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Lies, Damn Lies, and *Batson* Challenges: The Right to Use Statistical Evidence to Prove Racial Bias

Graham R. Cronogue

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Lies, Damn Lies, and *Batson* Challenges: The Right to Use Statistical Evidence to Prove Racial Bias

Graham R. Cronogue*

This Article provides two principal contributions to the study of wrongful convictions. First, it fills a gap in the literature by clarifying the scope of a capital defendant’s constitutional right to use statistics when attacking a wrongful conviction caused by racial bias in jury selection. In doing so, the Article not only examines the content of the Court’s jurisprudence but it also explores the historical “arc” toward greater evidentiary protections. This arc has been guided primarily by the realization that prior narrower solutions have been ineffective at combating racially-motivated peremptory strikes. The Article will also place modern statistical evidence in its proper place on that arc by discussing the relevance and unique value of statistics in illuminating patterns and bias.¹ Second, it examines the comparative merits of conferring these wrongful conviction protections through statute or confirming them through constitutional litigation. In light of the severe backlash against North Carolina’s statute, this Article advocates the, perhaps more lasting and less politically dependent, approach of constitutional litigation.

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¹ Especially in the peremptory strike context where bias is otherwise very difficult to prove.

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I. INTRODUCTION

Despite the many significant advances in the field of equal protection, the American criminal justice system remains haunted by its legacy of racial discrimination. Formal and overt tactics of racial discrimination have been effectively stamped out.² However, less overt tactics still slip by undetected, and the specter of slavery and Jim Crow continues to cast a shadow over the legitimacy of the legal process.³ As a result of these hidden tactics, minority defendants still face the danger that they will be wrongfully convicted because of their race;⁴ courts still run the risk that the sentences they impose will be tainted by racial bias;⁵

² See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (finding that segregation of children in public schools is a violation of the Equal Protection Clause of the Fourteenth Amendment).

³ Discrimination within the judicial system is most pernicious because it is “a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.” *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880); *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986). See also SAMUEL GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* xiii (1989) (“The Supreme Court has more or less acknowledged that race continues to play a major role in capital sentencing in America . . . But the Court has decided to do nothing about [discrepancies in the imposition of capital punishment] and refuses to hear future claims based on it.”).

⁴ See, e.g., Justin D. Levinson et. al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 563–65 (2014) (finding evidence of implicit racial bias in a juror’s perception of a criminal defendant’s capital case).

⁵ See e.g., Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149 (2010) (discussing the role that a trial judge’s implicit bias may play in jury selection).

and our society must still struggle with the fact that the promise of equal protection remains an aspiration and not a reality for so many Americans.

This Article addresses one of the most subtle, yet effective, forms of discrimination that continues to burden the criminal justice system: racially biased peremptory strikes. In recent years, these strikes have garnered considerable attention from courts, state legislatures, and the media; however, they remain a significant obstacle to the fair, impartial administration of justice.⁶

By their very nature, peremptory strikes are difficult to police. A peremptory strike may be used for any reason against a juror as long as the attorney demonstrates a plausible, non-discriminatory reason for striking the juror from the pool.⁷ Therefore, while a prosecutor may have removed a juror because he is black, he can avoid detection by putting forward a different reason for the strike.⁸ In a legal environment where such vague explanations as a juror's "casual" demeanor⁹ are plausible, non-racial reasons, it is very difficult for the defendant to prove that race was the actual reason for any specific strike.¹⁰ Since peremptory strikes remain a uniquely attractive option for a lawyer hoping to exclude minority jurors,¹¹ it is perhaps not surprising that race continues to play a non-trivial role in jury selection in many states and prosecutorial districts.¹²

⁶ Edward Pilkington, *Missouri Pressured to Halt Execution of Black Man Sentenced By All-White Jury*, THE GUARDIAN (Apr. 13, 2015, 3:07 P.M.), <http://www.theguardian.com/us-news/2015/apr/13/missouri-governor-pressured-execution-andre-cole-white-jury>.

⁷ In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Supreme Court held that the Equal Protection Clause also prohibits the discriminatory use of peremptory challenges based solely on gender; however, this Article will focus exclusively on the racial component of peremptory strikes.

⁸ *Id.*

⁹ For examples of vague reasons accepted by the courts as valid bases for peremptory strikes, see, e.g., *People v. Mack*, 538 N.E.2d 1107, 1111 (Ind. 1989) (casual manner); *United States v. Forbes*, 816 F.2d 1006, 1010–11 (5th Cir. 1987) ("posture and demeanor"); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir.1987) ("poor attitude"); *United States v. Cartledge*, 808 F.2d 1064, 1070–71 (5th Cir. 1987) ("avoidance of eye contact").

¹⁰ Such a task is even more difficult on appeal as the panel would not have had the opportunity to observe the demeanor of the juror in question.

¹¹ Barbara O'Brien and Catherine M. Gosso, *Report on Jury Selection Study*, MICHIGAN STATE UNIV. COLLEGE OF LAW (Dec. 15, 2011), <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1330&context=facpubs> at 11 (finding a "statistically significant disparity" between prospective black jurors and prospective white jurors in North Carolina).

¹² *Id.*

Though subtle, the damage caused by a racially biased peremptory strike should not be understated.¹³ It deprives a defendant of the most basic protection in our criminal justice system—the right to an impartial jury that has been indifferently chosen with respect to race. At the same time, it puts a prosecutor in a disproportionately powerful position to control the racial makeup of a jury, allowing him to play on racial biases and a lack of cross-racial understanding. As empirical studies have shown, juries from which minorities have been intentionally excluded are significantly more likely to convict African Americans.¹⁴ This problem is especially disconcerting in the capital punishment context, where a wrongful conviction carries with it extreme and irreparable harm.¹⁵ Such results profoundly undermine the legitimacy of our courts and the protections of the Fourteenth Amendment.

In an attempt to remedy this problem, some southern states have taken—or considered taking—action by conferring upon each capital defendant a statutory right to use statistical evidence of racial bias.¹⁶ The underlying goals of these attempts—fair and just trials, the minimization of false convictions, and greater equality in sentencing and punishment—cannot be legitimately challenged.¹⁷ However, the method by which these rights are secured—statistical evidence from a large group of cases—has been vehemently opposed.

North Carolina's initial triumph and eventual failure in this matter is especially instructive. In 2012, the North Carolina legislature attempted

¹³ *Id.*; see also *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (“[R]acial discrimination in the qualification or selection of jurors on account of race, ethnicity, or gender ‘offends the dignity of persons and the integrity of the courts.’”).

¹⁴ See generally Levinson, *supra* note 4 (finding evidence of implicit racial bias in a juror's perception criminal defendant's case); see also Patrick Bayer, et al., *The Impact of Jury Race in Criminal Trials*, DUKE POP. RESEARCH INST. (June 2011) (analyzing the effect of different racial compositions of jury on criminal verdict).

¹⁵ Clearly, a racially biased peremptory strike also deprives a prospective juror of his right to serve on a jury on account of his race or ethnicity, a separate (but still severe) constitutional violation. See e.g., *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

¹⁶ For more information about North Carolina's Racial Justice Act, see Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES (June 5, 2013), http://www.nytimes.com/2013/06/06/us/racial-justice-act-repealed-in-north-carolina.html?_r=0. For a discussion of efforts in Texas, see Scott Goldstein, *Dallas DA Craig Watkins to Push for Law Allowing Appeals Based on Racial Factors*, DALLAS MORNING NEWS (Jan. 22, 2013), <http://www.dallasnews.com/news/community-news/dallas/headlines/20130121-dallas-da-craig-watkins-to-push-for-law-allowing-appeals-based-on-racial-factors.ece>.

