and stymied challenges to race discrimination in other areas of law.⁶⁶

B. Back to Basics: A More Incremental Approach to Reform

The RJA is one of a long series of reforms to the North Carolina death penalty regime that a broad alliance of activists and lawyers advanced and implemented. For example, this group of activists advocated ground breaking reforms to indigent defense generally and capital defense in particular.⁶⁷ As discussed below, just as *McCleskey* contrasts with the RJA, the North

58. *Id.* at 298.

59. HAINES, *supra* note 17, at 78.

60. *Id.*

61. *Id.* at 79 (noting that movement activists began to use the *McCleskey* decision as an organizing tool among minority organizations).

62. Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 7 (2007) (summarizing studies on the impact of race in drug enforcement, police-citizen encounters, and sentencing laws).

63. Baldus, Woodworth & Grosso, *supra* note 5, at 146 (citing Justice Powell’s opinion and a memorandum Justice Scalia circulated to the Court while the case was pending).

64. Amsterdam, *supra* note 17, at 47.

65. Theodore M. Shaw, *Maintaining Hope in the Struggle Against the Constitutional Tolerance of Race Discrimination*, 39 COLUM. HUM. RTS. L. REV. 59, 59 (2007).

66. Fagan & Bakhshi, *supra* note 62, at 7 (summarizing studies on the impact of race in drug enforcement, police-citizen encounters, and sentencing laws).

67. See generally Alexa Woodward, *It Takes a Village to Save a Life: A Statewide Model for Indigent Capital Defense*, 11 N.Y. CITY L. REV. 159 (2007).

Carolina model for achieving reform contrasts sharply with the *McCleskey*-era litigation strategy.

The RJA opens by declaring, “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.”⁶⁸ A defendant may establish a claim by showing that race was “*a significant factor* in decisions to seek or impose the sentence of death *in the county, the prosecutorial district, the judicial division, or the State* at the time the death sentence was sought or imposed.”⁶⁹ The term “significant factor” does not have an established meaning in North Carolina law or practice, but may be distinguished from a requirement that race be the sole factor or even a primary one.⁷⁰ The Act expressly subjects both local and statewide decision making to its terms.⁷¹ By using the conjunction “or” in the list of possible geographic breadth, the Act requires only a finding that race was a significant factor in decisions in any one of the geographical areas.⁷²

The RJA expressly identifies statistical evidence as a type of evidence that is “relevant” to establishing a claim under the Act.⁷³ Such a claim may be for discrimination in charging or sentencing decisions on the basis of race of the defendant or race of the victim, or discrimination in the exercise of peremptory challenges during jury selection.⁷⁴ The claim must assert that the discrimination can be documented “irrespective of statutory factors.”⁷⁵

The defendant has the burden of proving that race was a significant factor in decision making, and the state may offer evidence in rebuttal, including evidence of programs intended “to eliminate race as a factor in seeking or imposing a sentence of death.”⁷⁶

The legislative debate surrounding the RJA makes clear that the North Carolina General Assembly intended to take up the issue punted to them by

68. N.C. GEN. STAT. § 15A-2010 (2011).

69. § 15A-2011(b) (emphasis added).

70. KENNY ROSE & HENDERSON HILL, *THE RACIAL JUSTICE ACT: A STATUTORY ANALYSIS 2* (on file with authors). The Kentucky Racial Justice Action, by comparison, requires that the defendant prove “by clear and convincing evidence that race was *the basis* of the decision to seek the death penalty [in his or her case].” KY. REV. STAT. ANN. § 532.300(5) (West 2011) (emphasis added).

71. N.C. GEN. STAT. § 15A-2011(a).

72. *Id.*

73. § 15A-2011(b).

74. *Id.* The undefined phrase “statutory factors” seems to refer to the elements of the crime and the system for identifying aggravators and mitigators and assigning punishment provided in the North Carolina criminal code. *See* § 14-17 (defining murder in the first and second degree); § 15A-2000 (codifying statutory aggravators and mitigators, and proceedings to determine sentence in capital cases).

75. § 15A-2011(b).

76. § 15A-2011(c).

the *McCleskey* Court.⁷⁷ The RJA is innovative in that it allows for the use of statistical evidence to uncover racial bias even when the bias is hidden or driven by psychological processes other than simple animus. When racism is overt, discriminatory purpose can sometimes be proved through direct evidence.⁷⁸ But in modern times, it is much more likely to operate covertly and even outside the conscious awareness of the decision maker.⁷⁹ Moreover, bias may not be driven by racial animus, but by greater empathy with certain victims. In other words, decision makers displaying racial bias may have no ill will toward people of certain races, but may simply put more value on the lives of people with whom they more closely identify.⁸⁰

As noted above, the RJA also authorizes relief based on a showing that “[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection.”⁸¹ In so doing, the RJA addresses not only the problem the *McCleskey* Court refused to face, but also the one the Court tried but by most accounts failed to fix in *Batson v. Kentucky*, that of racial discrimination in jury selection.⁸² *Batson* has been criticized as providing a toothless remedy against racially motivated strikes in jury selection because of the ease with which a claim can be rebutted. The challenged party need only provide a race neutral reason for the contested decision to strike.⁸³

77. Kotch & Mosteller, *supra* note 21, at 2112-13 (quoting North Carolina Senator Doug Berger setting out the differences between *McCleskey* and the proposed Racial Justice Act). For an analysis of the RJA’s evidentiary requirements, see Robert P. Mosteller, 10 OHIO ST. J. CRIM. L. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991477 (pp. 16-27).

78. For instance, Kenneth Rouse, an African American man, presented evidence that a juror who voted to convict and sentence him to death deliberately hid his animus toward African Americans in order to serve on Rouse’s jury. See Brief of Appellant at 7, *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2011) (No. 01-12), 2001 WL 34690440.

79. See, e.g., Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOC. PSYCHOL. 757, 757 (2001) (reviewing research on implicit stereotyping and prejudice, in which racial bias can operate outside a person’s conscious intent or awareness); but see Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023 (2006) (cautioning that implicit bias research is far from definitive in establishing that these unconscious biases manifest as tendencies to discriminate in real world settings).

80. Psychologists who study discrimination have found that bias does not always manifest as animus or negative feelings toward members of another group, but can instead lead to favoritism toward members of the in-group and lack of empathy for those in the out-group. See Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 LAW & SOC’Y REV. 69 (2011) (for a discussion of this research).

81. N.C. GEN. STAT. § 15A-2011(b)(3).

82. 476 U.S. 79 (1986).

83. *Id.* at 97.

Generating reasons for any particular strike decision is not difficult, and trial courts are often reluctant to find a proffered justification pretextual.⁸⁴

Although *Batson* advanced consciousness of the role that race continues to play in the criminal justice system, it shifted the presumed inquiry to the particular juror at issue in a claimant's particular case.⁸⁵ The Court has endorsed more systematic inquiries in recent years but has not considered whether empirical evidence of system wide discrimination can support a constitutional claim.⁸⁶ When patterns of racial disparities in strike decisions are observed across many cases, however, a clearer picture emerges. By inviting review of the role of race in the exercise of peremptory challenges *across cases* (i.e., across the county, district, division, or state), the RJA not only goes where the *McCleskey* Court would not, it goes where the *Batson* Court—with its focus on use of peremptories in individual cases—could not.⁸⁷

Thus, the RJA opens the door slammed by *McCleskey* and creates a new opportunity to consider the role of race in capital punishment. Its significance, however, lies not only in its text and the claims it supports, but in

84. See, e.g., Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (asserting that “[o]nly the most overtly discriminatory or impolitic lawyer can be caught in *Batson*'s toothless bite”); Lance Koonce, Note, *J.E.B. v. Alabama ex rel. T.B. and the Fate of the Peremptory Challenge*, 73 N.C. L. REV. 525, 560-61 (1995) (arguing that it is “likely that the peremptory will remain in place, damaged but still useful, and courts and litigators will do what they always do when confronted with new restrictions: adapt”).

85. *Batson* allowed the use of systematic evidence to establish a defendant's prima facie case, but did not require it. See *Batson v. Kentucky*, 476 U.S. 79, 95-96 (1986) (discussing the use of system-wide evidence). *Batson* overturned *Swain v. Alabama*, 380 U.S. 202 (1965), which had required evidence of system wide discrimination to state a claim.

86. *Miller-El v. Dretke*, 545 U.S. 231 (2005) (holding that the petitioner's showing of discriminatory pattern in state's race-neutral explanations as a whole warranted relief). Defendants have also sought to introduce a study on the role of race in the exercise of peremptory challenges in several cases in Philadelphia. See, e.g., *Ford v. Digugliemo*, No. Civ.A. 03-4336, 2004 WL 73961, at *4 n.7 (E.D. Pa. Jan. 14, 2004) (citing David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001)); *Holloway v. Horn*, 161 F. Supp. 2d 452, 493 (E.D. Pa. 2001) (citing Baldus et al., *supra*), *rev'd*, 355 F.3d 707 (3d Cir. 2004).

87. N.C. GEN. STAT. § 15A-211(b)(3) (2011). Analysis of strike information aggregated across many cases allows for a clearer picture of the role of race than analysis of strike decisions in any one case. If, for instance, prosecutors tend to believe that housewives make bad jurors, and if being a housewife is unrelated to race (that is, people of one race are no more or less likely to be housewives than people of another race), then strike decisions motivated by that factor should be evenly distributed across potential jurors of different races. The prosecutor who strikes a Black housewife would have done the same thing if the potential juror had been of a different race. Only by looking across cases can this be determined. The claimant can draw on thousands of strike decisions rather than the fourteen allotted in a North Carolina capital case to look at disparities in the use of peremptories against African-Americans and control for alternative, race-neutral explanations of those decisions.

its impact on the social movement behind the RJA, and perhaps even more broadly, on North Carolina race politics.

II. A CONFLUENCE OF SOCIAL MOVEMENTS

Social movement scholars have suggested several factors associated with success. At a very basic level, the organization itself matters—how it is structured, its coalitions, its strategies in choosing issues on which to focus and how best to frame them.⁸⁸ An important feature of success, however, is a social movement's capacity to forge a common path among many strong independent movements.⁸⁹ Three groups were responsible for propelling the RJA through the General Assembly: legislators, civil rights advocates, and death penalty reformers.⁹⁰ Indeed, it was the confluence of efforts by these three groups that emerged as a unified social movement that led to the passage of the RJA.

Representative Ronnie Sutton from Pembroke, North Carolina, first introduced a racial justice act in February 2001 as recommended by a Legislative Research Commission.⁹¹ This bill passed through several committees before being “[p]ostponed [i]ndefinitely” in October 2002.⁹² In April 2007, Representatives Larry Womble and Earline Parmon from Forsythe re-introduced the bill and lobbied in the legislature and around the state for its passage.⁹³ When the bill died in Senate committee, Womble and Parmon

88. See, e.g., JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 35 (1978) (identifying internal characteristics of social movement organizations that affect their ability to effect legal reform, such as size and funding); Edward L. Rubin, *Passing through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 29-32 (2001).

89. J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 546 (1983).

90. Samiha Khanna, *The Racial Justice Act: GOP Could Repeal or Amend Landmark Legislation: Legislative Preview*, INDEP. WKLY. (Durham, N.C.), Jan. 26, 2011, <http://www.indyweek.com/indyweek/the-racial-justice-act-gop-could-repeal-or-amend-landmark-legislation/Content?oid=1983591>.

91. NORTH CAROLINA GENERAL ASSEMBLY, HOUSE PRINCIPAL CLERK'S OFFICE, NORTH CAROLINA HOUSE OF REPRESENTATIVES 2009, at 15, available at <http://www.ncga.state.nc.us/DocumentSites/HouseDocuments/2009-2010%20Session/2009%20Alphabetical%20List.pdf>; Racial Justice Act, H.B. 140, 2001 Gen. Assemb. (N.C. 2001).

