CAPITAL PUNISHMENT IN NORTH CAROLINA: A JUSTICE'S VIEW ON WHY WE CAN "NO LONGER TINKER WITH THE MACHINERY OF DEATH"*

JAMES G. EXUM, JR.**

North Carolina's system for imposing the death penalty is arbitrary, infected with racial bias, and error-prone. It is time for our state to abolish it. This Article chronicles how I reached this conclusion after five decades in the law, including nearly thirty years on the bench, eight of which as chief justice of the Supreme Court of North Carolina. Throughout my judicial career, I struggled to ensure the death penalty conformed with the law. But legal safeguards failed to live up to their promise, and I have concluded that a reliable death penalty system is beyond the ability of human beings to devise.

As a state legislator in the late 1960s, I worked unsuccessfully to persuade my colleagues to abolish the death penalty because I thought it was bad public policy that taught the wrong lessons about the value of human life. As a judge, however, I thought the death penalty was constitutional, or could be made so, and that it was my duty to enforce it. But after reviewing hundreds of capital cases, I came to see that, despite our best efforts, the death penalty was not—and will never be—rationally reserved for only the worst defendants who commit the worst crimes. Decades of accumulated evidence now proves that North Carolina's death penalty is unconstitutional and should be brought to an end.

** James G. Exum, Jr., served on the Supreme Court of North Carolina from 1974 to 1994, and was chief justice from 1986 to 1994. Justice Exum was elected to the N.C. House of Representatives in 1967. He also served as resident superior court judge of Guilford County. In 1996, he returned to the practice of law at Smith Moore Leatherwood LLP where he led the appellate practice group. Justice Exum was a Distinguished Professor of the Judicial Process at Elon University School of Law before he retired in 2017.

I would like to acknowledge, with gratitude, the indispensable assistance of Gretchen Engel, Madhu Swarna, and David Weiss of the North Carolina Center for Death Penalty Litigation. Without their help, I could not have brought this Article to fruition.

INTRODUCTION

More than forty years ago, I cast my first vote to uphold a death sentence. I personally believed then, and I believe now, that the death penalty is abhorrent because the "cold, calculated, premeditated taking of human life is an act the brutality and violence of which is not diminished because it is sponsored by the state."[1] Nonetheless, I explained how, as a judge, I could not "substitute my personal will for that of the Legislature merely because I disagree[d] with its chosen policy."[2]

Over the next two decades as an associate and later chief justice of the Supreme Court of North Carolina, I voted to affirm many death sentences. In 1985, I publicly and unequivocally proclaimed my belief in the constitutionality of the death penalty.[3] Through most of my tenure on the court, I truly thought that, by refining our law and procedures, we could achieve a system that would reliably, rationally, and fairly sort people who committed murder into two distinct groups: those who deserved the death penalty and those who did not. I believed the court could "tinker with the machinery of death" enough to ensure the death penalty was fairly meted out.[4]

1. State v. Woodson, 287 N.C. 578, 598, 215 S.E.2d 607, 619 (1975) (Exum, J., concurring), *rev'd*, 428 U.S. 280 (1976).

2. *Id.* at 600, 215 S.E.2d at 621.

3. James G. Exum, Jr., *Symposium Address: The Death Penalty in North Carolina*, 8 CAMPBELL L. REV. 1, 3 (1985).

4. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari). In *Callins*, Justice Blackmun explained that for more than twenty years he had struggled to develop "procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor." *Id.* Despairing that the death penalty remained stubbornly arbitrary, racially discriminatory, and risked the execution of an innocent person, Justice Blackmun announced, "From this day forward, I no longer shall tinker with the machinery of death." *Id.*

By the time I left the court in 1994, however, this view began to feel untenable. Evidence of the death penalty's unreliability was starting to pile up. I began to have doubts as to whether a constitutional system for administering the death penalty could ever be created. And I was not alone. Justice Mitchell, one of my colleagues on the court, who succeeded me as chief justice and who has generally supported capital punishment, observed

> It's like being picked in a lottery. . . . When you execute one out of 100 every year, there can be no consistency to it. It's almost like one of those ancient societies that used to pick out someone to execute for a good crop that year. It's totally arbitrary.[5]

Over the years, as the number of people exonerated from death row increased, yet another of my court colleagues sounded the alarm. In 2016, former Chief Justice Lake, a death penalty supporter for most of his life, announced his view that our capital punishment system may be unalterably unconstitutional:

> [S]ystemic problems continue to lead to the conviction of the innocent as well as to the death penalty for those individuals for whom it is constitutionally inappropriate, regardless of the crime. Our inability to determine who possesses sufficient culpability to warrant a death sentence draws into question whether the death penalty can ever be constitutional under the Eighth Amendment. I have come to believe that it probably cannot.[6]

Chief Justice Lake's concern about the death penalty's unreliability is shared in many quarters. In 2009, the American Law Institute ("ALI")—the influential group of legal scholars that publishes the Model Penal Code, a basis for much of the substantive criminal law in the United States—voted to withdraw its model death penalty statute "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[7]

Increasingly, state appellate courts around the country have come to agree that the death penalty's flaws are intractable, finding the institution invalid

5. Eric Bates, *The Death Lottery: Who Lives and Who Dies? State Courts Decide Through a Deadly Ritual of Chance*, INDEP. WKLY., Oct. 13–19, 1999, at 19, 20 (quoting an interview with Burley B. Mitchell, Jr., former chief justice of the Supreme Court of North Carolina).

6. I. Beverly Lake, Jr., *I. Beverly Lake: Why I've Changed My Mind About the Death Penalty*, NEWS & OBSERVER (May 20, 2016, 4:47 PM), https://www.newsobserver.com/opinion/op-ed/article78910672.html [https://perma.cc/49A5-7K7H (staff-uploaded dark archive)].

7. *See Model Penal Code*, AM. L. INST., https://www.ali.org/publications/show/model-penal-code/ [https://perma.cc/RG4J-2DM9] (announcing the October 23, 2009, vote of the ALI Council to accept a resolution to withdraw its model death penalty statute); *see also* AM. L. INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (Apr. 15, 2009), https://files.deathpenaltyinfo.org/legacy/documents/alicoun.pdf [https://perma.cc/KM4E-5HQS].

pursuant to state law. In 2004, the New York Court of Appeals struck down the death penalty because, in the event of a deadlock, the state's jury instructions risked coercion of a death sentence.[8] In 2015, the Connecticut Supreme Court—citing an array of concerns, including the possibility of error, as well as caprice and racial bias—abolished the death penalty under the state's ban on cruel and unusual punishment.[9] In 2016, the Delaware Supreme Court held its death penalty improperly allowed a judge, rather than a jury, to make the findings needed to support a death sentence.[10] In 2018, the Washington Supreme Court struck down its death penalty as arbitrary and racially biased.[11]

Likewise, in 2018, twelve former North Carolina judges, prosecutors, and law enforcement officials submitted an amicus brief to the Supreme Court of North Carolina, in a case raising significant questions about racial bias in the death penalty, asking the court to address the issue through abolition.[12] The coalition argued that the death penalty's persistence in this state "undermine[s] and erode[s] confidence in the administration of the system that capital punishment was once enacted to protect."[13] After much reflection and close observation of North Carolina's death penalty—including nearly thirty years on the bench, followed by twenty-five as a practicing attorney—I have come to agree.

For many years as a judge, I struggled to reconcile what I saw as my duty to apply the death penalty statute, enacted by the legislature, with my persistent suspicion, and eventually firm belief, that human beings are simply not capable of devising a system of law that will result in a death penalty that is rationally imposed. This became increasingly clear to me after reviewing scores of capital cases while a member of the Supreme Court of North Carolina.

I intend in this Article to outline the reasons that led me down this path, from concern about the wisdom of capital punishment as a matter of public policy, to my conviction today that the death penalty is not only ill-advised policy, but is also inconsistent with the values embodied in our founding documents and therefore unconstitutional. In Part I, I trace the legal and historical basis for my initial opinion that the law could make the death penalty reliable and nonarbitrary, and therefore constitutional. In Part II, I outline the legal framework for considering the death penalty's constitutionality: the requirement that it be applied without arbitrariness. In Part III, I set out the

8. People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004).

9. State v. Santiago, 122 A.3d 1, 136 (Conn. 2015).

10. Rauf v. State, 145 A.3d 430, 482 (Del. 2016).

11. State v. Gregory, 427 P.3d 621, 635 (Wash. 2018).

12. Amicus Brief of Promise of Justice Initiative and 12 Former Judges, Justices and Law Enforcement Officers at 3–6, State v. Burke, 369 N.C. 37, 782 S.E.2d 737 (2016) (mem.) (No. 181A93-4).

13. *Id.*

reasons why North Carolina's death penalty fails this test. Most troubling, to my mind, is the fact that it is capricious. It has sent scores of people to death row whose cases cannot be meaningfully distinguished from the many other homicide cases that resulted in life imprisonment sentences. I am also concerned with the evidence indicating that racial bias has infiltrated critical decisions in capital cases and that too many innocent persons have been sent to death row in our state.

After North Carolina's forty years of tinkering with its modern death penalty, substantial evidence of these problems has been documented and amassed. The time has now come for our courts to finally address them head on.

I. FROM *MCGAUTHA* TO *FURMAN* TO *WOODSON*: THE STRUGGLE TO MAKE SENSE OF THE MODERN DEATH PENALTY

If history is any guide, it is not at all surprising that one of the major difficulties we face today with North Carolina's death penalty is our inability to implement legal standards that lead to rational and bias-free results. Since the very beginning of the modern death penalty, the search for these standards has proven elusive.