¹⁷ The Supreme Court has consistently held that procedural safeguards should prevent the arbitrary enforcement of the death penalty. See *Furman v. Georgia*, 408 U.S. 240 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

to right some of its past wrongs¹⁸ by implementing the “Racial Justice Act,” which afforded a defendant the right to use statistical evidence to show racially biased peremptory strikes in his state, county, or district.¹⁹ Instead of being embraced as a creative solution to a seemingly insurmountable problem, the RJA ignited a firestorm of controversy.²⁰ According to the opponents of the RJA, the statute’s approval of statistical evidence from similar cases is improper. That is, a defendant should only be able to use evidence of jury selection tactics that he can directly prove occurred during his trial; he should not be able to use statistical evidence of strikes from other cases to prove bias in his case.²¹

The debates surrounding the wisdom of this statutory provision seem to suggest that a defendant’s right to use statistics from other cases to demonstrate racial bias derives only from statute; he has no constitutional right to use such evidence.²² The subsequent repeal, which specifically attacked the statistical evidence provision, confirms that the legislature

¹⁸ See, e.g., Michal Biesecker, *Racial Justice Act Repeal Hits a Roadblock*, NEWS & OBSERVER (June 6, 2011), <http://www.pfadp.org/pfadp-news-othermenu-71/492-racial-justice-act-repeal-hits-a-roadblock> (quoting Rep. Paul Luebke “[u]ntil 1965, racial discrimination was legal in this state. Racial discrimination is part of our history, part of our heritage. It is wrong to pretend that racial discrimination does not still exist in this state.”); THE TRIALS OF DARRYL HUNT, (BREAK THRU FILMS 2006) (available on HBO) (Darryl Hunt, a black man in North Carolina, was wrongfully sentenced to life in prison based on an eyewitness identification from a former Klu Klux Klan member. The conviction was believed to be racially motivated); William J. Barber II, *Voices: Ending Racial Injustice and Prosecutorial Misconduct*, THE INSTITUTE FOR SOUTHERN STUDIES (July 2007), <http://www.southernstudies.org/2009/07/post-44.html>; ACLU, *Innocent North Carolina Man Exonerated After 14 Years On Death Row* (May 2, 2008) (Levon “Bo” Jones, an African-American who was wrongfully convicted and spent 13 years on death row because of false testimony).

¹⁹ Barbara O’Brien & Catherine M. Grosso, *Confronting Race: How A Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn’t*, 2011 MICH. ST. L. REV. 463, 464 (2011) (“North Carolina stands alone in providing capital defendants a strong claim for relief based on statistical evidence”) (citations omitted).

²⁰ Matt Smith, *‘Racial Justice Act’ Repealed in North Carolina*, CNN (June 21, 2013), <http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/>; Josh Ellis and David Horn, *GOP Lawmakers Plan to Address Racial Justice Act*, NORTH CAROLINA NEWS NETWORK (Jan. 17 2011), <http://www.ncnn.com/edit-news/6454-gop-lawmaker-plan-to-address-racial-justice-act>; Gary Robertson, *N.C. House Panel Backs Repealing Racial Justice Act*, NEWS & OBSERVER (June 6, 2011), <http://www.victoriaadvocate.com/news/2011/jun/01/bc-nc-xgr-death-penalty1st-ld-writethru/>.

²¹ See also WRAL News, *DAs Seek Repeal of Death Penalty Law* (Nov. 15, 2011), <http://www.wral.com/news/state/nccapitol/story/10383586/> (quoting District Attorney Scott Thomas, “[i]n its current form, generalized statewide statistics can be used to vacate every death sentence in North Carolina. We believe that death penalty decisions should be based upon the facts and the law of a particular case not on generalized unreliable statewide statistics.”).

²² See *id.*

believed the right to use statistical evidence in this context is a statutory right only.²³ This focus on the *statutory* right is misplaced. The use of statistical evidence to prove racial bias falls squarely inside a defendant's Fourteenth Amendment rights to be free of, and prove, racial discrimination, as well as the Sixth Amendment right to a properly constituted jury.

In light of the aims of the Fourteenth Amendment and the Supreme Court's jurisprudence on discrimination, the Equal Protection Clause should naturally be interpreted to give defendants robust power to rely on "all relevant circumstances" and evidence, including statistics from other cases, to prove purposeful discrimination.²⁴ The primary purpose of the Fourteenth Amendment is to end all forms of governmental discrimination on account of race,²⁵ including the exclusion of potential jury members on account of race.²⁶ Unquestionably, a defendant must have the right to prove discrimination before he may secure these constitutional protections.²⁷ Therefore, while a state may be able to combat discrimination by conferring a statutory right on defendants to use statistical evidence in post-conviction proceedings, such a tactic would only clarify, not create, a defendant's right to prove discrimination.²⁸

²³ See Sen. Doug Berger, *Senate Floor Debate on Racial Justice Act* (May 14, 2009) ("[I]f states wanted to provide this additional protection and [allow statistics to] prove racial discrimination, then they could do it."). Similarly, the notion that this evidentiary right flows only from statute, and not a defendant's constitutional protections, has spurred advocacy groups to suggest and some states to consider passing additional racial justice acts to better arm potential victims of racial bias. This Article certainly does not criticize those working to produce racial justice acts in other states. These statutes are immensely valuable in providing needed clarity to the right and clearing the road in what could prove to be a more efficient manner than complex litigation campaigns. These statutes also can create a new cause of action for those whose appeals have been exhausted. Most importantly, as the North Carolina RJA has shown, they can spur new studies and discussion on issues of racial bias.

²⁴ *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986)).

²⁵ *Batson v. Kentucky*, 476 U.S. 79, 85 (citing *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1880); see also *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954)).

²⁶ *Strauder*, 100 U.S. at 305 (this 132-year-old case has been continuously reaffirmed). In fact, the Court has explicitly held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86.

²⁷ See e.g., *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law.").

²⁸ They may also be used to expand the right or to give a in conferring an additional "bite at the apple" in habeas cases, as the North Carolina RJA did.

Statistical evidence is a crucial tool for proving racial bias and effectuating constitutional rights. Properly-conducted studies can illuminate patterns and motivations for conduct that we cannot otherwise see, especially if we expand the inquiry to a large number of cases.²⁹ In recognition of this fact, the Supreme Court has endorsed the use of statistics in proving patterns of discrimination in several other cases.³⁰ Yet, despite the Court's endorsement of statistical evidence and its encouragement to look outside the four corners of a case, there is confusion as to whether a defendant can do both of these things—i.e. whether a defendant can use statistical evidence derived from events that occurred outside the four corners of the case.

This Article provides some much needed guidance on this issue by examining the Supreme Court's jurisprudence regarding a defendant's evidentiary rights when attempting to prove racial bias in the use of peremptory strikes. This Article will discuss the misguided interpretation of Supreme Court precedent put forward by some scholars. It will show that the Supreme Court did not impose the often-insurmountable burden of providing proof of discriminatory intent in each specific case.³¹ Next, the Article will examine the admissibility of statistical evidence in the peremptory strike context under accepted evidentiary standards, primarily the Federal Rules of Evidence. It will also compare the types of statistical evidence commonly accepted by courts in other contexts to show that statistical evidence provisions actually codify what the Fourteenth Amendment already demands: robust evidentiary rights to combat racial decimation. Finally, the Article will consider the two major methods for allowing defendants to introduce statistical evidence into wrongful conviction challenges: passage of a racial justice act or litigation designed to clarify the evidentiary right.

²⁹ RICHARD HARRIS, *A PRIMER OF MULTIVARIATE STATISTICS* (2001) (discussing the “inferential” applications and benefits of statistics and their ability to explain why things occur); *see also* RICHARD RUNYON, *DESCRIPTIVE AND INFERENCE STATISTICS: A CONTEMPORARY APPROACH* (1977).