92. *North Carolina General Assembly – House Bill 140 Information/History (2001-2002 Session)*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascritps/BillLookUp/BillLookUp.pl?Session=2001&BillID=H+140&submitButton=Go> (last visited July 16, 2011).

93. N.C. Racial Justice Act, H.B. 1291, 2007 Gen. Assemb. (N.C. 2007); Press Release, Offices of Representative Larry Womble and Representative Earline Parmon, NC Senate Politics Kills Racial Justice Act for 2008; Battle Will Continue in 2009 (July 2008), available at <http://carolinajustice.typepad.com/ncnaacp/2008/07/nc-senate-polit.html> [hereinafter Press Release, Womble & Parmon] (“The North Carolina Racial Justice Act was

issued a joint press release decrying the Senate for failing to bring the bill forward, and listing and lauding the bill's "fearless advocates."⁹⁴ The press release concluded by promising,

While the battle has been lost until the next legislative session, state legislators, the NC Legislative Black Caucus and numerous coalitions including the NC NAACP led coalition of eighty-five statewide progressive organizations will continue to fight for this vital legislation in a new and improved form in the next legislative session.⁹⁵

As promised, Representatives Womble and Parmon reintroduced the RJA in the North Carolina House of Representatives in March 2009.⁹⁶ Senator Floyd McKissick Jr. of Durham introduced the bill in the Senate that same day.⁹⁷ Womble, Parmon, and McKissick resumed lobbying for what they characterized as an essential civil rights bill that was "critically needed to correct any type of conduct that might be impermissible when it comes to the imposition of the death penalty."⁹⁸ Representative Womble gave a "long, impassioned" speech in support of the bill on the floor of the House of Representatives.⁹⁹

The North Carolina Legislative Black Caucus provided important support to the bill in 2007 and 2009.¹⁰⁰ In 2007, caucus chair Representative Alma Adams and other members of the caucus were expressly recognized for their support.¹⁰¹ The caucus selected Senator McKissick, the primary

sponsored and championed by Forsyth county legislators, Representatives Larry Womble and Earline Parmon.").

94. Press Release, Womble & Parmon, *supra* note 93; James Romoser, *Session Finishes, Adjourns: Short Assembly May Be Best Recalled For What It Didn't Do*, WINSTON-SALEM J., July 19, 2008, at Metro 1 ("In a highly unusual step, Womble and Parmon sent out a scathing press release on Thursday, blasting Senate Democrats for not passing the bill.").

95. Press Release, Womble & Parmon, *supra* note 93.

96. *North Carolina General Assembly – House Bill 472 Information/History (2009-2010 Session)*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2009&BillID=H472> (last visited Nov. 4, 2011).

97. *North Carolina General Assembly – Senate Bill 461 Information/History (2009-2010 Session)*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2009&BillID=S461> (last visited Nov. 4, 2011).

98. James Romoser, *Racial Justice Act Passes, Now Goes to Purdue*, WINSTON-SALEM J., Aug. 6, 2009, at 1 (quoting Sen. McKissick).

99. James Romoser, *Racial Justice Bill Moves On: House Gives Tentative OK; Second Vote Scheduled for Today*, WINTON-SALEM J., July 15, 2009, at 1.

100. Press Release, Womble & Parmon, *supra* note 93; Samiha Khanna, *RJA Repeal Efforts: Bill to Erase Racial Justice Act Now Has A Half-Sister in the Senate*, INDYWEEK.COM, May 18, 2001, available at <http://m.indyweek.com/triangulator/archives/2011/05/18/rja-repeal-bill-to-erase-racial-justice-act-now-has-a-half-sister-in-the-senate> (last visited Nov. 10, 2011).

101. Press Release, Womble & Parmon, *supra* note 93; Samiha Khanna, *RJA Repeal Efforts: Bill to Erase Racial Justice Act Now Has A Half-Sister in the Senate*, INDYWEEK.COM, May 18, 2001, available at <http://m.indyweek.com/triangulator/archives>

sponsor of the RJA in the Senate, to chair the caucus shortly after the bill's passage.¹⁰²

Legislators repeatedly recognized the roles of two traditionally distinct social movements: the civil rights movement and the death penalty reform movement. Although the NAACP had played an important role in the abolitionist movement through LDF, the anti-death penalty movement had difficulty achieving racial or ideological diversity among their ranks.¹⁰³ Movement leaders had long recognized the importance of joining forces with civil rights groups, both because of the increased numbers offered by their rank and file and for the expertise they brought to the table.¹⁰⁴ But anti-death penalty movement leaders were largely unsuccessful in their efforts to frame the death penalty in a way that resonated with civil rights organizations.¹⁰⁵

In contrast, the North Carolina NAACP not only worked with the death penalty movement to pass the RJA, it played a distinct and leading role in the joint RJA campaign.¹⁰⁶ The confluence of these two movements around a common concern for racial justice may provide the strongest grounds for optimism about long-term prospects for the Act. In the next two sections we look at each movement in turn and consider how it approached this campaign. Each operates as a sophisticated social movement that has achieved a nuanced understanding of the interplay among social context, social mobilization, and legal reform. A closer look at these social movements helps to explain both why the RJA passed and how it might impact North Carolina's ability to confront the role of race in criminal justice.

A. The Civil Rights Movement, Led by the North Carolina NAACP

The North Carolina NAACP elected Reverend Doctor William J. Barber, II as its president in October 2005 after his successful challenge to in-

/2011/05/18/rja-repeal-bill-to-erase-racial-justice-act-now-has-a-half-sister-in-the-senate (last visited Nov. 10, 2011).

102. Samiha Khanna, *McKissick Named Chairman of the N.C. Legislative Black Caucus*, INDEP. WKLY. (Durham, N.C.), Feb. 2, 2011, <http://www.indyweek.com/triangulator/archives/2011/02/02/mckissick-named-chairman-of-nc-legislative-black-caucus> (an article on McKissick's selection as chairman tied his work on the RJA to his selection, noting, "He is well known for his work in 2009 to sponsor and win support for the N.C. Racial Justice Act").

103. HAINES, *supra* note 17, at 111-16 (discussing the difficulty anti-death penalty organizations faced in attracting the attention of civil rights groups).

104. *Id.*

105. *Id.*

106. Press Release, Womble & Parmon, *supra* note 93 (identifying the North Carolina NAACP as having "led [a] coalition of eighty-five statewide progressive organizations").

cumbent Melvin “Skip” Alston.¹⁰⁷ The two candidates campaigned on different visions of the NAACP’s role.¹⁰⁸ Alston, a businessman who held the title since 1996,¹⁰⁹ asserted that the presence of elected black officials in government meant that the NAACP could and should pursue its agenda by working with state legislators.¹¹⁰ Rev. Dr. Barber presented himself in stark contrast: “The people want the NAACP to be an out-front, not a behind-the-scenes, organization that speaks clearly.”¹¹¹

Rev. Dr. Barber took his election as a mandate to energize the North Carolina NAACP and to engage the movement in ways that resonated with social movement theory. Rev. Dr. Barber cultivated broad partnerships with a diverse group of organizations working for social and civil rights.¹¹² As noted above, scholars recognize that a social movement’s capacity to forge a common path among independent movements is an indicator of success.¹¹³ Rev. Dr. Barber argues, “We had to be smart enough to come together and at least have a working relationship and a common agenda that . . . provides a platform for us to use our collective strength to push for fundamental change.”¹¹⁴

This coalition, led by Rev. Dr. Barber and the North Carolina NAACP, identified a broad agenda for advancing social and civil rights in North Carolina. The 14-point People’s Agenda for North Carolina promoted by the North Carolina NAACP’s HKonJ movement reflects the breadth of the work.¹¹⁵ The agenda encompasses education reform, fair wages, access to health care, securing voting rights, and affordable housing.¹¹⁶ This broad

107. Mark Binker, *NAACP Replaces Alston as President*, GREENSBORO NEWS & REC., Oct. 9, 2005, at A1.

108. Jim Nesbitt, *NAACP to Tackle Issues Upfront*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 6, 2005, at B3.

109. Binker, *supra* note 107.

110. Nesbitt, *supra* note 108.

111. *Id.*

112. Lori Wiggins, *Rev. William Barber: The Gospel Truth*, THE CRISIS, Winter 2011, at 42.

113. J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 546 (1983).

114. Wiggins, *supra* note 112.

115. HKonJ stands for Historic Thousands on Jones Street, the street that passes in front of the North Carolina General Assembly. *Welcome to Our Online Community*, HKONJ, <http://carolinajustice.typepad.com/hkonj/2007/09/welcome-to-our-.html> (last visited July 20, 2011). HKonJ “began in 2007 as an effort to create a grassroots movement in support of a 14-point progressive agenda in connection with a rally and march on the state legislative building on Jones Street in downtown Raleigh.” *Id.* It is an ongoing coalition of nearly 100 organizations to support progressive causes in North Carolina. *Id.*

116. *About Us: Our 14-Point Agenda*, HKONJ, http://carolinajustice.typepad.com/hkonj/about_us/ (last visited July 20, 2011).

agenda provided a platform for activists to “connect[] the dots between their own organization’s issues and the others on the list of 14.”¹¹⁷

Social movement scholars have documented the importance of framing for maintaining this kind of broad mobilization.¹¹⁸ A frame is an interpretive scheme defining a problem and making the case for specific changes to rectify it.¹¹⁹ To succeed, a social movement’s leaders must package their ideas in a way that “push[es] the right buttons” by resonating with existing beliefs and values.¹²⁰ In that sense, social movement organizers are “consumers of existing cultural meanings and producers of new meanings.”¹²¹ In a complex coalition like this, framing takes place at both the organizational level and at a movement wide level.¹²²

The People’s Agenda provided a frame that redefined the way that very diverse movements saw each other and their role in North Carolina politics.¹²³ Rev. Dr. Barber and other leaders launched the agenda with a “teach in” and rally in front of the General Assembly for 2,000 activists from across the state.¹²⁴ The goal was to reach potential participants in all 100 North Carolina counties and to involve every possible organization.¹²⁵ An important question, however, was whether the framing that supported the march and rally could support a movement, rather than a single event.¹²⁶

Rev. Dr. Barber’s vision may have been tested for the first time during the 2008 presidential election. In early 2007, not long after the HKonJ rally, the movement committed to working in broad coalition to pass same-day voting and early voting laws.¹²⁷ The coalition engaged in this campaign and

117. Bob Geary, *HK on J ‘Teach-In’ Draws 2,000 to Raleigh*, INDEP. WKLY., Feb. 14, 2007, at 12. The HKonJ website lists 79 coalition partners. *Partners for HKonJ*, <http://www.hkonj.com/> (last visited July 21, 2011). Partners include unions, churches, peace organizations, civil rights groups, and others. *Id.*

118. David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 133 (Aldon D. Morris & Carol McClurg Mueller ed., 1992); see also HAINES, *supra* note 17, at 18.

119. HAINES, *supra* note 17, at 18 (citing David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986)).

120. HAINES, *supra* note 17, at 19.

121. *Id.*

122. See Snow & Benford, *supra* note 118, at 137-38.

123. Jesse James DeConto, *Massing for Schools, Peace*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 11, 2007, at B1.

124. Geary, *supra* note 117; DeConto, *supra* note 123.

125. Geary, *supra* note 117.

126. *Id.*

127. The coalition also included (at least) the Institute for Civic Engagement and Social Change (ICESC) at North Carolina Central University, Democracy North Carolina, North Carolina Common Cause, and Blueprint NC. Jarvis A. Hall, *The Campus, the Community, and Voter Mobilization*, NAT’L CIVIC REV., Summer 2010, at 43, 43-44 (2010) (listing coalition members); see also Lori Wiggins, *North Carolina Voters Change State from Red to Blue*, THE CRISIS, Spring 2009, at 48.