When I took the bench as a trial judge in 1967, I thought the death penalty was constitutional. Under the law at that time, I presided over capital trials where jurors were asked to decide whether a defendant, convicted of a capital crime, would live or die but were not given any guidance on how to make that grave determination. They were told only that they should decide the question in their sole discretion.[14]

The U.S. Supreme Court eventually addressed the issue of standardless capital sentencing in *McGautha v. California*.[15] In *McGautha*, two capital defendants argued that a death sentence without standards to guide the jury's sentencing discretion was constitutionally intolerable.[16] Such unfettered discretion, they argued, "failed to provide a rational basis for distinguishing" between cases where the defendant was allowed to live and other cases where the defendant was condemned to die.[17] The Court credited this argument, acknowledging that the search for a "criterion for isolating crimes appropriately punishable by death" was failure bound and "beyond present human ability."[18] The Court nevertheless approved this broad grant of discretion to juries, concluding it was "quite impossible to say that committing to the untrammeled

14. *See* Ernest S. DeLaney III, *Criminal Procedure—Capital Sentencing by a Standardless Jury*, 50 N.C. L. REV. 118, 118 (1971).

15. 402 U.S. 183, 196–208 (1971), *vacated*, 408 U.S. 941 (1972).

16. *Id.* at 204.

17. *Id.*

18. *Id.* at 198, 204.

discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[19]

As it turned out, *McGautha* would not be the final word. Just a year later, reflecting the difficulty we all face in reconciling ourselves to a system designed to take human life, the U.S. Supreme Court changed its mind about standardless death sentencing. In *Furman v. Georgia*,[20] the Court struck down the death penalty as unconstitutional.[21] In doing so, each of the five Justices who voted to invalidate the death penalty expressed concern about its arbitrariness and the absence of any "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[22] At the time *Furman* was decided, I shared the Justices' concern with arbitrariness but, like Justices Stewart and White, still believed capital punishment statutes could be written in a way that would avoid that arbitrariness and render the death penalty constitutional.

Although the concurring Justices in *Furman* were held together by their view that the death penalty at that time was impermissibly arbitrary, as the Court itself later acknowledged, the splintered opinion, with each of the Justices expressing their own unique rationale, "[p]redictably . . . engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment."[23] While some states responded to *Furman* by removing all traces of discretion and adopting mandatory death penalties for certain crimes, others retained the practice of individually assessing each case and attempted to comply with *Furman* by providing standards to guide the sentencer's discretion.[24]

As I outlined in one of my early death penalty opinions,[25] North Carolina chose the former approach: a mandatory death penalty.[26] This was a course that, as a justice, I assented to at the time, believing that the difficult and debatable

19. *Id.* at 207. The Court's opinion gives two hints as to what drove the result—the "gruesome" facts of the murders that "bespeak no miscarriage of justice" and the fact that the procedures challenged by the petitioners "are those by which most capital trials in this country are conducted." *Id.* at 221.

20. 408 U.S. 238 (1972).

21. *Id.* at 239–40.

22. *Id.* at 313 (White, J., concurring); *id.* at 309 (Stewart, J., concurring) (stating that the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *id.* at 256–57 (Douglas, J., concurring) (concluding the "discretionary statutes are unconstitutional in their operation" because they are "pregnant with discrimination"); *id.* at 293, 295 (Brennan, J., concurring) (finding the death penalty is "being inflicted arbitrarily" and in a "totally capricious" manner); *id.* at 365–66 (Marshall, J., concurring) (explaining that "capital punishment falls upon the poor, the ignorant, and the underprivileged members of society").

23. Lockett v. Ohio, 438 U.S. 586, 599–600 (1978).

24. *Id.*

25. State v. Johnson, 298 N.C. 47, 56–63, 257 S.E.2d 597, 606–10 (1979).

26. *Id.* at 57–58, 257 S.E.2d at 606–07. North Carolina initially adopted its mandatory death penalty by judicial decision in *State v. Waddell*, 282 N.C. 431, 439, 194 S.E.2d 19, 25 (1973), and later by legislative enactment in 1974. *See Johnson*, 298 N.C. at 57–58, 257 S.E.2d at 606–07.

questions about the death penalty, over which many people of good faith disagreed, "strongly militate[d] in favor of judicial deference to the legislative will."[27] However, the U.S. Supreme Court quickly forced North Carolina to change course once again when it held that the mandatory death penalty was unconstitutional because it failed to afford defendants individualized consideration of their character and record.[28] Instead, the Supreme Court read *Furman* as holding "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[29] The Court embraced what has come to be known as the "guided discretion" scheme, in which the death sentencer retains the discretion to consider each case on its own merits but does so within the confines of a legislative structure that instructs the sentencer on what factors to consider and how to weigh them.[30] The North Carolina General Assembly responded to this guidance by adopting, in large part, the guided discretion death penalty scheme proposed by the drafters of the Model Penal Code.[31]

Thus, within the span of a few years, North Carolina had a death penalty system defined by unbridled sentencing discretion; no death penalty at all in the wake of *Furman*; a mandatory death penalty scheme; and finally, a guided discretion scheme. This tumultuous history reflects the struggle, on the part of our state and nation, to make sense of the death penalty and to render it rational and reasonable.

This history also reflects my own struggle and ambivalence about the death penalty, which I set forth in my concurring opinion in *State v. Woodson*[32] in 1975.[33] I explained there that, as a matter of policy, I opposed capital punishment because I believed it inconsistent with the function of government to set an example of respect for life, I doubted its efficacy as a deterrent, and I disagreed with those who urged retribution as a valid justification of capital punishment (or other sanctions in our criminal justice system).[34] And, yet, I recognized that both the state and federal constitutions explicitly contemplate that the death penalty would be an authorized punishment in our criminal

27. State v. Woodson, 287 N.C. 578, 600–01, 215 S.E.2d 607, 621 (1975) (Exum, J., concurring).

28. Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976).

29. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

30. *Id.* at 192.

31. *See Johnson*, 298 N.C. at 60–63, 257 S.E.2d at 608–10 (describing the history of the Model Penal Code's development of a death penalty statute and North Carolina's adoption of that approach).

32. State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975), *rev'd*, 428 U.S. 280 (1976).

33. *Id.* at 597–600, 215 S.E.2d at 619–21 (Exum, J., concurring).

34. *Id.*

justice system.[35] Therefore, I believed it beyond my judicial role to substitute my will for that of the legislature.[36]

For the next forty years, the Supreme Court of North Carolina strived to interpret and apply North Carolina's death penalty statute in a constitutional manner. We took seriously our obligation to rationally narrow the class of defendants subject to the death penalty and endeavored to ensure that jurors actively considered all evidence favoring life instead of death.[37] In this way, I believed at the time we could make real the holding in *Gregg v. Georgia*,[38] insisting on reliability and rationality in the imposition of this ultimate punishment. And I believed we were required to do so.

But, if textual acknowledgment of the death penalty poses difficulties for facial challenges to the practice, it has no bearing on as-applied constitutional challenges. And, as outlined below, after four decades of experience and reflection, I believe the evidence is now much clearer than it was when North Carolina's modern death penalty scheme was first enacted in 1974.[39] In my view, the evidence now convincingly shows that, despite their best efforts, North Carolina's legislature and its courts have consistently proved unable to devise a system that adequately addresses the stark unreliability, irrationality, and arbitrariness that first rendered the death penalty unconstitutional in *Furman*.

II. EVALUATING THE DEATH PENALTY: AN EVIDENCE-BASED, CONSTITUTIONAL FRAMEWORK

Before discussing why North Carolina's death penalty is unconstitutional, a word is in order about how to approach the legal question in the first place. In *Furman*, when the U.S. Supreme Court invalidated the death penalty, it considered and relied on evidence that the sentence was meted out arbitrarily and on the basis of race and poverty.[40] Justices Douglas, Brennan, Stewart, White, and Marshall, in their separate concurring opinions, all relied on studies,

35. U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . ."); N.C. CONST. art. I, § 22 ("But any person . . . may . . . waive indictment in noncapital cases.").

36. *Woodson*, 287 N.C. at 601, 215 S.E.2d at 621 (Exum, J., concurring).

37. *See, e.g.*, State v. Quesinberry, 319 N.C. 228, 238, 354 S.E.2d 446, 452 (1987) (prohibiting the same evidence from being used to support multiple aggravating circumstances); State v. Oliver, 302 N.C. 28, 61, 274 S.E.2d 183, 204 (1981) (holding that doubts about the submission of an aggravating circumstance must be resolved in favor of the defendant); State v. Cherry, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979) (prohibiting a felony underlying conviction for first-degree felony murder from being submitted as an aggravating circumstance).

38. 428 U.S. 153, 189 (1976) (plurality opinion).

39. Act of March 11, 1949, ch. 299, 1949 N.C. Sess. Laws 262 (codified as amended at N.C. GEN. STAT. § 14-17 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)).

40. Furman v. Georgia, 408 U.S. 238, 240 (1972).

observations, and empirical evidence about the death penalty's application in concluding it violated the Eighth Amendment.[41]

A few short years later, in *Gregg*, the Court approved new capital statutes in the hope that legislative schemes would ensure that death sentences were imposed in a reliable and nonarbitrary manner.[42] *Gregg* made clear that its resurrection of the death penalty was premised on the theory that "it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns."[43] The Court approved Georgia's new statute, in part, on the ground that the defendant had not, at that time, identified convincing evidence of *Furman*-like problems.[44]

Moreover, in both cases, the Eighth Amendment question was whether the death penalty was being "imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[45] Put another way, "[i]n determining whether a punishment comports with human dignity, we are aided by [a principle] inherent in the [proscription on cruel or unusual punishment]—that the State must not arbitrarily inflict a severe punishment."[46] Thus, *Furman* and *Gregg* focused on analyzing evidence and facts to address the Eighth Amendment's requirement that the death penalty be applied rationally, reliably, and nonarbitrarily. The concurring opinion in *Gregg* made plain that the constitutional question is "whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion."[47]

This is not just a federal issue. Article I, section 27 of North Carolina's constitution provides the same if not greater protection as the Eighth

41. *Id.* at 249–52 (Douglas, J., concurring) (relying on a presidential commission that found "[t]he death sentence is disproportionately imposed" based on race and poverty and a study of Texas capital cases finding racial disparities); *id.* at 291–93 (Brennan, J., concurring) (describing data regarding the steady decline of the death penalty's use); *id.* at 309–10 (Stewart, J., concurring) (describing cases in which some individuals received a death sentence while others did not, even when convicted of similar crimes); *id.* at 313 (White, J., concurring) (referencing data cited by other Justices and relying on "10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state cases involving crimes for which death is the authorized penalty"); *id.* at 364 (Marshall, J., concurring) ("Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination.").