³⁰ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (invalidating a zoning ordinance on Equal Protection grounds); *see also* *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (finding it acceptable to consider regression analysis demonstrating racial discrimination in salaries). *See also* *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987) (“This Court has accepted statistics as proof of intent to discriminate in the context of a State’s selection of the jury venire and in the context of statutory violations under Title VII of the Civil Rights Act of 1964.”).

³¹ Namely, the Court’s decision in *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987), which has been seen as one of the worst Supreme Court decisions since *Plessy v. Ferguson*, 163 U.S. 537 (1896). *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 (2012).

II. THE PROBLEM: PEREMPTORY STRIKES

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.

–Justice Thurgood Marshall³²

Both for cause³³ and peremptory³⁴ challenges can be used to exclude venire members from the jury. For cause challenges allow parties to remove venire members on the “narrowly specified, provable and legally cognizable basis of partiality.”³⁵ Thus, for cause challenges exclude only those venire members who have demonstrated a readily observable bias and whose service on the jury could raise significant questions of partiality.³⁶ In contrast, a peremptory challenge affords parties in a criminal or civil trial the right to excuse a set number of jury members absent a showing of any partiality.³⁷ In other words, by using a peremptory challenge, a party can bar a venire member despite the judge’s determination that the he or she could render a fair, impartial verdict.³⁸ Naturally, it is through the peremptory challenge that an attorney could most easily distort the racial composition of the jury.

This practice of striking a juror for no particular reason is deeply rooted in English and American legal tradition. In fact, peremptory strikes date back to English common law³⁹ and were already “venerable” in Blackstone’s time.⁴⁰ As Blackstone observed in 1305, the “the law wills not that [a defendant] should be tried by any one man against whom [the defendant] has conceived a prejudice, even without being able to assign a reason for dislike.”⁴¹

³² *Batson v. Kentucky*, 476 U.S. 79, 106–07 (1986) (Marshall, J. concurring in judgment).

³³ 28 U.S.C. § 1870 (2012).

³⁴ FED. R. CRIM. P. 24.

³⁵ *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (overruled on other grounds by *Batson*, 476 U.S. at 79).

³⁶ *See Swain*, 380 U.S. at 220.

³⁷ *Id.* (a peremptory challenge is “exercised without a reason stated, without inquiry and without being subject to the court’s control”); *see also* 28 U.S.C. § 1870 (2012) (allowing peremptory strikes in civil cases).

³⁸ *See* FED. R. CRIM. P. 24 (b).

³⁹ JAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 302 (1883) (defendants in felony cases were given the right to challenge up to 35 jurors).

⁴⁰ *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (citing 4 W. BLACKSTONE, *COMMENTARIES* 346–348 (1769)).

⁴¹ BLACKSTONE, *supra* note 40, at 353.

The American legal system was quick to adopt this tactic, ironically seeing it as an important part of “reinforcing a defendant’s right to trial by an impartial jury.”⁴² In 1789, the Select Committee of the House of Representatives suggested that the Sixth Amendment contain a provision protecting the “right of challenge and other accustomed requisites,” including peremptory challenges.⁴³ However, Congress rejected this proposed language on the grounds that this provision was not necessary: In Congress’s view, the right to a peremptory strike was already embodied in the term “impartial jury.”⁴⁴ Since 1790, the exercise of peremptory strikes by defendants and prosecutors has been consistently upheld.⁴⁵ Its use has been guided—albeit with mixed results—by the courts⁴⁶ and by state statutes.⁴⁷ Yet, despite Congress’s apparent faith in peremptory strikes as important tools for ensuring an impartial jury,⁴⁸ these unquestioned strikes have been widely used as a vehicle for discrimination based on race and gender.⁴⁹

Biased strikes violate the Equal Protection Clause and the Sixth Amendment’s guarantee to an impartial jury in three principal ways.⁵⁰ First, racially motivated strikes violate the purported guarantee that “the

⁴² *Martinez-Salazar*, 528 U.S. at 311; *see also Swain*, 380 U.S. at 212–213; *Pointer v. United States*, 151 U.S. 396, 408 (1984).

⁴³ Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 374 (1992) (citing James Madison, *Amendments to the New Constitution*, GAZETTE OF THE U.S., Jun. 13, 1789, at 70).

⁴⁴ S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 297–99 (1973); *see also* U.S. CONST. amend. VI. Still, in 1790, Congress clarified this right by giving defendants a statutory right to twenty peremptory challenges in capital cases. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 119 (1790); *see also* Broderick, *supra* note 44, at 374 (explaining the history of the peremptory strike in American law).

⁴⁵ *Batson v. Kentucky*, 476 U.S. 79, 99 n.22 (1986) (use of peremptory strikes “has long served the selection of an impartial jury”); *id.* at 112 (characterizing peremptory challenge as “procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years”) (Burger, J., dissenting); *see also Swain*, 380 U.S. at 219 (“[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise”).

⁴⁶ *See generally Batson*, 476 U.S. at 79 (imposing constitutional limitations on the use of peremptory strikes); *see also Miller-El v. Dretke*, 545 U.S. 231 (2005).

⁴⁷ *See* FED. R. CRIM. P. 24 (allowing peremptory strikes in criminal cases); 28 U.S.C. § 1870 (2012) (allowing peremptory strikes in civil cases).

⁴⁸ *See, e.g.*, 28 U.S.C. § 1870 (2012).

⁴⁹ *See United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975) (in 1974, the prosecutors in the Western District of Missouri struck 81% of black jurors peremptorily); *State v. Washington*, 375 So.2d 1162, 1164 (La. 1979) (a prosecutor admitted that he routinely struck black jurors).

⁵⁰ *See Batson*, 476 U.S. at 89 (holding in part the Equal Protection clause forbid the prosecutor from challenging potential jurors solely on account of race).

State will not exclude members of [the defendant's] race from the jury venire on account of race."⁵¹ Second, they deprive the defendant of an impartial jury of his peers that has been "indifferently chose[n]" with respect to race.⁵² Finally, they violate the rights of individual jurors not to be excluded from jury service on the basis of race.⁵³

While antithetical to the notion of equal justice, jury exclusion has been a fixture of our justice system. Before the passage of the Fourteenth Amendment, blacks were systematically and openly excluded from the courtroom and the jury box.⁵⁴ These discriminatory actions were not only widely practiced and tolerated but were expressly and consistently condoned by the nation's highest court.⁵⁵ In fact, it was not until after the Reconstruction period that the Court's jurisprudence on race-based jury discrimination began to, very slowly, breathe life into the promise of an impartial jury for all Americans.⁵⁶ The Court began its attempt feebly, addressing only overt discrimination in the case at hand and turning a blind eye to all improper strikes in past cases.⁵⁷ This myopic focus on specific and discrete acts proved debilitating as in most cases it is exceedingly difficult to prove that the any specific strike was actually motivated by race and not some pretextual reason, such as "demeanor" or "style of dress."⁵⁸ As the Court came to realize that its proposed solutions were ineffective, it began to expand the evidentiary net and

⁵¹ *Id.* at 86 (citations omitted).

⁵² *Id.* at 87 (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

⁵³ *Id.* (stating that "[a] person's race simply 'is unrelated to his fitness as a juror'" (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

⁵⁴ *See e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393, 400 (1856) ("the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves"). In fact, many "Black Codes," including those in North Carolina, went so far as to explicitly deny blacks the essential right to serve on juries. James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HIST. 461, 461-73 (1930). Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 16 (2002).

⁵⁵ *Id.* Is there a direct citation that corresponds to this sentence? *See e.g.*, *Dred Scott*, 60 U.S. at 400.

⁵⁶ For a discussion of each stage of this process, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2004).

⁵⁷ *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879).