North Carolina passed laws providing “one-stop [absentee] voting site[s]” where eligible voters could register and cast a provisional ballot in response to this initiative.¹²⁸ North Carolina was the only southern state to make these changes.¹²⁹ In addition to working for legislative reform, the coalition initiated other campaigns intended to increase voting among African American and other minority communities (in which voting had traditionally been low).¹³⁰ The North Carolina NAACP provided a strong grassroots network to the coalition “with the wherewithal to do mass mobilizations and entrée to communities throughout the state.”¹³¹

The campaigns all focused on the importance of and meaningful access to voting. The North Carolina NAACP trained community leaders across the state, launched a series of statewide radio campaigns, distributed internet and YouTube messages, and sent hundreds of thousands of robo-calls targeting traditional non-voters.¹³² The North Carolina NAACP organized the “Millions Voting March” and the “Souls to the Polls” initiative focused on getting out the vote.¹³³ Movement leaders made contingency plans for election day and intervened to extend voting hours and resolve registration issues when needed.¹³⁴ In other words, the coalition conducted a broad based traditional grassroots campaign to get out the vote. And, the campaign succeeded. According to the North Carolina State Board of Elections, the state had the highest percent of the voting age population registered and highest turnout of registered voters since 1972.¹³⁵ More than 1.2

128. The registration was to be validated and the ballot included in the election within two days of the registration. N.C. GEN. STAT. § 163-82.6A (2011); *see also* Cash Michaels, *NAACP Pres. Jealous Endorses NC’s ‘Millions Voting March,’* N.Y. AMSTERDAM NEWS, Oct. 9, 2008, at 4 (noting that the new voting law came about “[a]s a result of the diligent work of the NAACP in North Carolina and its coalition partners”).

129. Wiggins, *supra* note 127.

130. *See id.* at 48-49 (describing the targeted populations); Kristen Collins, *NAACP Urges N.C. to Set Example for Nation,* NEWS & OBSERVER (Raleigh, N.C.), Oct. 11, 2008, at B5 (reporting on the North Carolina state NAACP annual convention and noting that North Carolina was a “key part of the [NAACP]’s efforts to bring historic numbers of black voters to the poles”).

131. Hall, *supra* note 127, at 44.

132. Wiggins, *supra* note 127, at 49 (describing the programs); Hall, *supra* note 127, at 45 (describing the programs and significant role of individual coalition partners in the programs); Michaels, *supra* note 128, at 4 (describing the breadth of programs).

133. Michaels, *supra* note 128, at 4 (providing detailed description of many different ways organizations participated in the Millions Voting March); Wiggins, *supra* note 127, at 48-49 (describing the Millions Voting March and Souls to the Polls); Hall, *supra* note 127, at 45 (same).

134. Wiggins, *supra* note 127, at 49.

135. *Statistics for Presidential Election Years, 1972 – 2004,* N.C. ST. BD. OF ELECTIONS, <http://www.sboe.state.nc.us/content.aspx?ID=70> (last visited July 20, 2011); *see also* Hall, *supra* note 127, at 43 (“In 2008, . . . North Carolina led the nation with the biggest increase in voter turnout over 2004, from 64 percent to 70 percent.”).

million minority voters participated in the 2008 presidential election in North Carolina.¹³⁶

The North Carolina state conference of the NAACP received prestigious national awards at the 99th Annual NAACP Convention in 2008 partly for its work on voter empowerment.¹³⁷ The broad and diverse coalition partners contributed a great deal to the success of the voter campaign.¹³⁸ So too, however, did the careful framing of the issues by the North Carolina NAACP and its partners. As demonstrated above, the coalition recognized the diverse constituencies for the voter empowerment campaign and framed the issue appropriately—from catchy names (“Souls to Polls”) and specific instructions (for example, instructing student voters to allow elderly voters to vote first and to escort them to the polls, offering an arm, if needed), to a broad use of longstanding civil rights messages around voters’ rights. As one historian of race and social movements in North Carolina noted, Rev. Dr. Barber “‘built a statewide interracial fusion political coalition that has not been seriously attempted since 1900.’”¹³⁹

The North Carolina NAACP brought its expertise as a sophisticated social movement with a strong leader committed to broad coalitions to the RJA campaign. Point 9 on the 14-Point plan called for the abolition of the “racially biased” death penalty.¹⁴⁰ People of Faith Against the Death Penalty, led by Steven Dear, had been involved in Rev. Dr. Barber’s coalition since its earliest days.¹⁴¹ As noted above, Rev. Dr. Barber and the North Carolina state chapter of the NAACP supported the racial justice act in 2007.¹⁴² In 2007 and 2008, the movement efficiently energized and mobilized its members around the presidential campaign. When Representatives Womble and Parmon introduced the racial justice act in the house in March 2009, the NAACP was in top shape for action. The issues of “racial justice” fit well with the minority rights aspects of the voting campaign and with the civil rights message of the movement.

C. The Death Penalty Reform Movement

A second diverse coalition of non-governmental organizations loosely organized under the North Carolina Coalition for a Moratorium (“NCCM”)

136. Wiggins, *supra* note 127, at 49.

137. *North Carolina Conference of NAACP Honored at National Convention*, NEWS & OBSERVER (Raleigh, N.C.), July 31, 2008, at B2.

138. Hall, *supra* note 127, at 43-44 (explaining the roles of different coalition partners).

139. Wiggins, *supra* note 112 (quoting Duke University historian Tim Tyson).

140. *About Us: Our 14-Point Agenda*, *supra* note 116.

141. DeConto, *supra* note 123.

142. Press Release, Womble & Parmon, *supra* note 93 (identifying the North Carolina NAACP as having “led” a coalition of eighty-five statewide progressive organizations).

played a significant role in organizing the RJA movement.¹⁴³ NCCM is “a partnership of organizations and individuals across the state that supports reforms to [North Carolina’s] capital punishment system.”¹⁴⁴ Not all organizations active in capital punishment reform belong to NCCM but many, if not most, do. We focus primarily on NCCM for ease of reference. Many coalition partners—including the North Carolina NAACP—played significant leadership roles in the RJA campaign and other reforms.¹⁴⁵ Coalition partners’ members provide the grassroots connections that power the movement.

NCCM expressly seeks a moratorium on executions (but not capital prosecutions) while the state institutes reforms to capital punishment.¹⁴⁶ Our understanding of the coalition is as a meeting place for equals rather than a hierarchical movement on its own. NCCM facilitates and informs strategy discussions, but does not dictate strategy.¹⁴⁷

As noted above, social movements are most likely to succeed when they form broad coalitions. The NCCM has been more successful in achieving this than abolitionist movements of the past.¹⁴⁸ NCCM maintained an impressively broad membership during the RJA campaign. Its website lists “partnership profiles” including advocacy, faith based, legal, and victim outreach.¹⁴⁹ Some of these alliances seem quite natural. For instance, the

143. *Partner Profiles*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/partnerprofiles.aspx> (last visited Mar. 30, 2011).

144. *North Carolina Coalition for a Moratorium*, N.C. ACTION NETWORK, <http://ncactionnet.org/organizations/?id=1298> (last visited June 16, 2011).

145. The coalition typically has one or two staff members. In contrast, many coalition partners support much larger staffs.

146. *Why North Carolina Needs a Moratorium on Executions*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/Issues.aspx?li=394> (last visited Sept. 20, 2011). NCCM advocates for reforms to minimize the possibility of wrongful convictions, the role of race in capital punishment, and the arbitrary nature of the death penalty. *Id.*

147. Personal conversations with coalition members.

148. The NCCM seeks a moratorium rather than complete abolition of capital punishment, but the abolitionist movement is nevertheless relevant here. The NCCM began as an abolitionist group under the name North Carolinians Against the Death Penalty, and clearly there is substantial overlap between the two movements in that they share a goal of ending the death penalty in its current form.

149. *Partner Profiles*, *supra* note 143. The NCCM website lists its partners and provides links to each organization’s webpage (if available). Under “Advocacy,” it lists Carolina Justice Policy Center, North Carolina Black Leadership Caucus, ACLU of North Carolina, ACLU Capital Punishment Project, Amnesty International, Charlotte Community Justice Coalition, Gaston Coalition for a Moratorium Now, NAACP North Carolina, National Association of Social Workers-North Carolina, and North Carolina League of Women Voters. *Advocacy*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/advocacy.aspx> (last visited Nov. 5, 2011). Under “Faith-based,” it lists Franciscan Coalition for Justice and Peace, North Carolina Council of Churches, and People of Faith against the Death Penalty. *Faith Based Organizations*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/faithorgs.aspx> (last visited Nov. 5, 2011). Under “Legal,” it lists Center for Death

coalition includes the Carolina Justice Policy Center, an organization committed to reforming sentencing practices generally and the death penalty in particular,¹⁵⁰ and the North Carolina chapter of the American Civil Liberties Union.¹⁵¹ It also includes groups not so obviously associated with death penalty reform. For instance, the National Association of Social Workers—North Carolina is a coalition member that “seeks to enhance the effective functioning and well being of individuals, families, and communities through its work and advocacy.”¹⁵² Its legislative agenda seeks to advance child welfare initiatives, increase access to health care, and expand the availability of eldercare.¹⁵³ The organization does not deal directly with the criminal justice system or criminal justice reform. Similarly, the coalition includes the League of Women Voters of North Carolina, an organization primarily focused on activities such as campaign and election reform, access to voting, and voter education.¹⁵⁴

The coalition also invited support for its campaign from “prominent North Carolinians” and received an endorsement from “a diverse and bipartisan group of North Carolina citizens,” including former elected leaders, retired judges, university trustees, former district attorneys, and religious leaders.¹⁵⁵ This broad coalition involved multiple constituencies in the RJA campaign.

An essential part of NCCM’s success derives from its ability to identify a successful master frame. NCCM’s work in the last ten years suggests a

Penalty Litigation, Fair Trial Initiative, North Carolina Advocates for Justice, and North Carolina Association of Women Attorneys. *Legal*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/Legal.aspx> (last visited Nov. 5, 2011). Under “Victim Outreach,” it lists Capital Restorative Justice Project and Murder Victims’ Families for Reconciliation. *Victim Outreach*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/VictimOutreach.aspx> (last visited Nov. 5, 2011). Finally, NCCM includes a coalition from the western part of the state, the Western North Carolina Coalition for a Moratorium Partners. *Western North Carolina Coalition for a Moratorium*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/WNCCM.aspx> (last visited Nov. 5, 2011). This coalition includes Asheville Friends Peace and Earth, Gaston Coalition for a Moratorium, Charlotte Coalition for a Moratorium Now, The Ethical Society of Asheville, UNC-Asheville Chapter of ACLU, UNC-Asheville Chapter of Amnesty International, UNC-Asheville Psi Chi, Unitarian Universalist Church of Asheville, Western Carolinians for Criminal Justice, and Western North Carolina ACLU. *Id.*

150. CAROLINA JUST. POL’Y CENT., <http://www.justicepolicycenter.org/> (last visited June 13, 2011).

151. ACLU OF N.C., <http://www.acluofnorthcarolina.org> (last visited June 13, 2011).

152. *About NASW-NC*, N.A.S.W.-N.C., <http://www.naswnc.org/displaycommon.cfm?an=2> (last visited June 16, 2011).

153. *2011 Legislative Agenda*, N.A.S.W.-N.C., <http://www.naswnc.org/displaycommon.cfm?an=1&subarticlenbr=29> (last visited June 16, 2011).