42. *Gregg*, 428 U.S. at 155 (plurality opinion).

43. *Id.* at 195.

44. *Id.* at 199–203; *see also id.* at 225 (White, J., concurring) ("Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts . . . . Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.").

45. *Id.* at 188 (plurality opinion).

46. Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

47. *Gregg*, 428 U.S. at 223 (White, J., concurring).

Amendment against "cruel *or* unusual punishments."[48] Legal scholars have observed that this phrasing, which is broader than the federal ban on "cruel and unusual punishments,"[49] indeed "may conceivably have practical consequences."[50] My former colleague, Justice Martin, wrote that "[t]he disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment."[51]

Regardless of whether the state or federal constitutional provision is applied, this is not an abstract issue. It requires judges to examine how, in fact, the death penalty is actually working. And, after forty years of experience, North Carolina has failed the constitutional test because arbitrary considerations and caprice still infect our death penalty system.

III. NORTH CAROLINA'S MODERN DEATH PENALTY: AN UNFULFILLED CONSTITUTIONAL PROMISE

The operation of the modern death penalty is well understood and ably described by Justice Breyer in his dissenting opinion in *Glossip v. Gross*.[52] In *Glossip*, Justice Breyer noted that, after years of study, we still lack any reliable evidence that the death penalty contributes meaningfully to public safety.[53] "[T]he National Research Council . . . [has concluded there is] insufficient [evidence] to establish a deterrent effect. . . ."[54] Meanwhile, we know that "innocent people have been executed."[55] We know there are a "'disturbing' . . . number of instances in which individuals had been sentenced to death but later exonerated."[56] There have been 172 exonerations from death row nationally.[57] And we recognize that the "factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not . . . . [On the other hand,] circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*."[58]

What may be less well known is how these broader trends have put down roots here in North Carolina. When the evidence describing North Carolina's death penalty is examined—an undertaking *Furman* requires—it is difficult to

48. N.C. CONST. art. I, § 27 (emphasis added).

49. U.S. CONST. amend. VIII.

50. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 84 (2d ed. 2013).

51. Medley v. N.C. Dep't of Corr., 330 N.C. 837, 846, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring).

52. 135 S. Ct. 2726 (2015).

53. *See id.* at 2767–68 (Breyer, J., dissenting).

54. *Id.* at 2768.

55. *Id.* at 2756.

56. *Id.* at 2756–57.

57. *Innocence Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence-database [https://perma.cc/UXF9-TCPB].

58. *Glossip*, 135 S. Ct. at 2760.

deny that the state's death penalty scheme is unconstitutional. We do not, today, have a system that is free from arbitrary, cruel, or unusual punishment. I have come to believe, as the Justices in *McGautha* acknowledged almost fifty years ago, that such a system for determining who should live and who should die is beyond the ability of human beings to create.[59]

A. *Arbitrary Results*

I begin with my central concern, formed after many years of close review of homicide cases on direct appeal. After decades of attempts, our legal system appears incapable of devising a structure that rationally separates the worst cases, arguably deserving of the death penalty, from the less aggravated homicides, arguably deserving life imprisonment. Given this inability, our constitutional protections against arbitrary punishment require that we reject the death penalty as a legitimate sanction in the administration of our criminal justice system.

The capital case of Robert Bacon starkly illustrates just how badly our system fails to prevent the random imposition of death sentences. When Bacon's convictions and death sentence came before the Supreme Court of North Carolina in *State v. Bacon*,[60] I filed a dissent because I believed his sentence was an excessive and disproportionate "misfit."[61] I argued that Bacon's girlfriend and codefendant, Bonnie Clark, was "at least equally culpable."[62] Yet Clark received a life sentence.[63]

As I discussed in my dissent, Clark wanted her husband dead, apparently to collect on his life insurance policy, and she convinced Bacon to help her kill him.[64] Clark lured her husband with an invitation to a movie and, when the three met, Bacon stabbed Glennie Clark to death.[65] After reviewing the record, I concluded that Bacon and Clark "committed the same crime."[66] Further, "Clark was the instigator, planner and motivator who was actually present during and actively participated in the murder."[67] The fact that Bacon received a death sentence, and Clark a life sentence, was an "inconsistent, inherently self-contradictory" result that cried out for the state's highest court to intervene, yet

59. McGautha v. California, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

60. 337 N.C. 66, 446 S.E.2d 542 (1994).

61. *Id.* at 131, 446 S.E.2d at 579 (Exum, C.J., dissenting) ("From every perspective the instant case is a misfit among similar cases in the proportionality pool.").

62. *Id.* at 128, 446 S.E.2d at 577.

63. *Id.* at 116, 446 S.E.2d at 570 (majority opinion).

64. *See id.* at 122–23, 446 S.E.2d at 573–74 (Exum, C.J., dissenting).

65. *Id.*

66. *Id.* at 128, 446 S.E.2d at 577.

67. *Id.*

it did not.[68] Bacon's death sentence, for a killing he committed "at the behest and under the inspiration, direction, and domination"[69] of Bonnie Clark, who received a life sentence,[70] illustrates dramatically the limits of our efforts to create a rational system of capital punishment.[71]

Robert Bacon's case is not an outlier. Rather, it represents a broader trend that became apparent to me during my time as a justice: too often, there is simply no way to rationally explain why a jury imposed death in one case but not another. Examples of such arbitrariness are not hard to find in North Carolina.

In *State v. McCollum*,[72] for example, I dissented, along with my colleague Justice Frye, from the imposition of a death sentence on a nineteen-year-old defendant who was intellectually disabled: he functioned at the mental age of eight to ten years and his IQ placed him on par with second and third grade children.[73] These factors, I found, placed the defendant in the same class as other defendants who had received life sentences for their crimes.[74] I found, for this reason, that his death sentence was "disproportionate;"[75] yet my colleagues disagreed and affirmed the death sentence.[76]

In yet another arbitrary case, *State v. LeGrande*,[77] the defendant, Guy LeGrande, was sentenced to death for killing the victim at the behest of her estranged husband, Tommy Munford.[78] But, while LeGrande was sentenced to death, Munford was permitted to plead guilty in exchange for a second-degree life sentence.[79] This disparity occurred even though Munford told numerous people in advance that he wanted to "do in" his wife.[80] He took out a life

68. *See id.*

69. *Id.* at 131, 446 S.E.2d at 579.

70. *Id.* at 116, 446 S.E.2d at 570 (majority opinion).

71. In 2001, the governor of North Carolina granted Bacon clemency because there were concerns that the jury considered Bacon's race and his interracial relationship with a White woman when deciding his punishment. *N.C. Governor Commutes Sentence of Death-Row Inmate to Life*, CNN: L. CTR. (Oct. 3, 2001, 2:29 PM), http://edition.cnn.com/2001/LAW/10/03/nc.death.row/index.html [https://perma.cc/KBG7-2WN6].

72. 334 N.C. 208, 433 S.E.2d 144 (1993).

73. *Id.* at 248, 433 S.E.2d at 166 (Exum, C.J., concurring in part and dissenting in part).

74. *Id.*, 433 S.E.2d at 166–67.

75. *Id.*, 433 S.E.2d at 167.

76. *Id.* at 245, 433 S.E.2d at 164. As I will discuss in greater detail below, only adding to the tragedy of this case is the fact that Henry McCollum, as it turned out, was not guilty of any crime at all but would have to spend thirty years on death row before being fully exonerated and released from prison. *See infra* Section III.C.

77. 346 N.C. 718, 487 S.E.2d 727 (1997).

78. *Id.* at 721–22, 487 S.E.2d at 728.

79. Munford's second-degree murder conviction can be viewed through the N.C. Offender Public Information database. *Criminal Offender Searches*, N.C. DEP'T PUB. SAFETY, https://www.ncdps.gov/dps-services/crime-data/offender-search [https://perma.cc/UF4V-F78K] (follow "Offender Public Information Search/Inmate Locator" link; then search for "Howard T. Munford").

80. *LeGrande*, 346 N.C. at 722, 487 S.E.2d at 728.

insurance policy on her life and named himself the beneficiary.[81] Munford promised to pay LeGrande $6,500 to kill his wife, he provided LeGrande with a gun, and he even bought the ammunition.[82] Munford arranged things so his wife would be home alone, dropped LeGrande off nearby, and then blew a horn to signal to LeGrande that it was time to commit the murder.[83] Meanwhile, LeGrande plainly had mental health problems that were apparent when he represented himself at trial and made bizarre statements to the jury.[84] LeGrande was later found incompetent to be executed as a result of his delusional disorder.[85]

In another instance, highlighted in Justice Breyer's *Glossip* dissent, a North Carolina defendant

> committed a single-victim murder [and] receive[d] the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant [killed a single victim and did not receive the death penalty,] . . . despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime.[86]

Disparate results such as these are seen in even the most aggravated and tragic of homicide cases in our state. In *State v. Burr*,[87] the defendant was sentenced to death where the State's evidence at trial indicated the four-month-old victim sustained a head injury when Burr was left alone with her.[88] But, as terrible as this crime was,[89] far more shocking cases involving the murder of children have resulted in life sentences in North Carolina. In *State v. Crawford*,[90] the defendant was sentenced to life even though he had a history of inflicting

81. *Id.*

82. *Id.*

83. *Id.*, 487 S.E.2d at 728–29.

84. *See id.* at 722, 725, 487 S.E.2d at 729, 730.

85. *Judge: Inmate Too Mentally Ill To Be Executed*, WRAL (July 1, 2008, 4:18 PM), https://www.wral.com/news/local/story/3136429/ [https://perma.cc/PTC3-XCTZ].

86. Glossip v. Gross, 135 S. Ct. 2726, 2763 (2015) (Breyer, J., dissenting) (discussing two North Carolina homicide cases: *State v. Badgett*, 361 N.C. 234, 644 S.E.2d 206 (2007), which resulted in a death sentence, and *State v. Edwards*, 174 N.C. App. 490, 621 S.E.2d 333 (2005), which resulted in a life sentence).