⁵⁸ *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). While *Batson* challenges do pose a non-trivial requirement on prosecutors to articulate a non-discriminatory reason for the peremptory challenge, *Batson* is certainly not a complete solution of the problem. For the reasons discussed later in this paper, *Batson* challenges are often easily defeated and would only be able to weed out a very small number of cases.

consider other evidence of racial bias, including “patterns” of actions occurring “outside the four corners” of the case at hand.⁵⁹

Given the state of modern statistical analysis and its ability to find patterns from a large set of actions,⁶⁰ this Article argues that statistical evidence clearly falls in line with the kinds of proof that the Court has recognized in its jurisprudence.⁶¹ As the following analysis demonstrates, the Court’s slow march toward a more and more inclusive stance on evidence of racial bias has been continually spurred by the realization that other more restrictive approaches fail to give full force to the protections guaranteed by the Fourteenth Amendment.⁶²

A. *Push Toward Greater Fourteenth Amendment Protections: Evidentiary Rights Under Strauder and Swain*

The Court’s 1880 decision in *Strauder v. West Virginia* marked the first major step toward securing the right of an impartial jury for all Americans. In *Strauder*, the Supreme Court was called upon to consider the constitutionality of a West Virginia statute that explicitly stated that only white people could serve on juries.⁶³ In finding that such a practice violates the Fourteenth Amendment, the Court held that the Fourteenth Amendment “not only gave citizenship and the privileges of citizenship to persons of color, but it denied any State the power to withhold from them the equal protection of the laws,” and that included among these protections is the right to an impartial jury.⁶⁴ West Virginia violated this defendant’s equal protection rights when it tried him in front of a jury from which members of his own race had been purposefully excluded.⁶⁵

⁵⁹ *Miller-El v. Dretke* at 239–240 .

⁶⁰ See HARRIS, *supra* note 29 (discussing the “inferential” applications and benefits of statistics and their ability to explain why things occur); see also RUNYON, *supra* note 29.

⁶¹ For a discussion of patterns and statistics used in the employment discrimination context, see *Tex. Dept. of Community Aff. v. Burdine*, 450 U.S. 248, 254 (1981); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁶² Recent studies on racial bias in jury selection should act as the next impetus, compelling even more robust protection. For a discussion of the new studies and methods, see *infra* page 28.

⁶³ *Strauder*, 100 U.S. at 306.

⁶⁴ *Id.* at 306–08 (1879) (“The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”).

⁶⁵ *Id.* (“[I]n the selection of jurors to pass upon [a defendant’s] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.”); *Neal v. Delaware*, 103 U.S. 370, 394 (1881); see also *Virginia v. Rives*, 100 U.S. 313, 323 (1880).

Strauder represented a major step in stamping out discrimination and set the “foundation for the Court’s unceasing effort to eradicate racial discrimination in the procedures used to select the venire.”⁶⁶ However, its focus on laws that on their face barred individuals from serving on a jury because of their race proved too narrow. *Strauder* did nothing to stop actions that were facially race-neutral but had the same deleterious effect the *Strauder* Court sought to stamp out, i.e. “lessen[ed] the security of [African Americans’] enjoyment of the rights which others enjoy.”⁶⁷

In the wake of *Strauder*, Southern states continued to discriminate against black jurors.⁶⁸ Rather than drafting overtly discriminatory laws, state legislatures and prosecutors began passing laws and engaging in practices that were facially race-neutral⁶⁹ but still had the effect of excluding African Americans from the jury box.⁷⁰ For instance, many of these laws imposed requirements—usually financial—for service that most newly freed blacks could not meet. Other laws created very subjective requirements—such as high moral character or sufficient intelligence—that a prosecutor could easily manipulate to exclude whomever he wished.⁷¹ Given the excessively high burden of showing required under *Strauder*, black defendants could not effectively challenge these laws.⁷² Thus, African American venire members still faced significant statutory obstacles to jury service well after *Strauder*.⁷³ Indeed, prosecutors began using peremptory strikes and other exclusionary tactics against minorities at an alarming rate, effectively achieving the same outcome as the West Virginia statute.⁷⁴

The Court’s modest advancement against these tactics came in *Swain v. Alabama*. *Swain* reaffirmed that a “State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the

⁶⁶ *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

⁶⁷ *Strauder*, 100 U.S. at 310.

⁶⁸ For a discussion of various statutory obstacles to jury participation including the financial requirement of paying taxes and obviously subject requirements of “good moral character” and “sufficient intelligence,” see Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C.L. REV. 2031, 2050 (2010).

⁶⁹ For a discussion of various statutory obstacles to jury participation including the financial requirement of paying taxes and obviously subject requirements of “good moral character” and “sufficient intelligence,” see Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C.L. REV. 2031, 2050 (2010).

⁷⁰ *Strauder*, 100 U.S. at 310.

⁷¹ *Id.* My editor could not find this proposition in *Strauder*. Please review.

⁷² See *Strauder*, 100 U.S. at 308.

⁷³ See Kotch & Mosteller, *supra* note 68, at 2050.

⁷⁴ *Id.*

administration of justice violates the Equal Protection Clause.”⁷⁵ However, it went a step further, recognizing that racial discrimination can occur even in the exercise of a race-neutral law or practice.⁷⁶ The Court held that a defendant can show racial discrimination if he can demonstrate that the prosecutor engaged in a “systemic pattern” of strikes against African Americans.⁷⁷

Despite its lofty goal, this ruling did little to actually promote equal protection in many cases. To satisfy the burden of proof under *Swain*, a defendant had to provide direct evidence of a *systemic pattern* of strikes against African Americans by the specific prosecutor in his jurisdiction.⁷⁸ Essentially, defendants had to “demonstrate that the peremptory challenge system had been ‘perverted.’”⁷⁹ Thus, a defendant would fail under *Swain* unless he could show that the prosecutors in his jurisdiction had exercised their strikes to exclude blacks from the jury to systematically and uniformly strike African Americans, almost without exception.⁸⁰ It was not enough to show that the process had failed him; he had to show that the process failed most minority defendants. Given the exceptionally high showing required under *Swain*, this requirement proved far too great for most defendants, and equal protection remained elusive.⁸¹

B. Expansion to “All Relevant Circumstances”: Batson v. Kentucky

In 1986, recognizing that the current legal regime had “placed on defendants a crippling burden of proof, making prosecutors’ peremptory challenges [. . .] largely immune from constitutional scrutiny,”⁸² the Court decided to increase the types of admissible evidence yet again. In *Batson v. Kentucky*, the Court dismissed the cumbersome requirement of

⁷⁵ *Swain v. Alabama*, 380 U.S. 202, 203–04 (1965) (overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986)).

⁷⁶ *Id.*

⁷⁷ *See Swain*, 380 U.S. at 226.

⁷⁸ *Id.* at 237.

⁷⁹ *Construction and Application of Constitutional Rule of Batson v. Kentucky*, 476 U.S. 79 (1986), 8 A.L.R. FED. 2D 547 (originally published in 2006).

⁸⁰ *Batson*, 476 U.S. at 92.