154. *See generally* LEAGUE OF WOMEN VOTERS OF N.C., <http://www.rtpnet.org/~lwvnc/> (last visited June 16, 2011).

155. Letter to Michael F. Easley, James B. Black & Marc Basnight (Apr. 25, 2005), available at <http://www.ncmoratorium.org/support.aspx>.

keen awareness of the power of framing. NCCM was founded in 1965, under the name “North Carolinians Against the Death Penalty.”¹⁵⁶ In 2003, it changed its name to the “North Carolina Coalition for a Moratorium,”¹⁵⁷ as part of a national effort to re-frame, and re-energize, the anti-death penalty movement.¹⁵⁸ Much like the “Nuclear Freeze” frame energized the peace movement in the 1980s, the moratorium movement built on widespread concerns about wrongful convictions to enlist new members to what was now seen as a reform movement and to energize long time abolitionists.¹⁵⁹

Rather than standing against something, the coalition now offered the affirmative, and perhaps more broadly politically palatable, solution of a moratorium.¹⁶⁰ Potential supporters of a moratorium need not oppose capital punishment in principle; they need only support reform. Popular support for a moratorium has been shown to be strong, notwithstanding similarly strong support for capital punishment. A 2004 poll showed that sixty-three percent of North Carolina residents surveyed supported implementing a moratorium on executions to provide time for the state to study its capital punishment system.¹⁶¹

This frame resonated broadly across many coalition partners. Several coalition partners adopted similar names.¹⁶² Others modified their message to be consistent with this goal. For example, the website of the Carolina

156. *Death Penalty Opponents Remain Vigilant*, THE CARRBORO CITIZEN, June 12, 2008, <http://www.carrborocitizen.com/main/2008/06/12/death-penalty-opponents-remain-vigilant/>; Jeremy Collins, *Reforming Capital Punishment in the South: A Glimpse at the North Carolina Racial Justice Act Movement: Address at the “Moving Beyond ‘Racial Blindside’?” Symposium, April 8, 2011*, 2011 MICH. ST. L. REV. 447.

157. *Death Penalty Opponents Remain Vigilant*, *supra* note 156; Collins, *supra* note 156.

158. Patrick O’Neill, *Moratorium Leader Sees Hope for End of Death Penalty*, NAT’L CATH. REP., Jan. 19, 2001, at 7 (explaining how coalition partner Stephen Dear, Executive Director of People of Faith Against the Death Penalty, learned about the “moratorium” and “reform” frame at a national meeting and introduced the idea to his board in North Carolina); *see also* Snow & Benford, *supra* note 118, at 140-41 (stating that a frame has greater mobilizing potential when it rings true to the experience of the targets of mobilization).

159. Snow & Benford, *supra* note 118, at 143 (using the Nuclear Freeze movement as an example of a successful master frame).

160. Darren Freeman, *Legislators Rework Bill on Death Penalty Moratorium*, VIRGINIAN-PILOT, June 17, 2005, at Y1.

161. *Id.* A poll conducted in 2005 found that sixty-four percent of the state’s population supported the death penalty. Gary L. Wright, *N.C. Takes Aim at Bias in Death Penalty*, CHARLOTTE OBSERVER, Aug. 12, 2009, *available at* <http://www.eji.org/eji/files/08.12.09%20Charlotte%20Observer%20-%20NC%20takes%20aim%20at%20bias%20in%20dp.pdf>.

162. GASTON COALITION FOR A MORATORIUM NOW AND CHARLOTTE COALITION FOR A MORATORIUM, <http://www.charlottejustice.org/> (last visited Nov. 11, 2011) (now Charlotte Community Justice Coalition); *see also Our Partners*, NORTH CAROLINA COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/partners.aspx> (last visited Jan. 26, 2012).

Justice Policy Center advances a “cooling off period” in the form of a moratorium in order to undertake necessary reforms.¹⁶³

Much of the social movement literature posits tension between grassroots advocates and legal advocates.¹⁶⁴ Lawyers are seen as hired guns who take over decision making about the movement’s goals and strategies.¹⁶⁵ Litigation-based strategies, such as the ones that supported *McCleskey*, have been challenged not only as ineffective, but counterproductive.¹⁶⁶ NCCM, however, has managed to strike a balance between the roles of grassroots activists and litigators. It frames the movement as one for legal reform and includes lawyers and non-profit law firms as coalition members.

The lawyers and law firm members are coalition partners rather than primary decision makers as they were in the earlier litigation campaign. They do not present themselves as directing or leading the coalition.¹⁶⁷ The legal advocacy groups, such as the non-profit law firm the Center for Death Penalty Litigation (CDPL)¹⁶⁸ and the Fair Trial Initiative,¹⁶⁹ are themselves

163. See THE CAROLINA JUSTICE POLICY CTR., AREAS OF DEATH PENALTY REFORM, available at http://www.justicepolicycenter.org/Articles%20and%20Research/Research/Death%20Penalty/CJPC_Reform_Position.pdf; see also *Death Penalty*, ACLU OF N.C., <http://www.aclu.org/human-rights/death-penalty> (“The ACLU Capital Punishment Project is fighting for the end of the death penalty by supporting moratorium and repeal movements through public education and advocacy. We are engaged in systemic reform of the death penalty process, and case-specific litigation highlighting some of its fundamental flaws.”).

164. See Scott Barclay, Lynn C. Jones & Anna-Maria Marshall, *Two Spinning Wheels: Studying Law and Social Movements*, 54 *STUD. L., POL., & SOC’Y* 1, 8 (noting the ubiquity of criticism among social movement scholars of legal strategies because “they rely on elite intervention and deplete scarce movement resources, thus sapping the strength of more grassroots mobilization”).

165. A movement to reform capital punishment may be categorically different from movements for pay equity or gay rights in that capital punishment exists only through the law and the legal system. Changing the law may be itself the end, rather than one means to an end. If this is true, lawyers would have a more natural role to play than in other movements. But NCCM seeks to reform rather than abolish the death penalty. It may not be the case that legal mobilization can achieve these reforms.

166. For instance, public support for the death penalty was in decline in the late 1960s but rose dramatically following the *Furman* decision. While many factors likely contributed to that shift, backlash against the *Furman* decision may have been a factor. HAINES, *supra* note 17, at 22, 44-46 (discussing the shift in the anti-death penalty movement’s strategy in the 1960s and 70s from traditional grassroots activism targeted at persuading the public and lawmakers to end capital punishment, to one led by litigators with LDF and the ACLU seeking to end the death penalty through test case litigation directly challenging its constitutionality).

167. Authors’ conversations with attorneys involved in NCCM.

168. CENTER FOR DEATH PENALTY LITIGATION, <http://www.cdpl.org/index.html> (last visited June 13, 2011). CDPL describes itself as “a non-profit law firm located in Durham, North Carolina. Our staff includes lawyers, social workers, mitigation investigators, public information officers, and paralegals. Together, we provide direct representation to death sentenced inmates of North Carolina’s death row and consultation assistance to virtually every lawyer practicing capital litigation in the state.” *Id.*

part of the coalition, just like the faith-based or victims' rights groups. Many of the lawyers working with NCCM represent capital defendants and consider this their first and foremost role.¹⁷⁰ The attorneys' involvement in capital trials and appeals gives them a particular expertise that they, in turn, can assert in coalition meetings.

Additionally, NCCM seeks to reform capital punishment primarily by embracing incremental reform in the capital punishment system.¹⁷¹ Most of the reforms are, in fact, changes to the law of capital punishment in North Carolina. For example, NCCM worked to pass legislation preventing the execution of the mentally retarded in North Carolina in 2001,¹⁷² a year before the Supreme Court held the practice unconstitutional.¹⁷³

The extent to which NCCM deliberately used direct litigation as a means to advance reform is less clear. There appear to be some cases in which the coalition may have encouraged this approach. For example, the lawyers and law firm coalition partners challenged North Carolina's use of lethal injection on multiple grounds between 2005 and 2011.¹⁷⁴ The success of these interventions created a de facto moratorium, and therefore supported the NCCM's primary objective.¹⁷⁵ Certainly the litigation would not have been seen to be at odds with the long term goals. At the least it created an opportunity for other reforms, like the RJA, to advance. It seems likely to have appeared on the agenda at coalition partner meetings.

169. FAIR TRIAL INITIATIVE, www.fairtrial.org (last visited Sept. 15, 2011). The Fair Trial Initiative (FTI) works "to ensure fairness for indigent defendants facing the death penalty" by "recruiting and training lawyers and other professionals to assist with representation in individual cases; promoting a multidisciplinary approach and teamwork in capital defense; and continuously introducing innovative approaches to the defense of death penalty cases. FTI also promotes reform through public education." *Id.*; *About Us*, FAIR TRIAL INITIATIVE, <http://www.fairtrial.org/about.php> (last visited Sept. 15, 2011).

170. Typically, litigators engage less in abolitionist work and more in the "more modest task of saving the lives of their clients one by one rather than as a class." HAINES, *supra* note 17, at 118.

171. *Reforms to Consider During a Temporary Delay of Executions*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/Issues.aspx?li=537> (last visited June 22, 2011).

172. N.C. GEN. STAT. § 15A-2005 (2011).

173. *Atkins v. Virginia*, 536 U.S. 304 (2002).

174. *See, e.g.*, Appellants' Brief, *Conner v. Council of State*, No. 213PA10, 2011 WL 4636587 (N.C. Oct. 7, 2011), 2010 WL 4734110, available at <http://deathwatch.files.wordpress.com/2011/03/10-11-8-appellants-brief.pdf>. Oral argument in this case took place on March 14, 2011. David Weiss of coalition-partner the Center for Death Penalty Litigation argued the case for the Appellants. *Supreme Court Hearing on Executions*, WRAL.COM (March 14, 2011), available at <http://www.wral.com/news/video/9266150/#/vid9266150> (video of North Carolina Supreme Court hearing arguments).

175. Woodward, *supra* note 67, at 171-72.

This approach fits nicely into what others have identified as a “legal mobilization approach.”¹⁷⁶ This approach recognizes that “specific legal tactics and practices . . . often have multiple motivations and complex effects.”¹⁷⁷

A review of the North Carolina NAACP and NCCM as social movements documents the coalitions’ particular strengths as they approached the racial justice act campaign. The two social movements had also placed themselves in a strong position to work cooperatively. NCCM belongs to the North Carolina NAACP HKonJ coalition; the North Carolina NAACP belongs to NCCM.¹⁷⁸

It is equally important to consider the context in which the campaign operated.

III. READY TO LISTEN? A CHANGING LANDSCAPE CREATES FERTILE GROUND FOR CHANGE

Both social movement theory and social psychology suggest the importance of changes in landscape to a reform movement like the RJA campaign. Bear in mind that the NCCM had been around for forty-five years (though with a different name) and RJA bills had been introduced in the General Assembly a number of times between 1999 and 2009.¹⁷⁹ Indeed, support for capital punishment had been strong and stable for years following the reinstatement of the death penalty in 1977. Efforts to limit the impact of race in the administration of the death penalty largely stagnated in the last quarter century. *McCleskey* had shut the door on empirical evidence on the impact of race, and courts have been loath to open it even a crack.¹⁸⁰

In sharp contrast to the narrative on race and capital punishment, the larger narrative about the use of capital punishment shifted dramatically during this period. This new narrative may have opened the door in North Carolina to fresh consideration of the corrupting influence of race on the system. To be precise, North Carolina’s experiences of wrongful convictions may have catalyzed a shift in public opinion that can help explain the passage of the RJA.

176. Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* 10 (1994).