87. 341 N.C. 263, 461 S.E.2d 602 (1995).

88. *Id.* at 273–74, 461 S.E.2d at 606–07.

89. It should be noted, however, that at least one judge found a serious question about whether Burr was actually innocent. *See* Burr v. Branker, No. 01CV393, 2012 WL 1950444, at *7–9 (M.D.N.C. May 30, 2012) (granting relief in view of trial counsel's failure to investigate and present medical evidence of Burr's innocence, specifically that the child's death resulted, not from abuse, but from falling when she was accidentally dropped by a sibling). *But see* Burr v. Lassiter, 513 F. App'x 327, 341 (4th Cir. 2013) (reversing district court's grant of habeas relief after applying the highly deferential federal standard of review, under which "even a strong case for relief" does not mean that a federal habeas petition may be granted).

90. 329 N.C. 466, 406 S.E.2d 579 (1991).

humiliating abuse on his girlfriend's six-year-old son, such as forcing him to drink hot sauce.[91] Crawford ultimately killed the boy by forcing him to drink large quantities of water to the point of water intoxication and death.[92] In another terrible case, *State v. Fisher*,[93] the defendant raped and murdered an eight-year-old girl, leaving her body hanging from a tree by a rope, yet this defendant also received a life sentence after a capital trial.[94]

In yet another example, *State v. Elliott*,[95] a death sentence was imposed, and affirmed on direct review, for the murder of a two-year-old child, even though there was no evidence of sexual assault by the defendant.[96] Meanwhile, in a 2011 Wake County case, a defendant was capitally tried but sentenced to life imprisonment, even though he committed a murder of a ten-month-old child that involved a sex offense.[97]

The death-sentenced defendant in *Elliott* arguably merited the less harsh sentence of life imprisonment because, after injuring the child victim, he attempted to atone for his conduct; first by calling the child's mother for help and then by helping to drive the child to the hospital.[98] Yet, Elliot remains on death row today. Compare his case to *State v. Bondurant*.[99] There, the Supreme Court of North Carolina overturned the defendant's death sentence as disproportionate to the crime.[100] The court recognized Bondurant's crime was "a senseless, unprovoked killing" but vacated his death sentence nonetheless, in part because Bondurant displayed remorse after the shooting by trying to help the victim obtain medical care.[101] A rational death penalty, it would seem, would have placed equal weight on this mitigating factor in both Bondurant's and Elliot's cases.

Troubling cases involving the murder of police officers are no less exempt from such arbitrariness. In *State v. Maness*,[102] involving the shooting of a police officer, the jury imposed a death sentence on an eighteen-year-old defendant even though he had no other significant criminal history.[103] Yet, many other murders of police officers have resulted in life sentences, and often the murders

91. *Id.* at 470–71, 406 S.E.2d at 581–82.
92. *Id.* at 473–74, 406 S.E.2d at 583.
93. 321 N.C. 19, 361 S.E.2d 551 (1987).
94. *Id.* at 21, 361 S.E.2d at 552.
95. 344 N.C. 242, 475 S.E.2d 202 (1996).
96. *Id.* at 258–59, 475 S.E.2d at 207–08.
97. *See Raleigh Man Gets Life Sentence for Murder of Infant Stepdaughter*, WRAL (Sept. 13, 2011, 7:04 PM), https://www.wral.com/news/local/story/10125021/ [https://perma.cc/8J9E-E84G].
98. *Elliott*, 344 N.C. at 259, 475 S.E.2d at 207–08.
99. 309 N.C. 674, 309 S.E.2d 170 (1983).
100. *Id.* at 694, 309 S.E.2d at 183.
101. *Id.* at 693–94, 309 S.E.2d at 182–83.
102. 363 N.C. 261, 677 S.E.2d 796 (2009).
103. *Id.* at 267, 677 S.E.2d at 800–01.

were more aggravated. In *State v. Mays*,[104] for example, the defendant was capitally tried, but a life sentence was imposed, even though the crime involved the murder of a police officer who was investigating the defendant for another murder, one for which the defendant was also convicted.[105] In *State v. Cunningham*,[106] the defendant received a life sentence even though he initially threatened the officer, then shot him through the back seat of the patrol car, and finally killed the officer by shooting him in the head after the officer exited the car.[107] In another case, *State v. Wong*,[108] the defendant was tried for the death penalty but sentenced to life even though he killed a highway patrol officer to evade a drug-related arrest.[109] The officer begged for his life and said he had a new baby at home before the defendant killed him.[110]

Similarly, homicides of a disturbing sexual nature seem to be resolved in random and starkly different ways. In *State v. Williford*,[111] the defendant broke into the home of a woman who was recovering from a recent surgery, struck her in the head with a blunt object multiple times, and then removed her clothing and raped her.[112] He was capitally tried in Wake County and sentenced to life imprisonment.[113] In contrast, in *State v. Thomas*,[114] another defendant in Wake County was sentenced to death for a similar crime involving a brutal rape and murder, and remains on death row today.[115]

Even mass killings sometimes, inexplicably, escape a death sentence. For example, in the 2009 Moore County case of *State v. Stewart*,[116] two weeks after his wife left him, Robert Stewart went to his wife's place of work, a nursing home, armed with several firearms, and shot and killed eight people.[117] Not only did Stewart not receive the death penalty, he was not even convicted of first-degree murder but instead was found guilty of the lesser offense of second-degree murder.[118]

To be sure, in each of the previous cases that I suggested may not have merited a death sentence, a careful researcher might identify disturbing

104. 158 N.C. App. 563, 582 S.E.2d 360 (2003).
105. *Id.* at 566–67, 582 S.E.2d at 362–63.
106. 344 N.C. 341, 474 S.E.2d 772 (1996).
107. *Id.* at 350, 474 S.E.2d at 775.
108. 222 N.C. App. 319, 729 S.E.2d 730, 2012 WL 3192715 (2012) (unpublished table decision).
109. *Id.* at 319, 729 S.E.2d at 730, 2012 WL 3192715, at *2–3.
110. *Id.*
111. 239 N.C. App. 123, 767 S.E.2d 139 (2015).
112. *Id.* at 124, 767 S.E.2d at 141.
113. *Id.* at 126, 767 S.E.2d at 141–42.
114. 344 N.C. 639, 477 S.E.2d 450 (1996).
115. *Id.* at 644, 477 S.E.2d at 651–52; *Offender Public Information*, N.C. DEP'T PUB. SAFETY, https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0404386 [https://perma.cc/VPT6-PYHM].
116. 231 N.C. App. 134, 750 S.E.2d 875 (2013).
117. *Id.* at 135–36, 750 S.E.2d at 876.
118. *Id.* at 136–37, 750 S.E.2d at 877.

circumstances that arguably contradict my opinion and warranted that the death sentence be imposed. But such a rejoinder would only prove my point. For that same careful researcher might just as easily find similar disturbing facts in the homicide cases that did *not* receive the death penalty. Likewise, while homicide cases in which the death penalty was not imposed often reached that result because of compelling mitigating circumstances, death-sentenced cases also often include such mitigating facts.

Thus, the enterprise of identifying which cases truly are the worst of the worst very often devolves into after-the-fact cherry-picking of information aimed at justifying the random results reached by juries. As Justice Breyer aptly observed, "after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years . . . discrepancies [exist] for which . . . [there are] no rational explanations."[119]

1. *State v. Brown*: Arbitrary Application of Procedural Rules

The caprice of capital punishment extends not only to irreconcilable jury verdicts but also to the vagaries of the law itself. The law changes; new rules take the place of old ones. This has been especially true regarding the law governing capital sentences, as our courts have struggled to interpret new state legislation passed to comply with decisions of appellate courts.

The troubling case of Willie Brown[120] well illustrates these vagaries. Brown was convicted and sentenced to death in 1983.[121] Pursuant to the Supreme Court of North Carolina's decision in *State v. Kirkley*,[122] the jurors were instructed that unless they unanimously believed a mitigating circumstance existed, no juror could consider it in determining whether a sentence of death or life imprisonment should be imposed, even those jurors who believed it should be considered.[123] Although the *Brown* jury failed to find any of seven mitigating circumstances Brown submitted, Brown (presumably because of the *Kirkley* decision) did not challenge the unanimity rule and his conviction and sentence were affirmed.[124]

Meanwhile, the constitutionality of the unanimity rule was being litigated before the U.S. Supreme Court in *Mills v. Maryland*.[125] As a result, in 1987, Brown filed a motion contending the unanimity rule was unconstitutional and

119. Glossip v. Gross, 135 S. Ct. 2726, 2763 (Breyer, J., dissenting).

120. State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985).

121. *Id.* at 48, 337 S.E.2d at 816.

122. 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds by* State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

123. *Id.* at 217–18, 302 S.E.2d at 156.

124. *See Brown*, 315 N.C. at 40–43, 337 S.E.2d at 814 (challenging seventeen alleged errors committed by the lower court not including the unanimity rule).

125. 486 U.S. 367 (1988).

should not have been applied in his sentencing proceeding.[126] The superior court rejected this argument, holding that Brown had waived it because he had not raised it on his direct appeal.[127]

Mills seemed to hold that the unanimity rule was unconstitutional; it at least cast serious doubt on the unanimity rule's constitutionality.[128] Finally, in 1990, the U.S. Supreme Court unequivocally concluded in *McKoy v. North Carolina*[129] that this rule was, indeed, unconstitutional; it held that if any juror believed a mitigating circumstance existed, that juror could consider it in determining the defendant's sentence, notwithstanding what other jurors believed.[130]

For the next fifteen years, Brown, in state and federal post-conviction proceedings, argued to the courts that he should receive a new sentencing hearing at which the jury could be given instructions that, unlike those given at his initial hearing, not only comported with *McKoy* but also might persuade a jury to impose a life sentence instead.[131] Solely because he had not raised this issue on his first appeal, the courts consistently concluded he was barred from having this argument considered on its merits.[132]

Other death-sentenced North Carolina defendants who failed to raise what became known as "*McKoy* error"[133] on their initial appeal succeeded, nevertheless, in having the issue considered on post-conviction review and, in some cases, were given new sentencing hearings.[134] Because of these inconsistent state rulings, the Fourth Circuit eventually concluded that Brown was entitled to review on the merits of his *McKoy* error claim.[135]

By this time, the Supreme Court of North Carolina had ruled that *McKoy* should be retroactively applied to cases in which such error had occurred.[136] This resulted in new capital sentencing proceedings for many North Carolina

126. Brown v. Polk, 135 F. App'x 618, 621 (4th Cir. 2005).

127. *Id.*

128. *See Mills*, 486 U.S. at 367–69 (rejecting the Court of Appeals of Maryland's interpretation of the unanimity requirement and conclusion that it was constitutionally sound).