⁸¹ *See id.*

⁸² *Batson*, 476 U.S. at 92–93, 103 (Marshall, J., concurring) (“[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice.”).

having to show a systemic, jurisdiction-wide pattern of discrimination as inconsistent with the spirit of equal protection.⁸³

To establish a *prima facie* case under *Batson*, the defendant must first prove that he is a member of a cognizable racial group and that the prosecutor used peremptory challenges against members of the defendant's race.⁸⁴ "Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"⁸⁵ The defendant must then show that these facts, along with any other relevant circumstances, raise an inference that the prosecutor used peremptory strikes to exclude venire members based on race.⁸⁶

Most importantly with regard to statistics, *Batson* directed the trial court to "consider all relevant circumstances" when examining a claim of discrimination and discriminatory intent.⁸⁷ The Court's examples of relevant circumstances included the prosecutor's pattern of strikes against black venire members.⁸⁸ The list of relevant circumstances also included circumstantial evidence of invidious intent and "under some circumstances proof of discriminatory impact."⁸⁹ Admittedly, the list of relevant circumstances did not explicitly mention the pattern of strikes in other cases or throughout other jurisdictions. However, the Court made clear that the list was "merely illustrative."⁹⁰ In fact, the Court was so careful not to limit avenues of proof that it explicitly cautioned that this list is not exhaustive and advised that courts should give "significant deference" to the trial judge in deciding what *other* factors were relevant in making a *prima facie* case of discrimination.⁹¹

The context of this opinion is helpful in understanding its breadth. This expansion to "all relevant circumstances" was a direct reaction to the practical difficulty in proving racial bias.⁹² Recognizing that evidentiary restrictions often frustrated the goal of equal protection,

⁸³ "[T]o dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Id.* at 95 (Marshall, J. dissenting from denial of certiorari) (quoting *McCray v. New York*, 461 U.S. 960, 965).

⁸⁴ *Id.* at 96.

⁸⁵ *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

⁸⁶ *Batson*, 476 U.S. at 96–97.

⁸⁷ *Id.* at 96. The third requirement to establish a *prima facie* case generates the most controversy.

⁸⁸ *Id.*

⁸⁹ *Id.* at 93.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See Batson*, 476 U.S. at 94.

Batson directed courts to consider “the totality of relevant facts.”⁹³ Thus, by refusing to narrowly limit the scope of what was relevant, the Court demonstrated a clear desire to provide a true remedy for racial discrimination.⁹⁴

However, the application of *Batson* had one significant shortcoming.⁹⁵ Under *Batson*, the prosecution can defeat a challenge by providing a plausible non-racial explanation for the strike.⁹⁶ Since the peremptory strike, by its very nature, affords the privilege to excuse certain jury members without an articulable reason, this requirement was often very easy to satisfy.⁹⁷ Even though the explanation has to be “clear and reasonably specific,” there proved to be far too many acceptable non-racial reasons for excusing a juror.⁹⁸ For instance, prosecutors were allowed to excuse jurors for vague, nondescript reasons such as poor body language and demeanor or low intelligence.⁹⁹ Thus, a skilled prosecutor could exercise racially motivated peremptory strikes yet still provide a plausible, albeit fictitious, non-racial reason for each strike.¹⁰⁰ This difficulty created serious problems of enforcement that prosecutors exploit to this day.¹⁰¹

C. *A Setback For Statistical Evidence or A Misinterpreted Holding?: McCleskey v. Kemp*

Batson’s shortcoming has been heavily exploited. Prosecutors are consistently able to point to a non-racial reason for strikes, making it extremely difficult to prove discriminatory intent on a case-by-case basis.¹⁰² In response, defendants tried to show racial bias in other stages

⁹³ *Id.* at 96.

⁹⁴ *Id.* at 94.

⁹⁵ *Id.*

⁹⁶ *See id.* at 106.

⁹⁷ *See id.*

⁹⁸ *Id.* at 124.

⁹⁹ *See, e.g.,* *People v. Mack*, 538 N.E.2d 1107, 1111 (1989) (casual manner); *United States v. Forbes*, 816 F.2d 1006, 1010–11 (5th Cir. 1987) (“posture and demeanor”); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (“poor attitude”); *United States v. Carlidge*, 808 F.2d 1064, 1070–71 (5th Cir. 1987) (“avoidance of eye contact”).

¹⁰⁰ *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987).

¹⁰¹ *See, e.g.,* Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 349 (1989) (discussing the difficulty of proving racial bias under *Batson*); David D. Hopper, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 836–38 (1988).

¹⁰² Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 162 (2010) (“Not surprisingly, *Batson* has engendered an enormous amount of often virulent criticism One even

and through other means. One of the most well-known attempts, and the one whose eventual failure is most commonly cited by opponents of statistics, is Warren McCleskey's push to invalidate the Georgia death penalty because of its disparate impact against blacks.¹⁰³

In *McCleskey v. Kemp*, the Court examined "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."¹⁰⁴ The statistical study in *McCleskey* showed that the death penalty in Georgia was imposed more often against black defendants and killers of white victims.¹⁰⁵ Specifically, it "found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims."¹⁰⁶

The *McCleskey* Court noted that statistics are acceptable proof of intent to discriminate in some contexts, such as an "equal protection violation in the selection of the jury venire in a particular district."¹⁰⁷ While it found that statistics generally must show a "stark pattern to be accepted as the sole proof of discriminatory intent under the Constitution," the Court also noted that due to "the nature of jury-selection [courts] have permitted a finding of constitutional violation even when the statistical pattern does not approach such extremes."¹⁰⁸

less charitable commentator has said, '*Batson* is either a disingenuous charade or an ill-conceived sinkhole.' *Batson* and its progeny appear to remain ineffective, despite the fact that other members of the Court have recognized the role of implicit bias in the legal system.).

¹⁰³ *McCleskey*, 481 U.S. at 279. For a discussion of the political efforts leading up to the enactment of the law and the evidence of discrimination, see *Landmark: McCleskey v. Kemp*, NAACP LDF, <http://www.naacpldf.org/case/mccleskey-v-kemp> (last visited Apr. 14, 2015).

¹⁰⁴ *Id.* Notably, this case examined whether the disparate impact and imposition of the death penalty makes the use of the death penalty unconstitutional in that state, and only tangentially touches on the use of peremptory strikes that might lead to this end result. For an excellent discussion of *McCleskey* and its political and social consequences, see Caitlin Naidoff, *Confronting the Fear of "Too Much Justice": The Need for a Texas Racial Justice Act*, 19 TEX. J. C.L. & C.R. 169 (2013).

¹⁰⁵ *McCleskey*, 481 U.S. at 321.

¹⁰⁶ *Id.* at 287.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). The Court gives several examples including *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (2-to-1 disparity between Mexican-Americans in county population and those summoned for grand jury duty); *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (1.6-to-1 disparity between blacks in county population and those on grand jury lists); *Whitus v.*

The Court's recognition of the myriad opportunities for subtle acts of discrimination as well as the importance of statistics suggested that it might respond by lowering the evidentiary burden in the jury-selection context. But the Court took a different approach. It found that *McCleskey's* statistics, while they showed a racial disparity, did not demand an inference of racial discrimination.¹⁰⁹ Rather, the Court reasoned, the study "indicate[d] [only] a discrepancy that appears to correlate with race," which the Court felt was a "far cry from [a] major systemic defect."¹¹⁰

According to the Court, a mere statistical correlation is not enough to demonstrate bias in this context because the decision to impose the death penalty is fundamentally different from other instances in which statistics have been used. In other words, the ultimate decision to impose the death penalty is based on "innumerable factors that vary according to the characteristics of the individual defendant and the facts of a particular case" and, therefore, cannot be analyzed through statistics.¹¹¹ According to the Court, it would be nearly impossible to analyze the considerations that go into these decisions for each jury member and the prosecutor when deciding to impose a sentence of death because it would be impossible to control for any single aspect of the discretionary decision-making process.¹¹²

This holding was seemingly premised on two points. As a general rule, mere correlation does not necessarily demonstrate causation.¹¹³ And, more specifically, disparities in the degree of punishment may simply be a product of both prosecutorial as well as juror discretion, something the Justices saw as an "inevitable"¹¹⁴ part of our criminal justice system."¹¹⁵ According to the Court, prosecutors and jurors have to make complex decisions on a variety of factors when deciding the appropriate punishment for a crime.¹¹⁶ As long as our system affords prosecutors and juries such broad discretion in criminal trials, the

Georgia, 385 U.S. 545, 552 (1967) (3-to-1 disparity between eligible blacks in county and blacks on grand jury venire).