177. *Id.*

178. HKONJ, <http://www.hkonj.com/> (last visited July 21, 2011) (listing NCCM as a coalition member under the “Partners for HK on J” heading); *Advocacy*, *supra* note 149 (listing NAACP as a partner).

179. See *infra* note 234 and accompanying text; *infra* note 256.

180. Baldus, Woodworth & Grosso, *supra* note 5, at 144; Johnson, *supra* note 4, at 180; *Evans v. State*, 914 A.2d 25 (Md. 2006) (rejecting race discrimination claims).

A. Exonerations Undermine Basic Presumptions About the Death Penalty

The landscape in which a social movement operates is critical; even the best-connected and savviest organization needs conditions to be ripe to implement reform.¹⁸¹ The social movement itself can facilitate these optimal conditions through its efforts to persuade the public and lawmakers of the merits of its case. But developments with no direct relation to the issue at hand can also affect the viability of reform. Sometimes these shifts are gradual, and sometimes they come about because of a crisis in a related field that upends assumptions that justify the current system.¹⁸² The crisis provokes an “episode of contention” in which the effectiveness of the system is called into question and the relevant actors look to proximate fields for solutions.¹⁸³

The civil rights movement provides an example of a movement facilitated by exogenous developments. Socio-legal scholar Doug McAdam points to several ostensibly unrelated environmental factors that contributed to the success of that movement.¹⁸⁴ The Cold War raised the stakes in America’s international image of a free and democratic society, and at the same time the decline of the southern textile industry undermined the power of white segregationists.¹⁸⁵ All the while, black churches were gaining strength and ultimately formed the basis of the civil rights movement.¹⁸⁶ Once the external conditions were ripe, the institutional strength of the black churches allowed movement leaders to seize the moment of political opportunity.¹⁸⁷

The innocence movement created a similar “episode of contention.” While not framed as a movement about racism, the innocence movement upended assumptions about the basic fairness and efficacy of the system.

181. Melinda D. Kane, *Social Movement Policy Success: Decriminalizing State Sodomy Laws, 1969-1998*, 8 MOBILIZATION: INT’L J. 313, 324 (2003).

182. For example, disruption caused by World War I may have facilitated support for women’s suffrage. Daniel J. Tichenor, *The Presidency, Social Movements, and Contentious Change: Lessons from the Woman’s Suffrage and Labor Movements*, 29 PRESIDENTIAL STUD. Q. 14, 15-19 (1999).

183. Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. SOC. SCI. 653, 655, 672 (2010); see also HAINES, *supra* note 17, at 21 (discussing the political process theory of social movements and social change).

184. DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970* (2d ed. 1999).

185. *Id.* at 73, 82-83.

186. *Id.* at 90-92.

187. *Id.*

These assumptions had justified the Court's refusal to entertain the possibility of entrenched and pervasive biases in the system.¹⁸⁸

In the ten years preceding the passage of the RJA, six high-profile exonerations took place in North Carolina, including those of five death row inmates.¹⁸⁹ Three of the six exonerations took place after 2005.¹⁹⁰ The exonerations directly implicated prosecutorial misconduct and incompetent defense counsel. For instance, Alan Gell was convicted of murder in 1995 and sent to death row.¹⁹¹ When it was later discovered that the prosecution withheld material evidence favorable to the defense, Gell's conviction was vacated, and he was acquitted at a retrial.¹⁹² Glen Edward Chapman was convicted of murder in 1994.¹⁹³ One of his attorneys admitted drinking up to twelve shots of alcohol a day in the capital trial of another (since executed) defendant.¹⁹⁴ These exonerations garnered significant attention in the North Carolina media.¹⁹⁵

Concerns about wrongful convictions spurred North Carolina Chief Justice I. Beverly Lake to convene the North Carolina Actual Innocence

188. For an excellent study on the impact of the wrongful conviction cases on support for the death penalty, see FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008).

189. *The Innocent List*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited March 9, 2011). Death Penalty Information Center lists the following five people as having been wrongfully convicted and sent to death row in North Carolina during that period: Glen Edward Chapman (2008), Levon "Bo" Jones (2008), Jonathon Hoffman (2007), Alan Gell (2004), and Alfred Rivera (1999). A sixth, Darryl Hunt, was freed after DNA tests cleared him of rape and murder for which he was sentenced to life imprisonment. Phoebe Zerwick, *State: DNA Results Irrelevant; Scientific Evidence Shows Semen in Sykes Case Was Not That of Hunt or Other Possible Suspects*, WINSTON-SALEM J., Nov. 22, 2003, at Metro 1, available at Factiva, Doc. No. XWSJ000020031123dzbm0001d.

190. *The Innocent List*, *supra* note 189.

191. *State v. Gell*, 524 S.E.2d 332 (N.C. 2000).

192. *Id.* (upholding Gell's conviction and sentence of death for first-degree murder); see also Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262-76 (2008) (describing the facts of Gell's case and the events leading up to his eventual exoneration).

193. *State v. Chapman*, 464 S.E.2d 661 (N.C. 1995).

194. *Id.*; see also Shalia Dewan, *Releases from Death Row Raise Doubts over Quality of Defense*, N.Y. TIMES, May 7, 2008, at A1 (discussing exonerations of Jones, Hoffman & Chapman).

195. See, e.g., *Taken Off Death Row, Man Found Not Guilty of Murder*, USA TODAY, Feb. 18, 2004, http://www.usatoday.com/news/nation/2004-02-18-death-row_x.htm; *A Pardon Is a Start: Darryl Hunt's Long Trial Is a Disgrace to North Carolina*, CHARLOTTE OBSERVER, Apr. 22, 2004, available at <http://www.ncmortality.org/News.aspx?li=1068>; Pete Bowne, *Former N.C. Prosecutors Facing Hearing For Withholding Death-Penalty Case Evidence*, DIGTRIAD (Sept. 21, 2004, 5:17 AM), <http://www.digtriad.com/news/local/story.aspx?storyid=30990>.

Commission in 2002 (“the Commission”).¹⁹⁶ Justice Lake attracted a diverse group of leaders to talk about wrongful convictions in North Carolina and to suggest reforms that would improve the system.¹⁹⁷ The Commission recommended reforms to eyewitness identification procedures in October 2003 and the creation of the North Carolina Innocence Inquiry Commission (the “Innocence Inquiry Commission”) in 2006.¹⁹⁸ The Innocence Inquiry Commission is unique in that it authorizes its members to review cases with new evidence of innocence and to vacate a conviction upon a showing of clear and convincing evidence of innocence.¹⁹⁹

The experience of the exonerees and the work of the Commission and the Innocence Inquiry Commission made the national innocence movement highly relevant to North Carolina. Developments like these undermine complacency about the system’s effectiveness, especially when they bring to light widespread problems that cannot be dismissed as case-specific isolated aberrations. This phenomenon is aptly illustrated by the sequence of events triggered by the exoneration of Greg Taylor, the Innocence Inquiry Commission’s first.

In February 2010, the Innocence Inquiry Commission vacated the conviction of Greg Taylor, who had spent sixteen years in prison for a murder that he did not commit.²⁰⁰ Investigation into his case revealed a lack of candor in the serological tests offered by the state.²⁰¹ A significant portion of the state’s case against him rested on evidence of blood found on his car, but the SBI’s report omitted the fact that more sensitive follow-up tests did not indicate the presence of blood.²⁰²

This discovery prompted an independent investigation of the North Carolina State Bureau of Investigation (SBI).²⁰³ Two former FBI agents

196. Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 *DRAKE L. REV.* 647, 648 (2004).

197. *Id.* at 650-51.

198. *Id.* at 653. For more information see INNOCENCE INQUIRY COMMISSION, <http://www.innocencecommission-nc.gov/> (last visited Nov. 6, 2011).

199. N.C. GEN. STAT. § 15A-1460 (1) (2011) (defining “claim of factual innocence” as being based on “credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief”); § 15A-1469(h) (stating the standard of proof and authority to vacate a conviction).

200. *State v. Taylor*, 447 S.E.2d 360 (N.C. 1994) (affirming Taylor’s conviction for first-degree murder); Robbie Brown, *Judges Free Inmate on Recommendation of Special Innocence Panel*, *N.Y. TIMES*, Feb. 17, 2010, <http://www.nytimes.com/2010/02/18/us/18innocent.html>.

201. Mandy Locke & Joseph Neff, *Former SBI Agent Appeals Dismissal*, *NEWS & OBSERVER* (Raleigh NC), May 17, 2011, <http://www.newsobserver.com/2011/05/17/1204047/former-sbi-agent-appeals-dismissal.html>.

202. *Id.*

203. CHRIS SWECKER & MICHAEL WOLF, AN INDEPENDENT REVIEW OF THE SBI FORENSIC LABORATORY 2-3 (2010), available at <http://ncdoj.gov/getdoc/0a92ee81-0667-4935-b2d3-221d4f586c61/Independent-Review-of-SBI-Forensic-LAB.aspx>.

reviewed 15,419 serology laboratory files from cases from 1987 to 2003.²⁰⁴ Of those, 230 revealed that lab workers had provided incomplete and misleading reports about serological testing in more than 200 cases between 1987 and 2003.²⁰⁵ The study found that laboratory reports were more forthcoming about tests that bolstered the state's case, but often omitted test results that would have supported the defense.²⁰⁶ The former FBI agent who conducted the audit, while finding that there was no evidence that files or reports were deliberately suppressed,²⁰⁷ stated that the problems stemmed in part from "poorly crafted policy" and a "lack of objectivity."²⁰⁸

The investigation generated bad publicity for the SBI,²⁰⁹ creating an opportunity not lost on the NCCM's leadership.²¹⁰ These developments led the state House of Representatives to vote unanimously to approve changes in the operation and oversight of the crime laboratory.²¹¹ Some of the questionable reports were prepared in capital cases, including those of four people still on death row at the time of the report, and three who had been executed.²¹² The SBI's misfeasance in a particular case does not mean that the aggrieved defendant was innocent. Yet the knowledge that the ostensibly objective evidence to which juries presumably accord great weight was the product not of objective well-trained scientists but that of biased advocates willing to spin the evidence to suit the state's case likely struck a blow to the public's confidence in the system.²¹³

204. *Id.* at 2-3 & n.2.

205. *Id.* at 3.

206. *Id.*

207. *Id.* at 28.

208. *Id.* at 4.

209. *See, e.g., Shake-up*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 17, 2010, <http://www.newsobserver.com/2010/08/17/632099/shake-up.html>; Joseph Neff & Mandy Locke, *SBI Bloodstain Analysis Team Had No Guidelines for 21 Years*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 10, 2010, <http://www.newsobserver.com/2010/09/09/671509/sbi-bloodstain-analysis-teamwent.html>; Paul Woolverton, *State Officials Work to Restore Trust in SBI Lab*, FAYETTEVILLE OBSERVER, Sept. 13, 2010, <http://fayobserver.com/articles/2010/09/13/1029287?sac=Home>.

210. Representatives from the NAACP, People of Faith Against the Death Penalty, the ACLU of North Carolina, the Carolina Justice Policy Center, and Murder Victims Family Members for Reconciliation of North Carolina held an event with exoneree Darryl Hunt to highlight the implications of the audit's findings for the integrity of the death penalty system. Anne Blythe, *Audit Spurs Death-Penalty Protest*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 24, 2010, <http://www.newsobserver.com/2010/08/24/644415/audit-spurs-death-penalty-protest.html>.

211. Joseph Neff, *Perdue Signs Law to Bolster Crime Lab*, CHARLOTTE OBSERVER, Apr. 1, 2011, at A1.

212. SWECKER & WOLF, *supra* note 203, at 2. Governor Bev Perdue signed the bill into law on March 31, 2011, N.C. Sess. Laws 2011-19.