129. 494 U.S. 433 (1990).

130. *See id.* at 433–34.

131. *See Brown*, 135 F. App'x at 621–23 (detailing Brown's efforts from 1990 to 2005 to argue for a new trial).

132. *See id.* at 624.

133. *See* Brown v. Lee, 319 F.3d 162, 168 (4th Cir. 2003) (applying the *McKoy* error).

134. *Id.* at 174 ("Brown has pointed us to five defendants convicted in North Carolina of capital murder who obtained judicial review of the merits of their constitutional unanimity claim, first raised in a motion for appropriate relief, by the state MAR court. Two were ultimately successful in obtaining relief on the merits, and three were not, but all obtained review of the merits. A sixth capital defendant obtained review of the merits on federal habeas, even though it had not been raised on direct appeal to the state court.").

135. *See id.* at 175.

136. State v. Zuniga, 336 N.C. 508, 514, 444 S.E.2d 443, 447 (1994) ("*McKoy* must be applied retroactively to cases on state collateral review . . . .").

defendants.[137] Ultimately, however—and just in time to deny Willie Brown relief from his death sentence—the U.S. Supreme Court held that the "new rule" announced in *McKoy* should not be applied retroactively to cases, like Brown's, that had become "final" before *McKoy* was decided.[138]

In his twenty-year judicial odyssey, Brown repeatedly asked the courts simply to accord him a capital sentencing proceeding that complied with the U.S. Constitution, a proceeding which all courts that considered his post-conviction claim conceded he had not been accorded. Yet, these courts consistently and ultimately denied him this right. While such legal inconsistencies and procedural bars might be tolerable in most criminal cases, they should be intolerable when they are used to deny relief in death penalty cases when that ultimate and irreversible penalty is infected by unconstitutional sentencing proceedings. That had long been the position of the Supreme Court of North Carolina.[139] Unfortunately, this principle was forgotten in the case of Willie Brown. Brown was executed on April 21, 2006.[140]

2. Restrictions on Prosecutorial Discretion Exacerbate Arbitrariness

Another instance of a strict procedural rule, intended to reduce arbitrariness in the imposition of the death penalty, was established in *State v. Case*,[141] where the Supreme Court of North Carolina held that whenever the state can prove at least one aggravating circumstance, prosecutors must seek the death penalty.[142] We established this rule because we were concerned that allowing prosecutors discretion not to do so would lead to "irregular, inconsistent and arbitrary" capital sentencing, thereby rendering North Carolina's death penalty scheme unconstitutional.[143]

This decision had unintended consequences. North Carolina became the *only* state in the nation to require prosecutors to seek the death penalty in any case where there was evidence of an aggravating factor, notwithstanding

137. *See* MARK A. DAVIS, A WARREN COURT OF OUR OWN: THE EXUM COURT AND THE EXPANSION OF INDIVIDUAL RIGHTS IN NORTH CAROLINA 97 (2020) (explaining that thirty-nine North Carolina defendants were awarded new capital sentencing trials because of *McKoy* errors).

138. Beard v. Banks, 542 U.S. 406, 408 (2004).

139. *See, e.g.*, State v. Fowler, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967) ("[I]t is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State.").

140. Brown was represented to the end by my good friend, and one of North Carolina's exemplary trial lawyers, the late Donald Cowan, Jr. Don not only won many important civil and business cases; he devoted himself as well to the representation of indigent criminal defendants who were long forgotten by others. Don was present for the execution of his client, Mr. Brown.

141. 330 N.C. 161, 410 S.E.2d 57 (1991).

142. *Id.* at 163, 410 S.E.2d at 58.

143. *Id.*

whatever mitigating circumstances might exist.[144] The result was an explosion of death penalty prosecutions in the state. During the 1990s, when *Case* was the law, North Carolina sentenced 245 defendants to death, far more than in any other decade.[145] These prosecutions swiftly overwhelmed the system and undermined the court's ability to maintain a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[146] Although I wrote the opinion for the court in *Case*, I now believe our decision was unwise and shortsighted.

The irony of *Case*, however, should not be lost on those who believe that judges and lawmakers can build a fair and constitutional death penalty scheme. We believed at the time that we were eliminating arbitrariness and providing an important right to criminal defendants. The court thought that by eliminating prosecutorial discretion the accused would be treated fairly and the death penalty would no longer be used as a bargaining chip by prosecutors. In practice, however, *Case* eliminated a critically important safeguard. Prosecutors could no longer reserve the death penalty for the truly "worst of the worst" murder cases, but instead were required to seek it for any defendant whose offense met the technical eligibility requirements of our death penalty statute. In practice, this led to a period of excessive death sentencing in North Carolina. Fortunately, the North Carolina legislature finally corrected the problem in 2001 when it superseded *Case* by enacting a statute giving prosecutors the discretion to forgo the death penalty in first-degree, aggravated murder cases.[147]

The results were stark and unmistakable. In the eight years preceding the statutory change, when prosecutors lacked discretion in capital cases, North Carolina averaged about twenty-four death sentences per year. In the eight years following the change in law, when prosecutors were granted discretion, death sentences dropped precipitously, to an average of only about four per year.[148] Thus, the sea of defendants, sent to death row before prosecutors had discretion to consider whether they should be there, are serving sentences imposed in arbitrary circumstances.

144. 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, 2079 (2010).

145. Frank R. Baumgartner, North Carolina's Wasteful Experience with the Death Penalty 11 (Feb. 1, 2015) (unpublished research), http://fbaum.unc.edu/Innocence/Baumgartner_NC_Death_Reversals-1-Feb-2015.pdf [https://perma.cc/EE8H-RKUN (staff-uploaded archive)].

146. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

147. Act of May 17, 2001, Sess. L. 2001-81, § 2(b), 2001 N.C. Sess. Laws 163, 164 (codified as amended at N.C. GEN. STAT. § 15A-2001(c) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)).

148. *See* Kotch & Mosteller, *supra* note 144, at 2080, n.235.

3. Proportionality Review Fails To Alleviate Arbitrariness

The other major effort in North Carolina to bring order to death penalty cases is an appellate process known as proportionality review.[149] However, as happened with *Case*, this project failed as well.

Like many death penalty states, North Carolina's statutory scheme requires our supreme court to ensure that no death sentence be "imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[150] The Supreme Court of North Carolina's application of this statutory mandate has, over four decades, been both inconsistent and ineffectual, resulting in scores of death sentences imposed in cases that are too frequently indistinguishable from other homicide cases that resulted in life sentences.

In its earliest proportionality reviews, though the supreme court was required by statute to compare the case at hand with other "similar cases,"[151] the court did not explain or define what pool of cases it was making comparisons to. It simply approved death sentences under section 15A-2000(d)(2) of the North Carolina General Statutes without explanation of how the mandated comparisons were conducted.[152] In dissent, I characterized the court's approach as "shrouded in mystery" and thought it was giving too little attention to an important tool for achieving a rational death penalty system.[153] I argued that the court should "advise the bar of the manner in which it conducts such a [proportionality] review" and "use as a pool for comparison purposes all cases tried under the new death penalty statute, whether the jury recommended death or life imprisonment and which have been reviewed on appeal by this Court."[154] Not long after, the court agreed, and announced that its proportionality review would include capitally tried cases which resulted in either death or life imprisonment sentences that were affirmed on appeal.[155]

149. Carolyn Sievers Reed, *The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases*, 63 N.C. L. REV. 1146, 1147 (1985).

150. N.C. GEN. STAT. § 15A-2000(d)(2) (LEXIS through Sess. Laws 2020-97 of the Reg. Sess. of the Gen. Assemb.)).

151. *Id.*

152. *See* State v. Williams, 305 N.C. 656, 690, 292 S.E.2d 243, 263–64 (1982); State v. Rook, 304 N.C. 201, 235–36, 238 S.E.2d 732, 753 (1981); State v. Martin, 303 N.C. 246, 255–56, 278 S.E.2d 214, 220 (1981); State v. McDowell, 301 N.C. 279, 293–94, 271 S.E.2d 286, 295–96 (1980); State v. Barfield, 298 N.C. 306, 354–55, 259 S.E.2d 510, 544 (1979).

153. State v. Pinch, 306 N.C. 1, 59–61, 292 S.E.2d 203, 242–43 (1982) (Exum, J., dissenting), *overruled by* State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988), *and* State v. Robinson, 336 N.C. 78, 443 S.E.2d. 306 (1994).

154. *Id.* at 59, 292 S.E.2d at 242.

155. *See* State v. Williams, 308 N.C. 47, 79–82, 301 S.E.2d 335, 355–56 (1983); *see also* State v. Lawson, 310 N.C. 632, 647–48, 314 S.E.2d 493, 503 (1984) (explaining, pursuant to *Williams*, that the

During this next period, the court did indeed compare death sentence cases to similar capital cases that resulted in life imprisonment sentences, as would seem necessary to any effort designed to eliminate arbitrariness in capital sentencing. But, even here, the court diminished the effectiveness of its review by taking the position that "the fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone" of how the court should resolve the issue.[156] Rather, the court held, the similarity of cases with disparate outcomes would not "become the last word on the subject of proportionality."[157] The court instead chose to rest its determinations on its own "experienced judgments" instead of "mere numerical comparisons of aggravators, mitigators and other circumstances."[158] Thus, a majority of the court tolerated the patent disparity in the life sentence for Bonnie Clark and the death sentence for Robert Bacon.[159]

It is ironic, however, that in applying a statutory mandate plainly adopted to bring rationality to the death penalty, the court would diminish objective analysis as a mere fad or "vogue among social scientists,"[160] while at the same time elevating its own subjective judgment. In one case, the court declared that it had "long rejected" an "empirical approach" to proportionality review.[161] It should not be surprising that this rejection of objective analysis led to arbitrary results.