¹⁰⁹ *McCleskey*, 481 U.S. at 286 ("defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.").

¹¹⁰ *Id.* at 312.

¹¹¹ *Id.* at 294.

¹¹² *See id.* at 294–95.

¹¹³ *Id.*

¹¹⁴ And apparently excusable.

¹¹⁵ *McCleskey*, 481 U.S. at 312–13.

¹¹⁶ *Id.* at 327 (Brennan, J., dissenting).

imposition of punishment cannot be uniform.¹¹⁷ Since this discretion is deemed such a “fundamental value of jury trial,” the Court “decline[d] to assume that what is unexplained is invidious.”¹¹⁸

In its defense of discretion and its resulting discrepancies, the Court also pointed to procedural safeguards that make the process as fair as possible.¹¹⁹ The Court noted that chief among these safeguards is a “properly constituted venire” to come to an impartial decision.¹²⁰ Even if the prosecutor had racist motives for seeking the death penalty, the jury theoretically will act as an impartial check to these biases.¹²¹

If all of the factors the Court assumed were true the Court’s reasoning is at least arguably plausible in the context of general disparities in sentencing. Juries are a fundamentally important component of our legal system and are ultimately tasked with determining guilt or innocence.¹²² Therefore, it should be very difficult to overturn a properly constituted jury’s considered judgment. However, applying *McCleskey’s* reasoning, as opponents of statistical evidence have done, to the jury selection context is a fundamental mistake.

Unquestionably, the jury cannot serve as an effective check if it is selected in a discriminatory fashion. When the defendant argues a *Batson* challenge, he is challenging that very assumption; he claims that this jury is not impartial.¹²³ Therefore, to apply *McCleskey* to discriminatory strikes is to assume as true the very issue in question.

Refusing to apply *McCleskey* in the context of jury selection is not an indictment of *McCleskey* as *McCleskey* was not about jury selection. On the contrary, it was a case about disparate impact in capital sentencing that *assumed* proper jury selection.¹²⁴ The statistics undoubtedly showed that race was strongly correlated to the death

¹¹⁷ *Id.* at 297.

¹¹⁸ *Id.* at 313.

¹¹⁹ *Id.* at 313 (citing *Singer v. United States*, *supra*, 380 U.S. 24, 35 (1965)).

¹²⁰ *McCleskey*, 481 U.S. at 294.

¹²¹ It is a fundamental notion of our legal system that a properly constituted jury of one’s peers serves an invaluable check on the arbitrary exercise of government power. *See* U.S. CONST. amend. V. The jury secures the criminal defendant’s fundamental “protection of life and liberty against race or color prejudice.” *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

¹²² U.S. CONST. amend. VII.

¹²³ *See, e.g.*, Justin D. Levinson et. al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014) (finding evidence of implicit racial bias in a juror’s perception criminal defendant’s case); *see also* Patrick Bayer, et al., *The Impact of Jury Race in Criminal Trials*, DUKE POP. RESEARCH INST. (June 2011) (analyzing the effect of different racial compositions of jury on criminal verdicts).

¹²⁴ *See McCleskey*, 481 U.S. at 295 (“each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire”).

penalty.¹²⁵ However, the defendant was challenging the decision to seek the death penalty and, in doing so, seemingly indicting the racial motivations of the prosecutor, judge, and jury.¹²⁶ That the Court was noticeably hesitant to permit a statistical finding to overturn the decision of what it assumed to be an impartial jury is in some ways not surprising.¹²⁷ After all, to do so would challenge a fundamental tenet of our justice system that jury decisions are not affected by racial or other bias.¹²⁸ The study did not show, nor did it purport to show, that the jury was improperly selected or that it was the product of racial bias.¹²⁹ Based on the question presented and the concepts at issue, the Court exercised what it perceived as restraint and held that this specific statistical analysis (which only showed a racial discrepancy) is, on its own, insufficient to invalidate a death sentence.¹³⁰

Another matter that bears mentioning here is the oft-repeated contention that *McCleskey* leaves the decision of whether statistics can be used to show racial discrimination to the state legislature.¹³¹ *McCleskey* recognized the role of states in meting out punishments for crimes. However, the language in *McCleskey* regarding state legislatures refers to the disparate impact of the death penalty in Georgia and whether maintaining capital punishment is appropriate in light of the Eighth Amendment.¹³² The Eighth Amendment is interpreted in such a way as to protect the “dignity of man” and is determined based on “evolving standards of decency.”¹³³ Naturally, this standard makes more room for legislative input than the Fourteenth Amendment, whose dictates are clear. Accordingly, the Court declined to weigh in on the legislative determination of what the precise standards of dignity are in the State of Georgia.¹³⁴ However, the Court did not say that the admissibility of

¹²⁵ See *id.* at 285.

¹²⁶ *Id.*

¹²⁷ See *id.* Whether this hesitation is appropriate is another matter entirely.

¹²⁸ See *id.*

¹²⁹ *McCleskey*, 481 U.S. at 296. Furthermore, as opposed to a *Batson* challenge, the jurors did not have an opportunity to explain why their decision was not racially biased.

¹³⁰ *Id.* at 297.

¹³¹ *NC Republicans Propose Racial Injustice Act*, BLUE NC (Apr. 5, 2011), <http://www.bluenc.com/nc-republicans-propose-racial-injustice-act>; see also *Moving Beyond “Racial Blindsight”? The Influence of Social Science Evidence After the North Carolina Racial Injustice Act*, MICH. ST. UNIV. COLLEGE OF LAW (2010), <http://law.msu.edu/blindsight/introduction.html>.

¹³² *McCleskey*, 481 U.S. at 300.

¹³³ *Id.*

¹³⁴ “First among these indicia are the decisions of state legislatures, ‘because the . . . legislative judgment weighs heavily in ascertaining’ contemporary standards.” *Id.* (citing *Gregg v. Georgia*, 428 U.S. 175 (1976)).

statistics, or any other relevant evidence to prove racial discrimination, should be determined exclusively by the states.

In fact, it could not have made such a claim. There can be no question that states are absolutely barred from denying African Americans the protection of an impartial jury. The Court has continuously upheld that principle by striking down laws and limiting practices that enforced or allowed racial discrimination as repugnant to the Constitution and the Fourteenth Amendment.¹³⁵ It has also held that the imposition of unnecessary evidentiary hurdles renders the Fourteenth Amendment ineffective. Since peremptory strikes can be used to discriminate, a defendant must have the right to challenge them when they are used in a discriminatory fashion.¹³⁶ Thus, states cannot limit the use of evidence that the Court has deemed necessary in making out a claim of discrimination.¹³⁷ An alternative holding would effectively allow states to circumvent the Fourteenth Amendment—the very amendment designed to prevent the states from discriminating.¹³⁸

D. Expanding Outside the “Four Corners” of the Case: Miller-El v. Dretke

Subtle tactics of racial exclusion have always been a problem.¹³⁹ For example, in 1948 the Clerk of Court for Bertie County, North Carolina admitted to printing the names of black jury pool members in red and the names of whites in black so that the prosecutor could achieve an all-white jury without ever meeting the members.¹⁴⁰ Decades following *State v. Speller*, racially driven exclusionary tactics had become more advanced and increasingly difficult to prove. By 2005, the use of racial stereotypes seemed even “better organized and more systematized than ever before.”¹⁴¹ In a bizarre twist, at least one District Attorney’s office used a statistical “demographic analysis” to decide which races and

¹³⁵ U.S. CONST. amend. XIV, §1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹³⁶ *McCleskey*, 481 U.S. at 300 (citations omitted).