213. Seth Edwards, president of the North Carolina Conference of District Attorneys, stated that "[r]estoring the public's confidence not only in the SBI lab, but our entire system of justice, is our paramount concern, and a full scale audit of the lab is a step in the right

B. A New Narrative Emerges

The innocence movement also changed the narrative about capital defendants. Because a disproportionate number of the exonerated had been sentenced to death,²¹⁴ their stories changed how people thought about the death penalty. Psychologists have long recognized that people are moved more by anecdotes than statistics.²¹⁵ Numbers—no matter how big—don't capture people's interest and empathy the way a story does.²¹⁶ For the decades following the reinstatement of the death penalty in the United States,²¹⁷ the most readily-accessible anecdotes typically featured monstrous killers who stayed alive on the taxpayer dime while defense attorneys and other bleeding hearts searched for a technicality to allow the criminal to avoid justice. Meanwhile, the families of these remorseless killers' victims waited in agony for closure.²¹⁸

While that narrative is still salient, exonerations brought to light stories of a different kind of victimization—those of people wrongfully accused of the most serious crimes and shuffled through the system.²¹⁹ Their cases did not get the kind careful attention many presumed death penalty cases automatically receive. Their stories had casts that included sleeping defense attorneys, incompetent (and occasionally malicious) forensic analysts who presented misleading laboratory results, eyewitnesses who picked the wrong person despite their best intentions, detectives who wore down

direction." Mandy Locke & Joseph Neff, *DAs Demand Full SBI Audit*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 28, 2010, <http://www.newsobserver.com/2010/08/28/651620/das-demand-full-sbi-audit.html>.

214. Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL L. STUD. 927, 942 (2008).

215. See Richard E. Nisbett et al., *Popular Induction: Information Is Not Necessarily Informative*, in COGNITION AND SOCIAL BEHAVIOR 113, 128-31 (John S. Carroll & John W. Payne eds., 1976); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 55-59 (1980).

216. For an overview of psychological tendencies that contribute to a preference for narrative over statistical data, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998); see also John B.F. de Wit, Enny Das & Raymond Vet, *What Works Best: Objective Statistics Or a Personal Testimonial? An Assessment of the Persuasive Effects of Different Types of Message Evidence on Risk Perception*, 27 HEALTH PSYCHOL. 110 (2008).

217. *Gregg v. Georgia*, 428 U.S. 153 (1976).

218. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 7, 26, 27-32 (Stephen P. Garvey ed., 2003) (describing how scripts about the death penalty changed in the wake of DNA and other exonerations).

219. *Id.*; see also BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003) (reporting stories of wrongfully convicted inmates).

naïve or mentally challenged suspects into confessing falsely, and amoral snitches willing to say anything to catch a break in their own cases.²²⁰ These anecdotes created a competing narrative, putting a human face and a “there but for the grace of God go I” element to the statistics.

The story changed even though the underlying reality had not. No evidence suggests that the system has become less accurate over time, or that arbitrary factors like race play more of a role now than they did twenty years ago.²²¹ Although defendants had been exonerated from death row before the advent of DNA technology, those cases were necessarily more ambiguous and did not upend faith in the system overall. In contrast, DNA exonerations were smoking guns of failure. The defendant was exonerated not merely because he dismantled the state’s case, but because he provided affirmative and indisputable evidence that the state prosecuted the wrong person. The stories of exonerees became harder to ignore.

This new narrative—constructed from vivid anecdotes—paved the way for serious consideration of ways in which the system can be corrupted. One such potentially corrupting influence is that of race. Contrast the *McCleskey* Court’s reluctance to rely on credible statistical findings of discrimination with the RJA’s express authorization of the use of this evidence. This new narrative may have opened the door in North Carolina to fresh consideration of what data can tell us about racism in the system.

The chilled reception for empirically sound findings of race effects in various death penalty systems demonstrates how statistics that contradict what we believe to be true can be disregarded as mere “numerology” and dismissed.²²² In contrast, statistics become much more palatable when they comport with existing beliefs. Courts are receptive to statistical evidence in many contexts, such as school segregation, voting rights cases, and employment discrimination, because the statistical information comports with dominant beliefs.²²³ The new narrative of innocence created an opportunity

220. SCHECK, NEUFELD & DWYER, *supra* note 219.

221. See generally GAO Report, *supra* note 10 (summarizing capital charging and sentencing studies between 1972 and 1990 and finding consistent evidence of race of victim discrimination); Baldus & Woodworth, *supra* note 10 (updating the GAO Report and reaching similar conclusions).

222. *Ballew v. Georgia*, 435 U.S. 223, 246 (Powell, J., concurring) (1978).

223. Researchers who study the efficacy of public health messages have found that whether a listener prefers narrative to statistical evidence depends in part on the consistency of the message’s content with the listener’s initial beliefs. Statistics are more persuasive when a message is consistent with the listener’s initial preference, and narratives are most persuasive when the message was inconsistent with what the listener already believed. See Michael D. Slater & Donna Rouner, *Value-Affirmative and Value-Protective Processing of Alcohol Education Messages That Include Statistical Evidence or Anecdotes*, 23 COMM. RES. 210, 224-25 (1996) (finding that listeners were more receptive to messages about risks of alcohol use that included statistical information when the message was congruent with their own values about alcohol, while messages with anecdotal evidence were more persuasive to

to consider whether race played a role in decision making and the need to do so rigorously, with the best possible evidence, including rigorous empirical evidence. The combination of a strong social movement and shifts in the cultural landscape caused by the innocence movement created an opportunity for reform.

IV. SEIZING AN OPPORTUNITY: THE MOVEMENT TO PASS THE RACIAL JUSTICE ACT

We situate the RJA within the larger movement to address the role of race in capital punishment and criminal justice because of the strength of the Act itself toward this objective. As noted above, *McCleskey* invited state-level legislation, and national and state actors worked to pass racial justice acts beginning in 1987. Yet with the exception of Kentucky, these efforts have failed.²²⁴ The RJA, in contrast, not only passed, but passed with language that allows for a meaningful inquiry into the role of race.

As discussed above, lawyers who participated in NCCM brought a particular expertise as coalition members. The RJA text reflects this expertise in its clear response to the impact of *McCleskey* on litigation, the continuing role of race in jury selection, and the limits of the Kentucky Racial Justice Act.²²⁵ The first two of these topics are discussed directly in testimo-

listeners for whom the message was incongruent); see also Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 149 (1980-81) (noting that because people do not process probabilistic information well and have trouble integrating anecdotal probabilistic evidence, they "tend to ignore the *statistical* information"). For a collection of cases that use statistical evidence, see DANIEL L. RUBINFELD, REFERENCE GUIDE ON MULTIPLE REGRESSION IN REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 182-83 nn.5-11 (3d ed. 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/\\$file/SciMan3D01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf).

224. See note 5 and accompanying text. A Federal Racial Justice Act was introduced in 1994, but failed to pass. H.R. 4017, 103d Cong. (2d Sess. 1994). Similar bills have been introduced in Pennsylvania and California, but have not passed. *2010 - Proposed or Passed Legislation*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/2010-proposed-or-passed-legislation> (last visited June 22, 2011).

225. We do not have a complete record of the drafting of the Racial Justice Act. Coalition partners from the Center for Death Penalty Litigation testified before the House Interim Study Commission on Capital Punishment established by the Speaker of the House of Representatives on November 9, 2005, and before the earlier (joint) Legislative Research Commission Capital Punishment Mentally Retarded and Race Basis Committee in 2000. LEGISLATIVE RESEARCH COMM'N, REPORT TO THE 2001 SESSION OF THE 2001 GENERAL ASSEMBLY OF NORTH CAROLINA, CAPITAL PUNISHMENT MENTALLY RETARDED AND RACE BASIS (2001), available at <http://www.ncga.state.nc.us/documentsites/legislativepublications/study%20reports%20to%20the%202001%20ncga/legislative%20research%20committee%20%28lrc%29%20study%20reports%20%2701/capital%20punishment%20-%20mentally%20retarded%20and%20race%20basis%20%28lrc%29.pdf>; HOUSE INTERIM STUDY COMM. ON CAPITAL PUNISHMENT, REPORT TO THE 2007 GENERAL ASSEMBLY OF NORTH CAROLINA,

ny by capital defense attorneys before two legislative study commissions in the years leading up to the passage of the RJA.²²⁶ According to Center for Death Penalty litigation attorney Kenneth Rose, “[l]anguage about peremptory strikes was included in the earliest proposal considered by a N.C. legislative study commission (2006). . . . because of the lack of enforcement of *Batson* by the N.C. courts.”²²⁷ This expertise directly influenced coalition priorities during the legislative process.²²⁸ These coalition partners worked in cooperation with other coalition members to advance debate on the role of race in capital punishment. The attorneys’ involvement, however, brought additional legal sophistication to the conversation.

Equally important, the two movements discussed above brought a great deal of momentum to this campaign. As noted above, the 2003 NCCM name change signaled a significant re-framing of the campaign. At the time of the change in name, coalition partners engaged in a statewide campaign to pass a two year moratorium on executions.²²⁹ After months of organizing, the North Carolina Senate passed a moratorium bill.²³⁰ North Carolina and

available at <http://www.ncga.state.nc.us/documentsites/legislativepublications/Study%20Reports%20to%20the%202007%20NCGA/Capital%20Punishment.pdf>.

226. See, e.g., LEGISLATIVE RESEARCH COMM’N, *supra* note 225, at 10-11 (Attorney Henderson Hill testifying before the April 20, 2000, meeting of the Legislative Study Commission, discussing the role of race in capital jury selection). University of North Carolina law professor and attorney John C. Boger testified on the same day explaining the role of statistical analyses. *Id.* at 11-12.

227. E-mail from Kenneth Rose to Catherine Grosso (April 5, 2011) (on file with the author). This e-mail notes that the inclusion of a peremptory strike claim may also have been encouraged by the law review article by Amanda Hitchcock, “*Deference Does Not by Definition Preclude Relief*”: *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006).

228. For example, the coalition prioritized language authorizing the use of statistical evidence and supporting a statewide claim of discrimination over concerns over the difficulty of preparing necessary evidence in one year. N.C. GEN. STAT. § 15A-2011(a)-(b) (2009).

229. This was a classic widespread grassroots campaign. It put NCCM coalition partners in touch with citizens in every part of North Carolina. Coalition members sought support from municipalities and counties across the state and at least thirty-one municipalities passed a nonbinding resolution in support of a temporary moratorium on executions. Tim Whitmire, *Conservative Towns Back Death Penalty Moratorium*, CHARLESTON GAZETTE, May 27, 2003, at 1A; *Two More Towns Urge Moratorium*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 9, 2004, at B5. They worked “to get businesses and churches in all of North Carolina’s 100 counties to pass resolutions supporting the moratorium.” *Pace Picks up for Execution Moratorium*, INDEP. WKLY. (Durham, N.C.), May 20, 2003, at 9 (reporting on interviews with coalition partners Stephen Dear, Executive Director of the People of Faith Against the Death Penalty, and Lao Rubert, Executive Director of the Carolina Justice Policy Center).

230. S.B. 972, 2003 Gen. Assemb. (N.C. 2003-2004) (passed second and third reading on April 30, 2003, and was referred to the Committee on Rules, Calendar, and Operations of the House); see also Henry Weinstein, *North Carolina Senate Votes for Executions Moratorium*, L.A. TIMES, May 4, 2003, at A42 (reporting on the vote and recording the importance of coalition partners to the campaign).

the coalition partners made national news and hopes were high. A year later the House failed to take up the bill, which died.²³¹ Faced with this failure and the difficulty garnering support behind a new moratorium bill,²³² coalition partners before long refocused their attention exclusively on particular reforms like the racial justice act.²³³ They brought to the racial justice act campaign the relationships they developed through the moratorium campaigns among coalition partners and across the state, as well as their hard-won expertise in grassroots development, policy advocacy, and media relations. In particular, the North Carolina NAACP under Rev. Dr. Barber's strong leadership brought all of the experience of the voter empowerment campaign.