As the years wore on, the court continued its practice of giving only minimal consideration to the notion that a death sentence might be disproportionate because the case was similar to capitally tried cases that resulted in life sentences. For example, in *State v. Campbell*,[162] decided in 2005, the court held the death sentence proportionate after comparing it to other specific "cases in which we have found the death sentence proportionate."[163] The court then concluded with a brief, unexplained assertion that it had also found Campbell's case dissimilar from "those cases in which juries have consistently returned recommendations of life imprisonment," but the court did not identify the cases that it used as points of comparison.[164]

court should conduct proportionality review by comparing the death sentence under review to similar capitally tried cases that resulted in both death and life sentences).

156. State v. Green, 336 N.C. 142, 198, 443 S.E.2d 14, 46 (1994).
157. *Id.* at 198, 443 S.E.2d at 47 (quoting *Williams*, 308 N.C. at 80, 301 S.E.2d at 356).
158. *Id.* (quoting *Williams*, 308 N.C. at 81, 301 S.E.2d at 356).
159. *See* State v. Bacon, 337 N.C. 66, 114–16, 446 S.E.2d 542, 568–70 (1994).
160. State v. Williams, 308 N.C. 47, 80, 301 S.E.2d 335, 355 (1983).
161. State v. Buckner, 342 N.C. 198, 245–46, 464 S.E.2d 414, 441 (1995).
162. 359 N.C. 644, 617 S.E.2d 1 (2005).
163. *Id.* at 708, 617 S.E.2d at 40.
164. *See id.*

The following year, the court defended this approach in *State v. McNeill*,[165] where the defendant argued that proportionality review was no longer meaningful because of the court's failure to consider cases resulting in life sentences.[166] The court rejected this contention and insisted, "[w]e consider all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison."[167] The court then proceeded to affirm McNeill's death sentence without explicitly comparing it to any capital case that resulted in a life sentence.[168]

Even more recently, in 2018, the court held a death sentence proportionate based solely on a discussion of the eight death verdicts it previously found disproportionate, and other death verdicts the court previously affirmed, with no mention of similar capitally tried cases in which juries imposed life sentences.[169] This is emblematic of the court's contemporary proportionality review, where it usually confines its discussion to death sentences previously deemed proportionate or disproportionate but without comparison to similar cases in which juries chose life.[170]

To be clear, I believe it is appropriate for the court's review to include death sentences previously affirmed and other death sentences previously overturned on proportionality grounds. However, this is insufficient, standing alone, because the pool of cases is too narrow and not representative of capitally tried cases in North Carolina where *juries* have returned life sentences. The question of what juries are doing in capital cases should be the first line of comparison and is essential to a meaningful proportionality review. As I wrote for the court in a 1984 decision, "if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate."[171] Unfortunately, over the years, our court seems to have overlooked this principle.

Further, as I argued in my dissent in *State v. Pinch*,[172] if death sentence cases are only compared to other death sentence cases, and not meaningfully compared to factually similar, capitally tried cases in which juries imposed life

165. 360 N.C. 231, 624 S.E.2d 329 (2006).

166. *Id.* at 254, 624 S.E.2d at 344.

167. *Id.*

168. *See id.* at 254–55, 624 S.E.2d at 344–45.

169. *See* State v. McNeill, 371 N.C. 198, 264–66, 813 S.E.2d 797, 839 (2018).

170. Brooks Emanuel, *North Carolina's Failure To Perform Comparative Proportionality Review: Violating the Eighth and Fourteenth Amendments by Allowing the Arbitrary and Discriminatory Application of the Death Penalty*, 39 N.Y.U. REV. L. & SOC. CHANGE 419, 436 (2015).

171. State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984); *see also* State v. Harris, 338 N.C. 129, 167, 449 S.E.2d 371, 389–90 (1994) (Exum, C.J., concurring in part and dissenting in part) (listing cases in which the court's proportionality review included comparisons to jury verdicts).

172. 306 N.C. 1, 292 S.E.2d 203 (1982), *overruled by* State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988), *and* State v. Robinson, 336 N.C. 78, 443 S.E.2d. 306 (1994).

imprisonment, then no death sentence can be found disproportionate because one death sentence cannot "exceed" another:

> The basic purpose of proportionality review is to make sure that the death sentence in the case before us is not "excessive" to sentences "imposed in similar cases." If we look for comparison only to cases in which the death penalty has been imposed, the sentence in the case under review could never be excessive because one death sentence never "exceeds" another. It is only by comparing the case being reviewed in which a death sentence was imposed with other similar cases in which life was imposed that we can determine whether the death penalty in the case being reviewed is really excessive to the penalty being imposed in similar cases.[173]

The court has thus hollowed out the proportionality review function by ignoring trial-level, capitally aggravated homicide cases resulting in life sentences or less. A 2015 study from the North Carolina Office of Indigent Defense Services found that, for cases proceeding capitally at the trial level between 2007 and 2015, only 2.2% ended with a death sentence.[174] When the broader pool of *potentially* capital cases was considered, meaning homicide cases with evidence of at least one aggravating circumstance, the percentage was even lower: only 0.4% resulted in a death sentence.[175] Appellate proportionality review that accounts only for such a small portion of all aggravated first-degree murder cases in the state falls short of fulfilling the court's critical role in capital case review contemplated by our death penalty statute.

The court's record supports this critique. In the early years of North Carolina's modern death penalty its proportionality review was more robust. As of 1990, one hundred individuals were condemned to death in the state[176] and the court found that seven of those sentences were disproportionate.[177]

After that era, however, the court provided a more cursory level of proportionality review. Between 1990 and 2000, during the high-water era of death penalty use in North Carolina, 245 death sentences were imposed[178] and

173. *Id.* at 60, 292 S.E.2d at 242–43 (Exum, J., dissenting); *see also* Emanuel, *supra* note 170, at 45 ("The court's focus on the small number of cases in which it has found death disproportionate on appellate review eliminates the court's ability to determine what sentences 'juries have consistently returned' in factually similar cases, destroying the review's ability to serve its constitutionally mandated purpose.").

174. N.C. OFF. OF INDIGENT DEF. SERVS., FY15 CAPITAL TRIAL CASE STUDY: POTENTIALLY CAPITAL CASE COSTS AT THE TRIAL LEVEL 4 (2015), http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY15CapitalCaseStudy.pdf [https://perma.cc/ZY8K-JFJJ].

175. *Id.* at 31.

176. Baumgartner, *supra* note 145, at 11.

177. *See* State v. McNeill, 371 N.C. 198, 264–65, 813 S.E.2d 797, 839 (2018) (listing all death penalty cases that the Supreme Court of North Carolina has found disproportionate).

178. Baumgartner, *supra* note 145, at 11.

the state supreme court found none disproportionate.[179] Then, from 2000 to 2014, another fifty-six people were sentenced to death,[180] yet the court found only one death sentence disproportionate.[181]

All told, in the three-decade span between 1990 and today, juries imposed about 300 death sentences in North Carolina, *yet only a single one* was found disproportionate on direct review. Given this data, it can hardly be argued that proportionality review has served as the meaningful check on the arbitrary and random imposition of capital punishment intended by the legislature. Certainly, it has not fulfilled the role contemplated by the U.S. Supreme Court in *Gregg*, that "[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."[182]

B. *Racial Bias*

Irreparable randomness, troubling as it is, is not the death penalty's only constitutional problem in North Carolina. While it is not my intent to detail every one of those difficulties, as Justice Breyer did in *Glossip*,[183] two of them are sufficiently concerning to warrant further discussion. The first is the problem of racial bias. The second is those death-sentenced defendants later proven to be innocent.

From the very beginning, in *Furman* itself, racial bias has been part of the constitutional debate about the modern death penalty.[184] The U.S. Supreme Court returned to the subject when it held, unfortunately, that statistical patterns of racial bias in death penalty cases cannot be used as evidence of racial bias that would violate the Eighth and Fourteenth Amendments in a given case.[185] In his *Glossip* dissent, urging abolition of the death penalty, Justice

179. *See McNeill*, 371 N.C. at 264–65, 813 S.E.2d at 839.

180. *See* Baumgartner, *supra* note 145, at 11.

181. *See McNeill*, 371 N.C. at 264, 813 S.E.2d at 839 (noting that, since 2000, the only death sentence the court has found disproportionate was *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002)).

182. *See* Gregg v. Georgia, 428 U.S. 153, 206 (1976).

183. Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015).

184. Furman v. Georgia, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring).

185. McCleskey v. Kemp, 481 U.S. 279, 279 (1987). Famously, Justice Powell, who authored the majority opinion in *McCleskey*, told his biographer after he retired that it was the one decision he regretted. *See* Opinion, *Justice Powell's New Wisdom*, N.Y. TIMES (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html [https://perma.cc/AZ4T-QM68 (dark archive)]. Justice Powell's regret may have had something to do with the fact that legal commentators and scholars have roundly condemned *McCleskey* as the *Dred Scott v. Sandford*, 60 U.S. 393 (1857), or *Plessy v. Ferguson*, 163 U.S. 537 (1896), of our time. *See, e.g.*, Scott E. Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 5 n.2 (2012) (collecting commentary).