¹³⁷ See e.g., *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law . . .”).

¹³⁸ U.S. CONST. amend. XIV.

¹³⁹ Olatunde Johnson, *Legislating Racial Fairness In Criminal Justice*, COL. HUMAN RIGHTS L. REV. 233 (2008); Frank Baumgartner, *Detecting Bias Essential in Death Penalty Cases*, THE BURLINGTON TIMES (Nov. 26, 2011) <https://www.unc.edu/~fbaum/Innocence/NC/Burlington-Times-News-RJA-Nov-26-2011.pdf>.

¹⁴⁰ *State v. Speller*, 47 S.E.2d 537, 538 (N.C. 1948).

¹⁴¹ See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005).

genders to strike.¹⁴² In this way, the prevailing interpretation of *McCleskey* yielded an absurd result—prosecutors were using statistics to more effectively discriminate, yet defendants could not show this discrimination through statistical evidence of their own.

The Court attempted to address the problem of overly restrictive evidentiary hurdles and follow *Batson*'s move toward “less discouraging standards for assessing a claim of purposeful discrimination” in the capstone case of *Miller-El v. Dretke*.¹⁴³ The *Miller-El* Court recognized:

although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give . . . If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* . . . Some stated reasons are false, and although some false reasons are shown within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand.¹⁴⁴

The Court relied, in part, on the “all relevant circumstances” language in *Batson* to justify looking outside of the “four corners” of the defendant's case to find racial discrimination by the Dallas County, Texas District Attorney's Office.¹⁴⁵ In an attempt to discover the true intent of the prosecution, the Court looked past the evidence from *Miller-El*'s own case to patterns of racial discrimination in the prosecutorial district.¹⁴⁶ In addition to statistics from *Miller-El*'s own trial that showed the prosecution peremptorily struck 10 out of 14 blacks from the jury, the Court looked to side-by-side comparisons of struck blacks and whites as well as the District Attorney's Office historical jury selection practices.¹⁴⁷

Several components of the Court's opinion suggest an implicit endorsement of statistics. First, the Court examined a wide array of

¹⁴² *See id.* (“one jury-selection guide counsels attorneys to perform a “demographic analysis” that assigns numerical points to characteristics such as age, occupation, and marital status—in addition to race”).

¹⁴³ *Id.* at 239.

¹⁴⁴ *Id.* at 239–40.

¹⁴⁵ *Id.* at 240.

¹⁴⁶ *See id.* at 266.

¹⁴⁷ *Miller-El*, 545 U.S. at 241.

“relevant circumstances” to discover discriminatory intent.¹⁴⁸ The evidence included the State’s long-standing practice of strategic “jury shuffling” that sought to keep African Americans toward the back of the venire panel.¹⁴⁹ Jury shuffling refers to a procedure by which one side can change the order in which prospective jurors will be called for *voir dire* examination.¹⁵⁰ This process, when employed at the proper time, ensures that most African Americans would be called on later in the selection process or potentially not at all.¹⁵¹ Therefore, prosecutors could effectively bar minorities from the jury without having to strike them. By purposefully seeking to exclude jurors based solely on their race, this use of jury shuffling falls squarely in the category of prohibited discrimination.¹⁵² However, it would be difficult, if not impossible to prove that jury shuffling in any one case was racially motivated.¹⁵³ The sample size would be far too low, allowing a prosecutor to explain away individual shuffles as mere exercises of discretion.¹⁵⁴

Second, and most importantly, the Court looked to the aggregate of cases in Dallas County to find a policy of racist strikes.¹⁵⁵ The Court found that “for decades” before this trial, “the Dallas County office had followed a specific policy of systematically excluding blacks from juries.”¹⁵⁶ In support of this claim, the Court pointed to direct testimony that prosecutors were sometimes encouraged to exclude blacks. For

¹⁴⁸ *Id.* at 240.

¹⁴⁹ “[T]he prosecution’s decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense’s shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney’s Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past.” *Id.* at 254 (citations omitted).

¹⁵⁰ See TEX.CODE CRIM. PROC. ANN., art. 35.11 (West 2015). Though the statute calls on the clerk to make such requests, the transcript in *Miller-El* proved that both sides made the shuffles. *Miller-El*, 545 U.S. at 306. See also Edward Lazarus, *A Death Penalty Case the Supreme Court May Review Shows the Dysfunction of the Federal Judiciary When it Comes to Capital Punishment*, FINDLAW, (June 24, 2004), <http://writ.news.findlaw.com/lazarus/20040624.html>.

¹⁵¹ See 5 WITKIN, CAL. CRIM. LAW 3D (2000) Crim Trial, § 496, p. 702 (2008 Supplement).

¹⁵² *Id.*

¹⁵³ *Miller-El*, 545 U.S. at 254.

¹⁵⁴ Peter Peduzzi, et. al, *A Simulation of the Number of Events Per Variable in Logistic Regression Analysis*, 49 J. OF CLINICAL STATISTICS 1737 (1996) (discussing the importance of a statistically significant sample size in isolating variables and finding patterns in behavior and responses).

¹⁵⁵ *Miller-El*, 545 U.S. at 254.

¹⁵⁶ *Id.* at 263.

instance, a former assistant in the District Attorney's office stated that "his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury."¹⁵⁷ Prosecutors were even given a manual that justified racial exclusion from jury service.¹⁵⁸ Both forms of evidence showed that the Dallas County office had, for some time, supported racial profiling in jury selection.¹⁵⁹

However, none of the evidence dealt with Miller-El's case in particular. In fact, the manual was merely "available" to only one prosecutor in the office at the time of Miller-El's trial.¹⁶⁰ There was no evidence that the prosecutor actually used or read the manual. Indeed, the District Attorney's office argued that the manual was no longer in circulation when Miller-El was arrested for the crime.¹⁶¹ Under some interpretations of *McCleskey*, this evidence would not be admissible to prove racial bias in *this* defendant's case as it could not be directly and conclusively tied to the disposition of the matter before the Court.¹⁶²

Nevertheless, the Court looked beyond this issue and found adequate evidence of racial bias.¹⁶³ This holding not only called on courts to look past the case at hand, but it also exhorted them to strike actions that may not have indisputable and direct evidence of bias.¹⁶⁴ The Court admitted that "peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is."¹⁶⁵ "But when illegitimate grounds like race are in issue" the courts must look beyond the "pretextual" reasons to prevent bias.¹⁶⁶ In so stating, the Court reaffirmed the sentiment previously expressed in *Batson* that the courts must make a meaningful effort to enforce the Fourteenth Amendment.

A crucial part of this effort involves looking beyond an individual case for indirect evidence of patterns and policies; a look that should naturally be aided by statistics.

¹⁵⁷ *Id.* at 263; "Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries." *See id.* at 264.

¹⁵⁸ The "Jury Selection in A Criminal Case" manual outlined the reasoning behind excluding minorities from jury service. *See id.* at 334-35.

¹⁵⁹ *Miller-El*, 545 U.S. at 265-66.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 283.

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 284.

¹⁶⁵ *Miller-El*, 545 U.S. at 252 (internal citations omitted).

¹⁶⁶ *Id.*

III. THE NEXT STEP: STATISTICS

As set forth above, the historic arc of the Court's jurisprudence bends toward inclusion of many forms of indirect evidence, specifically evidence outside the "four corners" of the case that can demonstrate a "pattern" of racially biased strikes. However, the legal debate has focused almost exclusively on one form of indirect evidence—statistics.