The RJA had been introduced in the North Carolina General Assembly at least three times before 2009.²³⁴ Once the North Carolina NAACP and NCCM identified the RJA as the top priority for 2009, the coalitions and coalition partners brought their well-practiced campaign skills to the table—working with media consultants, hiring pollsters, and nurturing alliances. As they had in support of voter empowerment and moratorium bills,²³⁵ coalition partners organized events to garner support for the RJA. Murder Victims' Families for Reconciliation gathered on the steps of the various county courthouses and government buildings to appeal to law makers to support the RJA.²³⁶ Religious groups in the coalition organized similar events.²³⁷ The

231. Sharif Durhams, *Hearing, Yes; Vote, Not Yet: Witnesses Make Their Case, but House Delays Action to Build Support*, CHARLOTTE OBSERVER, July 16, 2003, at 1B.

232. See Cecil Bothwell, *Back from the Dead?*, MOUNTAIN XPRESS (Asheville, N.C.), Jan. 10, 2007, at 9 (quoting the NCCM director and coalition partner leaders on the failure to pass a moratorium bill in 2004 or 2005, and the 2007 effort to pass a moratorium bill); James Romoser, *Death-Penalty Moratorium Gets Momentum: Opinions Differ on Whether Legislators Will Take Action*, WINSTON-SALEM J., Jan. 27, 2007, at A1 (quoting the NCCM director and others about the 2007 effort to pass a moratorium); Mark Schreiner, *Death Penalty Debate to Go On*, STAR NEWS (Wilmington, N.C.), Jan. 23, 2005, at 1B (quoting the NCCM director and reporting on the 2005 effort to pass a moratorium bill).

233. James Romoser, *Backers Will Try Again on Bill: Goal of Legislation Is to Cut Racial Disparity in Death-Penalty Cases*, WINSTON-SALEM J., Jan. 22, 2009, at B1 (reporting that the N.C. Coalition for a Moratorium's main priority for the 2009 session was passage of the Racial Justice Act).

234. S.B. 991, 1999 Gen. Assemb. (N.C. 1999); H.B. 140/S.B. 171, 2001 Gen. Assemb. (N.C. 2001); H.B. 1291, 2007, Gen. Assemb. (N.C. 2007).

235. See Editorial, *A Killing Season? Gov. Easley Should Declare a Moratorium on Executions*, CHARLOTTE OBSERVER, Aug. 20, 2003, at 14A (reporting that rallies had been scheduled "across the state" in support of a moratorium); *Pace Picks Up for Execution Moratorium*, INDEP. WKLY. (Durham, N.C.), May 20, 2003, at 9 (reporting on a rally organized by coalition partners at the North Carolina General Assembly in support of the moratorium).

236. Jon Ostendorff, *Families of Murder Victims Support Racial Justice Act*, ASHEVILLE CITIZEN-TIMES, July 28, 2009, at 1B.

237. Leslie Boyd, *Clergy Members Call for Racial Justice*, ASHEVILLE CITIZEN-TIMES, July 10, 2009, at 1B; *Religion Notes: Racial Justice Event Planned for Sunday*, ASHEVILLE CITIZEN-TIMES, July 13, 2009, at B4.

NAACP held press conferences, accompanied by the Representatives Womble and Parmon, Senator McKissick, and black death row exonerees.²³⁸

Rev. Dr. Barber understood the RJA as entirely consistent with civil rights and basic fairness, and framed it that way to the press by highlighting the recent exonerations of three black men in North Carolina from death row.²³⁹ In 2008, after the RJA died in the General Assembly, Rev. Dr. Barber stated, “‘We’ve had three black men released from death row. . . . I believe that if we had had three wealthy men, three white men, exonerated like this, everybody would be declaring that our justice system is broken.’”²⁴⁰ To legislators, Rev. Dr. Barber took a gentler tack, acknowledging elected officials’ anxiety about supporting the bill: “‘We understand our representatives must face the voters. But you also must look in the mirror. . . . And we must also look into the faces of African-Americans who have been victimized by racism in the criminal justice system.’”²⁴¹

The RJA campaign garnered broad participation from the North Carolina NAACP and NCCM coalition partners and widespread grassroots support. Through the campaign, the RJA movement invited conversations about race and the role of race in criminal justice at all levels—from Rev. Dr. Barber’s statements to the media to the legislative debate. When the RJA became law, coalition leaders “hailed the law . . . as a landmark step toward ending . . . a pervasive pattern of racism in the criminal-justice system.”²⁴²

CONCLUSION

Opponents of the RJA have argued that it has more to do with ending the death penalty than achieving racial justice.²⁴³ This point of view is understandable, as the NCCM advocates for a moratorium and some of its

238. James Romoser, *Racial Justice Bill Waits For Panel; Womble, Parmon Are Its Sponsors; Hunt Helping*, WINSTON-SALEM J., May 31, 2008, at B1.

239. At one event, Barber called capital punishment “legal lynching” and argued that the state should stop “trying to play God.” Patrick O’Neill, *Separately, Church and State Debate the Death Penalty*, INDEP. WKLY. (Durham, N.C.), May 21, 2008, at 13; *see also Advocates Want Passage of NC Racial Justice Act*, ABC11-WTVD (May 27, 2008) <http://abclocal.go.com/wtvd/story?section=news/local&id=6167266> (quoting Barber as stating, “‘You can overturn a wrongful conviction, but you can’t unpack a wrong grave’”).

240. Romoser, *supra* note 94.

241. *N.C. Lawmakers Working to Get Done Before Next Week*, WRAL.COM, <http://www.wral.com/news/state/story/3186115/> (last updated July 10, 2008).

242. James Rosomer, *A Busy Session, Historic Decisions: General Assembly Finally Adjourns a Session That’s Been Hard, and Noteworthy*, WINSTON-SALEM J., Aug. 12, 2009, <http://www2.journalnow.com/news/2009/aug/12/a-busy-session-historic-decisions-general-assembly-ar-158850/>.

243. Ashley McErlean, *Area Death Row Inmates File Claims Under Racial Justice Act*, ENCTODAY.COM, (Aug. 16, 2010, 12:00 PM), <http://www.enctoday.com/articles/row-81597-jdn-inmates-death.html> (quoting prosecutor Dewey Hudson, stating that the RJA “‘should be called the abolition of the death penalty act’”).

members favor outright abolition.²⁴⁴ But the RJA is significant for reasons that extend beyond its application to the extraordinary cases (even in a state like North Carolina with a sizeable death row) that result in a death sentence. Claims brought under the RJA will compel a thorough and painstaking examination of the role of race in the criminal justice system.

In that regard, the potential significance of the RJA goes beyond capital cases. One of the concerns articulated by the *McCleskey* Court was that recognizing racial bias in the administration of the death penalty would necessarily call into question the fairness of the system generally. Death is different, to be sure, but proof of racial bias in capital cases would at least raise suspicion that it infects other parts of the system too.

On April 20, 2012, a North Carolina trial court ruled that race was, in fact, a significant factor in the prosecution's use of peremptory challenges in North Carolina at the time of Marcus Robinson's capital trial. The court vacated Mr. Robinson's death sentence and resentenced him to life in prison without the possibility of parole.²⁴⁵ This reduction of even one death sentence based on a finding of systematic race discrimination in capital prosecutions is simply unprecedented. While the results of the appeals process and the impact of this decision and other factors on other pending cases remain to be seen, the implications of this decision and the ongoing litigation could be significant for several additional reasons.

First, the litigation provides a forum in which to scrutinize how well the system functions. A claimant operating under the *McCleskey* framework would have to assert evidence of discrimination specific to his or her own case. Even when evidence of this sort is available, it offers at best a window for speculation about what might be happening in other cases. Any one case of misconduct can be dismissed as an aberration,²⁴⁶ signifying little about the system as a whole. When problematic findings about the system do come to light, it is generally through academic publications, which can be dismissed as smoke and mirrors.²⁴⁷

244. NCCM's website states that "[w]hile some members of the Coalition may approach the issue as abolitionists, many feel that if North Carolina is going to have an active death penalty, every effort must be made to eliminate the arbitrariness, racial disparities, hidden evidence and classist approach that has characterized NC's death penalty since its inception." *About the North Carolina Coalition for a Moratorium*, N.C. COALITION FOR A MORATORIUM, <http://www.ncmoratorium.org/whowere.aspx> (last visited June 22, 2011).

245. *North Carolina v. Robinson*, No. 91 CRS 23143, at *44-46, available at http://www.aclu.org/files/assets/marcus_robinson_order.pdf.

246. For instance, the National District Attorneys Association called North Carolina prosecutor Mike Nifong's mishandling of the rape allegations leveled against Duke lacrosse players "an aberration." Laura Parker, *Trial This Week for Prosecutor in Duke Case*, USA TODAY, June 10, 2007, at 3A.

247. McErlean, *supra* note 243 (quoting prosecutor Dewey Hudson, stating that "'you can prove anything with stats and numbers'").

Under the RJA, however, this kind of evidence is presented and tested in court.²⁴⁸ Findings of bias may not be dismissed summarily or ignored, but must be tested and rebutted with specificity. This process—even if it does not result in relief for the litigant—serves an important function by bringing this evidence into the public’s consciousness.

To that end, the RJA’s supporters did not assume their work was done once they had persuaded the legislature to pass it. The North Carolina NAACP and NCCM conducted a campus tour entitled “Race, Wrongful Convictions and the Death Penalty” during the summer of 2010, before any defendant had filed a claim or any study results had been released.²⁴⁹ Participants engaged in panel discussions about the role of race in capital punishment and the passage of the RJA.²⁵⁰ Speakers included not only prominent attorneys and academics, but also a former death row inmate, Darryl Hunt, and Jennifer Thompson Cannino, whose mistaken eyewitness identification of an African American man sent him to prison for a rape he did not commit.²⁵¹

Keeping the arguments for the necessity of the RJA before the public serves two objectives. First, it keeps political opponents seeking to repeal or radically limit the scope of the RJA from controlling how the issue is framed. Opponents argue that the law does nothing to further accuracy in that it requires no evidence of innocence to state a claim for relief.²⁵² Moreover, rather than promoting racial fairness, the RJA undermines it by “perpetuat[ing] a fixation on race to the detriment of fairness and reason.”²⁵³ By reminding the public of the human faces behind the statistics, the coalition ensures that debate about the RJA is not depicted as one pitting cold, easily manipulated numbers against common sense.

Fears of repeal of the legislation are not unfounded. Republicans took control of the North Carolina legislature in November 2010. During the campaign, the state Republican Party mailed a flyer that depicted mug shots of two death row inmates, Wayne Laws and Henry McCollum, to households in districts with contested races.²⁵⁴ The flyer described their brutal

248. See, for example, *North Carolina v. Robinson*, No. 91 CRS 23143, at *44-46, available at http://www.aclu.org/files/assets/marcus_robinson_order.pdf.

249. 2010 NORTH CAROLINA CAMPUS TOUR (2010), available at www.unc.edu/~fbaum/Innocence/NC/NC_Tour_Description.pdf.

250. *Id.*

251. *Id.*

252. Senate Minority Leader Phil Berger stated, “Make no mistake, this law has little to do with justice and nothing to do with guilt or innocence.” Editorial, *NC Racial Justice Act Aims at Fairness*, CHARLOTTE OBSERVER, Aug. 17, 2009, at 10A.