Breyer discussed in great detail the research and scholarship drawing a connection between racism and capital punishment.[186]

After the death of George Floyd at the hands of the Minneapolis police—and far too many others like him—and the wave of mass protests and anguish that followed, this issue is more salient than ever.[187] It is an issue the state judiciary has a constitutional duty to address. In the midst of the protests of 2020, Chief Justice Beasley reminded North Carolinians in a wise and heartfelt public address that both the data and everyday experiences bear out the truth: "African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty" in our criminal justice system.[188] Chief Justice Beasley called on the state judiciary to "openly acknowledge the disparities that exist and are too often perpetuated by our justice system."[189] Following her remarks, appellate courts and judges in Massachusetts, Oregon, Washington, Kentucky, Indiana, Georgia, Alaska, New Jersey, California, Connecticut, Maryland, New York, Hawaii, Maine, the District of Columbia, Wisconsin, Louisiana, and Texas followed suit by issuing their own acknowledgments of racial disparities in their respective jurisdictions.[190]

In the death penalty context, researchers have uncovered data in North Carolina indicating that decisions about who receives the death penalty are driven by the race of the victim in the case[191] and that decisions about who serves on capital juries are likewise determined by the race of prospective

186. *Glossip*, 135 S. Ct. at 2760–63.

187. *See* Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), https://time.com/5847967/george-floyd-protests-trump/ [https://perma.cc/H8RW-MSAT (dark archive)]

188. Cheri Beasley (@JusticeCBeasley), TWITTER (June 2, 2020, 11:53 AM), https://twitter.com/JusticeCBeasley/status/1267846848691212288 [https://perma.cc/8QQ4-QDPC].

189. Press Release, Chief Justice Cheri Beasley, Chief Justice Cheri Beasley Addresses the Intersection of Justice and Protests Around the State (June 2, 2020), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state [https://perma.cc/F6KW-ZW8F].

190. Jess Bravin, *Breaking With Tradition, Some Judges Speak Out on Racial Injustices*, WALL ST. J. (June 13, 2020, 11:00 AM), https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400 [https://perma.cc/JJQ7-J2YX (dark archive)]; *see also* Jesse Wegman, Opinion, *We Are Part of the Problem They Protest*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/state-supreme-courts-racial-justice.html [https://perma.cc/F8V5-HZ9J (dark archive)].

191. Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 1998 (2016); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2140 (2011); Isaac Unah, *Empirical Analysis of Race and the Process of Capital Punishment in North Carolina*, 2011 MICH. ST. L. REV. 609, 649 (2011); *see also* Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadidi & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. REV. (forthcoming Jan. 2021) (presenting a study finding that LWOP sentences in North Carolina are imposed disproportionately in cases involving White victims).

jurors.[192] These studies suggest prosecutors in this state pursue the death penalty in cases involving White victims more aggressively than in those with Black victims and disproportionately exclude Black citizens from serving on capital juries.[193] These disparities have been the subject of landmark, ongoing litigation in our state under the North Carolina Racial Justice Act,[194] which was enacted in 2009 and provides a mechanism for death row prisoners to obtain life without parole sentences if they can show through statistical or other evidence that race was a significant factor in their sentences.[195]

A death penalty riven with racial disparities is constitutionally intolerable. When the U.S. Supreme Court decided in *McCleskey v. Kemp*[196] that it would not address such disparities, it did so on the premise that they "are an inevitable part of our criminal justice system."[197] Of course, our state constitution is permitted to provide greater protection than the U.S. Constitution requires. But, more than that, it has long been understood that "evolving standards of decency" should inform our understanding of what punishments are cruel and unusual.[198] Given what we know today about the corrosive effects of racial bias on the administration of criminal justice,[199] we should not, as the U.S. Supreme Court did in *McCleskey*, glibly dismiss the effects of racial bias in death penalty prosecutions as "inevitable."

192. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1957 (2016); *see also* Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1425 tbl.2 (2018) (finding the same discriminatory trend in noncapital cases).

193. *See* Pollitt & Warren, *supra* note 192, at 1982–83; Wright, et al., *supra* note 192, at 1431–35.

194. Act of Aug. 11, 2009, ch. 464, 2009 N.C. Sess. Laws 1213, *repealed by* Act of June 19, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372.

195. The Supreme Court of North Carolina recently held that the legislature's repeal of the Racial Justice Act in 2013 could not be used to prevent death row prisoners, who discovered and filed evidence of discrimination while it was still the law, from presenting their claims in court. State v. Ramseur, 374 N.C. 658, 683, 843 S.E.2d 106, 122 (2020); State v. Burke, 374 N.C. 617, 619, 843 S.E.2d 246, 249 (2020).

196. 481 U.S. 279 (1987).

197. *Id.* at 312.

198. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

199. For example, in her June 2020 address on race, Justice Beasley highlighted the 2015 finding of a commission convened by former Chief Justice Martin which revealed that a majority of North Carolinians lack trust and confidence in our court system due to racial bias. *See* Chief Justice Cheri Beasley, *supra* note 189.

Regrettably, North Carolina's death penalty has been infused with racism in each of its historical incarnations.[200] The capital case of Kenneth Rouse[201] is but one example of its persistence.[202] I authored the court's opinion affirming Rouse's conviction and death sentence, released on my last day as chief justice.[203] My colleagues and I were asked to consider one specific race-related issue in his case—whether the prosecutor excused a prospective Black juror based on the juror's race.[204]

It was only in later post-conviction proceedings, however, that the depth to which Rouse's trial was infected by racism became clear. One of the members of Rouse's all-White jury "deliberately concealed contempt for all African-Americans and a particular bias against Rouse in order to serve on Rouse's jury."[205] The juror "intentionally concealed" from the trial court that his own mother "had been robbed, raped, and murdered by a man who was later executed for the crimes" so that he could serve on Rouse's jury and sentence him to death.[206] The juror had also expressed virulently racist views of Black citizens, claiming that they "rape white women in order to brag to their friends."[207]

This juror's racial bias made a mockery of Rouse's foundational right to a fair and impartial jury and should have shocked the conscience of any judge. But the federal courts, presented with this information, upheld Rouse's conviction and sentence on a procedural default: his lawyers filed his petition one day after the filing deadline.[208] In an en banc decision denying relief, the Fourth Circuit's majority opinion relegated a discussion of the juror's serious misconduct to a footnote[209] and instead focused on the procedural issues related

200. Seth Kotch & Robert P. Mosteller, *supra* note 144, at 2044, 2053, 2055–56 ("African Americans, most of them slaves, constituted 71% of the 242 people executed [in North Carolina] from 1726 to 1865. . . . African Americans represented 74% of the 160 people executed [in North Carolina] from the end of the Civil War to 1910 . . . . [And from 1910 to 1960 o]f the 362 people [North Carolina] executed, 283 were African American and six were Native American, meaning that 78% of those executed were African American and 80% were minorities. By contrast, 75% of the victims in these cases were white.").

201. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994).

202. *Id.* at 78, 451 S.E.2d at 553.

203. *Id.* at 114, 339 S.E.2d at 574.

204. Years later, after I left the bench and entered private practice, I would go on to represent Rouse in federal litigation challenging the state's lethal injection protocol on the ground that the procedures posed a substantial risk of inflicting severe pain during Rouse's potential execution, and thus violated the Eighth Amendment. Although I am no longer active as counsel in that case, it remains pending in federal district court. *See* Joint Status Report at 1–2, Rouse v. Hooks, No. 04-CT-00004 (E.D.N.C. Mar. 26, 2019) (Bloomberg Law, Court Dockets).

205. Rouse v. Lee, 339 F.3d 238, 257 (4th Cir. 2003) (en banc) (Motz, J., dissenting).

206. *Id.*

207. *Id.*

208. *Id.* at 258.

209. *Id.* at 242 n.2 (majority opinion).

to the late filing.[210] Compliance with procedure is certainly important to ensure that parties are treated equally and that cases are resolved in an efficient manner. But, all too frequently, procedure eclipses the substantive issues in death penalty cases. In Rouse's case, they permitted his death sentence to stand despite clear racism infecting his trial.

Kenneth Rouse's case is but one illustration of the many ways in which racism has distorted North Carolina's modern death penalty. Another is the troubling intersection between racial bias and innocence. Of the ten innocent men put on North Carolina's death row, eight were African American and one was Latino.[211] This trend is too startling to ignore.

As I wrote in my majority opinion in *State v. Cofield*,[212] we must take particular care to ensure that our legal system does not become "entangle[d] . . . in a web of prejudice and stigmatization."[213] If this maxim means anything, it is that the law does not permit capital punishment when there is credible evidence that death sentences were influenced by racial bias.

C. *Capitally Convicting the Innocent*

I turn finally to the problem of convicting the innocent, and the exoneration of North Carolina's longest-serving death row prisoner, Henry McCollum.

McCollum was wrongly convicted and sentenced to death for the particularly horrific rape and murder of eleven-year-old Sabrina Buie in rural Robeson County.[214] When the court reviewed the case in 1993, I dissented from my colleagues' decision only insofar as it affirmed McCollum's death sentence, believing, based largely on his mental abilities, that the sentence was excessive and disproportionate.[215] McCollum was only nineteen at the time of the offense, and he suffered from a significant intellectual disability that I believed impaired his capacity to appreciate what he had done.[216]

As it turned out, McCollum's mental deficits did not merely reduce his culpability, but also led him—and Leon Brown, his fifteen-year-old brother who was also intellectually disabled—to falsely confess to a crime they had nothing

210. *Id.* at 244–46.

211. *Innocence Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Bstate%5D=North%20Carolina [https://perma.cc/Z8JG-NGHE] (filter by "North Carolina").

212. 320 N.C. 297, 357 S.E.2d 622 (1987).

213. *Id.* at 303, 357 S.E.2d at 625.

214. State v. McCollum, 334 N.C. 208, 217, 433 S.E.2d 144, 148 (1993).

215. *See id.* at 245–46, 433 S.E.2d at 164–65 (Exum, C.J., concurring in part and dissenting in part).