253. Joseph D. Pearlman, *Death Penalty Should Be Colorblind*, CHARLOTTE OBSERVER, May 13, 2010, at 13A.

254. Rob Christensen, *Potshots Turn Nasty in N.C. Legislative Races: Democrats and Republicans Resort to Outdated Charges, Fear-Mongering*, CHARLOTTE OBSERVER, Oct. 21,

crimes and cautioned the targeted voters that because of their “ultra-liberal” representative, Laws and McCollum “might be moving out of jail and into [y]our neighborhood sometime soon.”²⁵⁵

New House Majority Leader Paul Stam joined other Republican lawmakers in pronouncing their intent to repeal the RJA.²⁵⁶ On April 4, 2011, Representative Stam co-sponsored House Bill 615, which proposed to amend the RJA to make it “consistent with the United States Supreme Court’s Ruling in *McCleskey v. Kemp*.”²⁵⁷ If passed, the bill will render the RJA redundant with the constitutional protections already recognized by the Supreme Court.

Legislators, the North Carolina NAACP, and NCCM coalition members repeatedly mobilized RJA campaign participants to defeat the repeal bill. The North Carolina Legislative Black Caucus “denounced” the effort to repeal the Act with caucus chairman McKissick noting, “Passing this repeal would be a giant step backwards for justice in North Carolina.”²⁵⁸ Rev. Dr. Barber and several other community members calling themselves the “State in Emergency Seven” staged a protest at the capital to voice their opposition to several proposed Republican measures, including budget cuts and a repeal of the RJA.²⁵⁹ Letters to the editor and editorials appeared in state and local newspapers.²⁶⁰ While the bill passed the House, the Senate adjourned the session without hearing the bill.²⁶¹

2010, <http://www.charlotteobserver.com/2010/10/21/1776187/potshots-turn-nasty-in-nc-legislative.html#ixzz1I7LpvV1v>.

255. *Id.* The assertion that the RJA would result in the release of death row inmates is tenuous at best, as the relief afforded successful claimants is a reduction of their sentence to life without the possibility of parole. The flyer was also controversial because the representative targeted by this accusation, Rep. Hugh Holliman, lost his own sixteen-year old daughter to murder in 1985 and witnessed the execution of her killer in 1998. *Id.*

256. Michael Biesecker, *N. Carolina GOP Looks to Repeal Racial Justice Act*, Jan. 23, 2011, <http://www.mcclatchydc.com/2011/01/23/107275/n-carolina-gop-looks-to-repeal.html#ixzz1I7Oza2em>.

257. No Discriminatory Purpose in Death Penalty, H.B. 615/S. 9, 2011 Session N.C. Gen. Assemb. (N.C. 2011).

258. Craig Jarvis & Lynn Bonner, *GOP Retreats on Parts of Medical Liability Bill*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 8, 2011, <http://www.newsobserver.com/2011/04/08/1113996/gop-retreats-on-parts-of-medical.html>.

259. Cash Michaels, *Rev. Barber, Protestors Arrested at NC General Assembly*, WILMINGTON J., May 26, 2011; Bruce Mildwurf, *Religious Leaders Rally to Save Racial Justice Act*, WRAL, <http://www.wral.com/news/state/nccapitol/story/9724734/> (last updated June 14, 2011); David LaMotte, *Why I Am in Jail*, N.C. COUNCIL OF CHURCHES (May 24, 2011, 4:30 PM), <http://www.nccouncilofchurches.org/2011/05/why-i-am-in-jail/>.

260. See, e.g., Fletcher Jean Parks, *Hopes Perdue Will Veto Attempt to Repeal Racial Justice Act*, ASHEVILLE CITIZEN-TIMES, June 14, 2011, available at <http://www.ncmoratorium.org/News.aspx?li=6597> (Fletcher Jean Parks is a long time member of coalition partner People of Faith Against the Death Penalty); Mark Rabil, *Mark Rabil: A Tale of Two Cities and Two Juries*, WINSTON-SALEM J., June 1, 2011, <http://www2.journalnow.com/>

Legislators resumed debate on this bill in November 2011 and passed it shortly thereafter.²⁶² Governor Bev Perdue vetoed the bill on December 14, 2011.²⁶³ The Senate voted to override the veto, but the House of Representatives appeared not to have the votes necessary for an override and referred the bill to a legislative committee on January 4, 2012.²⁶⁴ Repeal efforts continued until the publication of this article in May 2012.²⁶⁵

NCCM's involvement in holding off the repeal effort provided yet another forum for discussing the importance of race in North Carolina's criminal justice system and the need for reform. If the evidence presented in litigation establishes (or at least raises the strong possibility) that race continues to play a role in capital trials, questions should arise about fairness in non-capital cases as well. Capital cases constitute only a small fraction of criminal cases, but they are often where more broadly applicable reforms originate. Compared to garden variety felony cases, capital cases receive intense scrutiny and are therefore more likely to reveal serious errors in how the system functions, prompting reforms. The arguments for reform, however, often apply with equal force to non-capital cases. For instance, North Carolina enacted open-file discovery initially only for capital prosecutions, but later extended it to all felony cases.²⁶⁶

Second, for the individual litigants, RJA claims may have indirect effects. A respectable showing of racial bias that falls short of convincing a judge to grant relief under the RJA might render other claims more plausible.²⁶⁷ Johnson considered this possibility when her client lost a claim of race discrimination, but won an ineffective assistance of counsel claim. While the ineffectiveness claim had merit, she noted, she had lost stronger

news/2011/jun/01/wsopin02-a-tale-of-two-cities-mark-rabil-guest-col-ar-1081315/ (capital defense lawyer).

261. *Legislature Wraps Up First Session*, CHARLOTTE OBSERVER, June 19, 2011, <http://www.charlotteobserver.com/2011/06/19/2389730/legislature-wraps-up-first-session.html> (noting that the Senate sent the repeal bill back to the committee and did not take it up). North Carolina Senate leaders have stated that the Senate may take up the repeal bill in the short legislative session in May 2012. Gary D. Robertson, *Repeal of NC Racial Bias Review Delayed by Senate*, ABC11-WTVD (June 17, 2011), <http://abclocal.go.com/wtvd/story?section=news/local&id=8196187>.

262. *Senate Bill 9: No Discriminatory Purpose in Death Penalty*, NORTH CAROLINA GENERAL ASSEMBLY, <http://www.ncleg.net/gascripts/billlookup/billlookup.pl?Session=2011&BillID=S9> (showing the bill was ratified and sent to the governor on November 28th and 29th, 2011).

263. *Id.*

264. *Id.*

265. *Special Racial Justice Act Committee Meets*, NEWSOBSERVER.COM (Feb. 10, 2012, 12:11 PM), http://projects.newsobserver.com/under_the_dome/special_racial_justice_act_committee_meets.

266. Mosteller, *supra* note 192, at 262-63, 272-76 (citing N.C. GEN. STAT. § 15A-1415(f) (2006) and N.C. GEN. STAT. § 15A-903 (2005)).

267. Johnson, *supra* note 4, at 185.

such claims in other cases.²⁶⁸ Although the issues of race discrimination and ineffective assistance of counsel were theoretically distinct, it is not hard to see how decision makers' assessments of one claim can affect assessments of another. In the case of the RJA, such an effect would not necessarily be irrational. Doubts about whether the process was truly free of improper bias should prompt one to question how fair it was in other respects.

Finally, making race salient may give rise to a sense of accountability in capital decision makers and spur them to monitor themselves for bias more vigilantly. Social psychological research shows that bias may be implicit, and that making the possibility of bias salient causes people to monitor and correct for it.²⁶⁹ Kentucky's RJA has led to no successful claims, but some evidence suggests that the Act may have diminished biased decision making because the relevant actors know that they may someday be asked to account for their decisions.²⁷⁰

Many of the circumstances described above exist in other states, but they did not pass a statute like the RJA. Kentucky passed its Racial Justice Act²⁷¹ in 1998, but its requirements render it toothless in addressing race discrimination directly.²⁷² In contrast, the RJA offers a meaningful oppor-

268. *Id.* Along similar lines, post-trial interviews with capital jurors reveal that lingering doubts about guilt was a commonly cited reason for the decision to vote for a life sentence instead of death. William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 203-04 (2001).

269. Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1373-78 (2000) (presenting studies in which mock jurors showed less bias when racial issues were made salient).

270. See *infra* note 272 and accompanying text.

271. KY. REV. STAT. ANN. § 532.300 (West 2011).

272. Kentucky is the only other jurisdiction in the United States to have passed a racial justice act. §§ 532.300-532.309. While a bill very similar to the Kentucky act provided a starting point for considerations in the North Carolina General Assembly in 2007, North Carolina legislators significantly amended the text before passing it into law in 2009. N.C. Racial Justice Act, H.B. 1291, 2007 Gen. Assemb. (N.C. 2007). As a result, the RJA differs in important ways from the Kentucky act.

First, the Kentucky law requires that a defendant prove "that racial considerations played a significant part in the decision to seek a death sentence *in his or her case*." KY. REV. STAT. ANN. § 532.300(4) (emphasis added). North Carolina legislators removed language narrowing the inquiry to an individual case. See N.C. GEN. STAT. § 15A-2011(a). A requirement of case-by-case analysis would have precluded statistical analyses of the decision making at various levels in North Carolina, and thus imposed the very limitations set forth in *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987) (denying McCleskey's equal protection claim because he did not offer "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence"). While the Kentucky law is silent as to the appropriate geographic scope of inquiry, it has been understood to require that any proof of discrimination come from the defendant's county. Baldus & Woodworth, *supra* note 10, at 1467, 1467 n.215 (2004). The RJA states repeatedly that a

tunity to examine the role of race in the death penalty and beyond. It is too early to measure final outcomes or to declare a complete victory with the RJA. But its passage demonstrates that North Carolina hosts a complex social movement, worthy of additional study not only for their success at passing the RJA but for their ability to work together while maintaining separate roles, and a law that breaks new ground in our collective effort to confront the legacy of racism in the criminal justice system.

discrimination claim may be based on decisions “in the county, the prosecutorial district, the judicial division, or the State.” N.C. GEN. STAT. §§ 15A-2011(a)-(c), 15A-2012(a).

Second, the Kentucky law requires the defendant to prove “that race was *the* basis of the decision to seek the death penalty” and to prove it “by *clear and convincing evidence*.” KY. REV. STAT. ANN. § 532.300(5) (emphasis added). The RJA requires that race be “a significant factor,” N.C. GEN. STAT. § 15A-2012(a), rather than “the basis of the decision,” KY. REV. STAT. ANN. § 532.300(5). The statute states that the defendant must state his or her claim “with particularity,” N.C. GEN. STAT. § 15A-2012(a), and adopts the general procedures for a motion for appropriate relief where “the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion,” N.C. GEN. STAT. § 15A-1420(c)(5).

The same section of the Kentucky act limits claims to discrimination in “the decision to seek the death penalty.” KY. REV. STAT. ANN. § 532.300(5). As a result, the defendant may raise claims based *only* on prosecutorial charging decisions. In contrast, the North Carolina act expressly authorizes claims based on the decision “to seek or impose a death sentence,” i.e., prosecutorial charging decisions and jury sentencing decisions, as well as “decisions to exercise peremptory challenges during jury selection.” N.C. GEN. STAT. § 15A-2011(a)-(b).

Finally, the Kentucky law did “not apply to sentences imposed prior to July 15, 1998,” the effective date of the act. KY. REV. STAT. ANN. § 532.305. As noted above, North Carolina’s law provides all defendants under a death sentence on the effective date of the law one year in which to file a motion. North Carolina Racial Justice Act, 2009-464 N.C. Sess. Laws § 2.