216. *See id.*

to do with.[217] Few appeared to seriously question McCollum's guilt. Not even his own lawyers seemed aware of their client's innocence.[218] In fact, in a later unrelated Supreme Court case, Justice Scalia was so confident of McCollum's guilt that he cited the case as an example of why the death penalty was constitutionally necessary, noting that McCollum's pending "quiet death by lethal injection" would be "enviable" compared to what his victim suffered.[219]

Yet, after decades of languishing on death row, DNA testing revealed that McCollum and his brother were innocent.[220] The true killer, Roscoe Artis, was already in prison for the rape and murder of another woman in the same area.[221] The revelation of McCollum's innocence was so stunning that it led to Chief Justice Lake's public reversal of his longstanding support for capital punishment.[222] As Chief Justice Lake wisely observed, the mentally ill and intellectually disabled are especially prone to wrongful convictions because they are likely to be coerced into a false confession, yet "over half of the individuals executed [nationally in 2015] had severe mental impairments" of some kind.[223]

The failures in McCollum's case illustrate a major reason why our death penalty system has proven inadequate to prevent cruel or unusual punishment. Simply put, our system has proven incapable of reliably keeping the innocent off of death row. A total of ten innocent men have been sent to North Carolina's death row, where they served a combined 155 years in prison for crimes they did not commit.[224] Four of those men spent more than a decade each on death row.[225] Like McCollum's, their cases exemplify the reasons why North Carolina's death penalty has failed to protect the innocent.

Levon Jones, for example, was sentenced to death based on the testimony of a single witness who was given a reward for her statement and later

217. *See* CTR. FOR DEATH PENALTY LITIG., SAVED FROM THE EXECUTIONER: THE UNLIKELY EXONERATION OF HENRY MCCOLLUM 6 (2017), http://www.cdpl.org/wp-content/uploads/2017/06/SAVED-FROM-EXECUTION-web-final1.pdf [https://perma.cc/765Z-7FXT].

218. *See id.* at 9 (noting that McCollum's "attorneys talked him into conceding guilt" at his second trial).

219. Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring).

220. CTR. FOR DEATH PENALTY LITIG., *supra* note 217, at 2.

221. *Id.* at 12–13; *see also* Craig Jarvis, *Gov. McCrory Pardons Half-Brothers Imprisoned for Decades*, NEWS & OBSERVER (June 4, 2015, 9:48 PM), https://www.newsobserver.com/news/politics-government/article23091657.html [https://perma.cc/CN5G-85MW (staff-uploaded dark archive)] (noting that McCollum and his brother received pardons of innocence).

222. I. Beverly Lake, Jr., *supra* note 6.

223. *Id.*

224. DEATH PENALTY INFO. CTR., *supra* note 211.

225. *See id.*

recanted.[226] The jury was never told about the reward.[227] Alan Gell was sent to death row after prosecutors hid witness statements that proved Gell's alibi.[228] Glen Chapman was condemned after his trial lawyers failed to conduct the basic investigation that would have shown their client was innocent.[229]

More are likely to come. The National Registry of Exonerations documents a total of sixty-five wrongful convictions in North Carolina, including both capital and noncapital cases.[230] Reasons for exoneration include problems ranging from mistaken eyewitness identifications and false or misleading forensic evidence, to perjury, official misconduct, and false confessions.

Furthermore, as Justice Breyer pointed out in his *Glossip* dissent while reviewing similar data, "if we expand our definition of 'exoneration' . . . [to include] 'erroneous instances in which courts failed to follow legally required procedures, the numbers soar."[231] Since 1977, through 2014, of the 249 North Carolina cases where a death sentence was initially imposed, and where the courts completed appellate and post-conviction review, seventy-one percent ended in a reversal of the death sentence.[232] This is an astonishing rate of wrongfully imposed death sentences, undermining any claim that North Carolina capital trials have been effective in accurately determining whether a death sentence is justified.

Few issues convince me more of our perpetual inability to craft a constitutionally sound death penalty than the problem of convicting the innocent. It is hard to imagine a greater affront to due process, and the protection from cruel or unusual punishment, than the imposition of a death sentence on an innocent person. Yet we cannot seem to get it right. Given the scope of the problem, we simply cannot be sure that we will never again subject an innocent person to the execution chamber.

226. *See* Maurice Possley, *Levon Jones*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3337 [https://perma.cc/LM26-75ZS].

227. *See id.*

228. *See* Alexandra Gross, *Alan Gell*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3236 [https://perma.cc/5VDF-NKQ7].

229. *See* Alexandra Gross, *Glen Edward*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3793 [https://perma.cc/UZT9-B9V9].

230. *See List of Exonerations in North Carolina*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=North%20Carolina [https://perma.cc/7GC9-YSBN].

231. Glossip v. Gross, 135 S. Ct. 2726, 2758–59 (2015) (Breyer, J., dissenting).

232. Baumgartner, *supra* note 145, at 2–3.

CONCLUSION

It is difficult for me to identify precisely when, but at a certain point in my career in the law, my concerns about the appropriateness of the death penalty as a mere matter of policy developed into a clear determination that this institution is not only unwise, but also incompatible with our state's constitutional proscription against cruel or unusual punishment. More to the point, I believe the evidence accrued over the past forty years shows, unequivocally, that further efforts to make rational sense of the death penalty, to ensure it amounts to something more than a random lightning strike or biased and error-prone punishment, would be futile.

I recently explained this evolution in a foreword I wrote for a study of our court while I was chief justice:

> [Early in my judicial career], it struck me that even when the carefully drawn statutory mandates were assiduously followed in judicial proceedings, they did not seem to be having the desired effect.
>
> Not infrequently, juries were imposing death sentences in cases seemingly no worse than others where juries were imposing life sentences. And vice-versa: juries were imposing life sentences in cases seemingly as deserving of death as cases in which the Court had affirmed a jury-imposed death sentence. The two distinct groupings of cases that could be rationally differentiated were not materializing as I had hoped and believed they would.
>
> If my growing concerns were valid, then death sentences were not being rationally imposed in North Carolina. If not rationally imposed, then death sentences in North Carolina would be unconstitutional under the United [States] Supreme Court's decision in *Furman v. Georgia* (1972). *Furman* taught that a system of imposing death sentences that provides "no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not" violates the Eighth Amendment's prohibition against cruel and unusual punishment. 408 U.S. 238, 311.
>
> In the years since I left the Court, during which I followed the Court's death penalty jurisprudence, my concerns ripened into the firm belief that capital punishment was not being rationally administered in North Carolina, and that it could never be rationally administered here or anywhere else. I have come to believe that human beings simply lack the ability to determine rationally whether another human being should live or die. Thus the administration of capital punishment is inherently irrational; therefore, it is inherently unconstitutional.[233]

233. Jim Exum, Jr., *Foreword* to DAVIS, *supra* note 137, at xix.

North Carolina stands at a crossroads and must decide how it wishes to proceed in light of its recent experience with the death penalty. There are currently 137 people on death row in North Carolina.[234] Yet, there have not been executions for fourteen years, owing to serious concerns and ongoing litigation about torturous, botched executions[235] and questions about the role of racial bias in death sentences raised under the Racial Justice Act.[236] At the same time, the murder rate in North Carolina is essentially the same as what it was in 2006, the last time we executed a prisoner,[237] calling into question whether the death penalty is ever needed to enhance public safety.[238] Moreover, over the past decade, North Carolina has seen a growing, bipartisan consensus around the need to reexamine "tough on crime" practices of the 1980s and 1990s—practices that resulted in mass incarceration of Black citizens and racially-disparate enforcement of criminal laws.[239]

The death penalty was an integral part of the excessive, harsh approach to criminal justice now under reconsideration. It only makes sense then that, in this moment, we reconsider the death penalty as well. And in doing so, the state and federal constitutional bans on cruel or unusual punishment require North Carolina courts to look at the facts and ask, empirically, whether our capital system is reliable and even-handed.

I believe it is not. Four decades of experience and careful study tell us our death penalty is not working. It is not imposed rationally. Too frequently it is difficult, if not impossible, to tell the difference between the homicide cases that result in death sentences and those that receive life imprisonment. And our efforts to bring a semblance of order to capital case results have, repeatedly, not succeeded. There are other problems as well. The death penalty is not keeping

234. *Death Row Roster*, N.C. DEP'T PUB. SAFETY, https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster [https://perma.cc/BE4Y-FHHG].

235. *See, e.g.*, *North Carolina May Have Misled Federal Judge About Execution Procedures*, DEATH PENALTY INFO. CTR. (Apr. 2, 2007), https://deathpenaltyinfo.org/news/north-carolina-may-have-misled-federal-judge-about-execution-procedures [https://perma.cc/YPR8-KUC5].

236. *See* Bryan Stevenson, *NC Supreme Court Should End Racial Bias in Jury Selections*, NEWS & OBSERVER (Aug. 26, 2019, 1:00 AM), https://www.newsobserver.com/opinion/article234076852.html [https://perma.cc/8BS9-WJ84 (staff-uploaded dark archive)].

237. *List of Persons Executed*, N.C. DEP'T PUB. SAFETY, https://www.ncdps.gov/adult-corrections/prisons/death-penalty/list-of-persons-executed [https://perma.cc/99WU-XTAY].

238. *See* N.C. STATE BUREAU OF INVESTIGATION, CRIME IN NORTH CAROLINA: ANNUAL SUMMARY REPORT OF 2018 UNIFORM CRIME REPORTING DATA (2020), http://ncsbi.gov/Services/SBI-Statistics/SBI-Uniform-Crime-Reports/2018-Annual-Summary.aspx [https://perma.cc/DVJ8-WNXF]. In 2009, the North Carolina murder rate was 5.5 per 100,000 persons. Since then, it has fluctuated from a low of 5 in 2013 to a high of 7 in 2016. The most recent available data in 2018 found a murder rate of 5.8 per 100,000 persons. *Id.*

239. *See* Will Doran, *Some NC Republicans Want To Copy Trump's Criminal Justice Reforms. Will They Pass Here?*, NEWS & OBSERVER (Apr. 16, 2019, 4:44 PM), https://www.newsobserver.com/news/politics-government/article229176034.html [https://perma.cc/5GWW-LREM (staff-uploaded dark archive)]; *see also* ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES 1-11 to -12 (2014).

the innocent off death row. And serious, unaddressed concerns that racial prejudice affects decisions in capital cases persist.

Four decades of data and experience is enough. Capital punishment, as presently applied in North Carolina, is unconstitutional. It is time, indeed past time, to abolish it as an instrument of our criminal justice system.