Advocates of statistics point out that statistical models are immensely helpful in detecting relationships and behavioral patterns.¹⁶⁷ They are widely used to predict and discern patterns and behavior in a variety of fields, including oncology, sociology, and behavioral psychology.¹⁶⁸ By isolating potentially relevant variables, models can determine whether the observed patterns reflect corresponding patterns in decision making or are merely random fluctuations that merely correlate with the variable at issue.¹⁶⁹ In other words, inferential statistics can help determine whether a prosecutor's decision to strike a black juror was caused by the juror's race or if the juror's race was not a factor in the decision.

Despite its theoretical attractiveness, statistical evidence must still pass muster under the Federal Rules of Evidence before it is admitted. First, statistics must have the tendency to make a relevant fact more or less probable.¹⁷⁰ The relevant fact is the motive for the prosecutor's decision to excuse a juror: Was the purported non-racial reason the actual reason or was it pretext for a racially biased action? With respect to this point, there can almost be no question that statistics are relevant. The Supreme Court has specifically endorsed the use of statistics to prove pretext in other contexts—most notably in employment discrimination.¹⁷¹ In Title VII cases, plaintiffs are able to use statistical patterns in hiring, firing, and promotion to demonstrate that an employer's asserted reason for its employment decisions are not the true ones.¹⁷²

For instance, in *International Brotherhood of Teamsters v. United States*, the Court held that a plaintiff can use evidence of gross statistical disparities to show a pattern and practice of racial discrimination.¹⁷³ In

¹⁶⁷ FREDERICK GRAVETTER, STATISTICS FOR THE BEHAVIORAL SCIENCES 124 (2012).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ FED. R. EVID. 401.

¹⁷¹ Members of the Court have also looked to statistical evidence in other cases, including in *Furman v. Georgia*, 408 U.S. 238 (1972) (examining the deterrent effect of capital punishment).

¹⁷² See, e.g., *Obrey v. Johnson*, 400 F.3d 691, 698 (9th Cir. 2005). In *Obrey*, the Ninth Circuit found that a statistical report tending to show a correlation between race and promotion constituted additional evidence of discrimination.

¹⁷³ 431 U.S. 324, 338 (1977).

that case, the plaintiff presented evidence that African American employers were hardly ever promoted to “line driver” to show that she was not promoted due to her race.¹⁷⁴ In fact, only one African American in the entire company had been promoted to this position, while whites were promoted at a very high rate. Finding that “statistical analyses have served and will continue to serve an important role in which the existence of discrimination is a disputed issue,” the Court found that this evidence demonstrated discriminatory intent.¹⁷⁵

Statistics involving a large number of cases have been most heavily attacked. However, statistical evidence that incorporates a large number of cases and actions yields more, not less, reliable data than evidence from just one case.¹⁷⁶ The largest hurdle to a reliable statistical model is variability; each interaction contains some unique circumstances and outlying considerations that could explain the phenomena.¹⁷⁷ In other words, in any one case the prosecutor may actually have a negative feeling about a juror that has nothing to do with the juror’s race. Therefore, his striking of that one juror may not tell us much about why he engages in strikes.

The variability problem is controlled by increasing the number of iterations. That is, the more prosecutor strikes that occur, the less likely any outlying considerations, such as an individual’s personality, is to skew the data sample. As a threshold matter, we can certainly say that the average African American juror is as qualified to serve as any other juror, i.e. his demeanor, intellect, and mannerisms are no more objectionable than the average non-black juror. However, we cannot say that each African American (or white) juror in any specific case represents the “average” juror. Therefore, it is quite possible that one specific juror really does have a bad demeanor and just happens to be black. Thus, it is difficult to read much into the fact that this juror was excluded.

However, evidence that the prosecutor consistently, over a large number of cases, strikes black jurors at a very high rate tells a different story. The effect of any outliers is minimized, and we are more justified in relying on what we know about the general population of African Americans—that they are as qualified to serve as the general white population. Accordingly, with each additional striking of a black or white

¹⁷⁴ *Id.* at 339.

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.,* SAMUEL KOTZ, et. al., CONTINUOUS MULTIVARIATE DISTRIBUTIONS 643 (2000).

¹⁷⁷ *Id.*

juror the prosecutor paints a clearer picture of his racial biases, or lack thereof.

The statistical study employed pursuant to North Carolina's RJA demonstrated such a pattern of racial bias. In *North Carolina v. Robinson*, the first case brought under the RJA, the Cumberland County Superior Court considered statistical evidence of racial bias in that prosecutorial district and county. Upon review of the evidence, Judge Weeks endorsed the quality of the study, finding that the statistical analysis showed "race, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government."¹⁷⁸

Still, despite their ability to illuminate patterns and motivations, statistics are usually attacked on relevance grounds. The major argument against statistical evidence is that it does not prove that any specific strike was done for racial reasons.¹⁷⁹ This perceived problem manifests in two major ways: at the individual level and at the regional, state, or district level.

The problems at the individual level stem from one concern: people do not *always* follow the same pattern. In other words, even though a prosecutor has engaged in a pattern of racially biased actions, he might not have made any racist strikes in this defendant's case.¹⁸⁰ Quite simply, the prosecutor, who normally strikes due to race and uses demeanor or attire as his pretexts, may actually have struck a specific juror because of his poor demeanor or sloppy dress. Yet, under the statistical evidence approach, a defendant would still obtain relief by proving that the prosecutor habitually strikes African American jurors in other cases.¹⁸¹

¹⁷⁸ Order Granting Motions for Appropriate Relief at *2-3, *North Carolina v. Golphin et al.*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, (N.C. Sup. Ct. Dec. 13, 2012).

¹⁷⁹ See e.g., Jordan, *DAs Seek Repeal of Death Penalty Law*, WRAL (Nov. 15, 2011) (quoting District Attorney Scott Thomas "[i]n its current form, generalized statewide statistics can be used to vacate every death sentence in North Carolina. We believe that death penalty decisions should be based upon the facts and the law of a particular case not on generalized unreliable statewide statistics"); see also Frank Baumgartner, *Detecting bias essential in death penalty cases*, THE BURLINGTON TIMES-NEWS (Nov. 26, 2011), <http://www.unc.edu/~fbaum/Innocence/NC/Burlington-Times-News-RJA-Nov-26-2011.pdf>.

¹⁸⁰ In fact, character evidence is strictly barred to prove that a party acted in conformance with that character trait in any given instance. See FED. R. EVID. 404.

¹⁸¹ Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, (Jun. 5, 2013), <http://www.nytimes.com/2013/06/06/us/racial-justice-act-repealed-in-north-carolina.html> (reporting concern that "a white supremacist who murdered an African-American could argue he was a victim of racism if blacks were on the jury.").

In the second scenario, the individual prosecutor may not have any noticeable biases.¹⁸² However, his office engaged in a noticeable pattern of striking African American jurors throughout the district, demonstrating a clear racial bias.¹⁸³ Under most conceptions of a racial justice act, any defendant in which this prosecutor picked the jury would be entitled to some form of relief on the grounds that the prosecutorial district is corrupted. Therefore, even if a prosecutor does not engage in a pattern of racially-motivated strikes, his actions may still be viewed in light of the general actions of the district or even state over which he has no control.¹⁸⁴

In many ways, these scenarios appear unsettling. However, these issues do not doom the use of statistics, nor do they compromise the legitimacy of broader statistical evidence. First, there are extraordinary institutional benefits to vacating even these “untainted” sentences. In both of the above-described scenarios, the justice system failed to afford a certain number of its defendants the fundamental right to equal protection of the laws.¹⁸⁵ The prosecutorial system was broken.¹⁸⁶ Public trust and confidence in a racially-tainted prosecutorial mechanism would, and should, be extraordinarily limited. Even though an individual capital sentence may have somehow avoided the effects of racial bias, it may not escape untainted in the public’s eye.¹⁸⁷

Next, the Supreme Court has already decided that, on the balance, vacating individual sentences that are not clearly the product of racial bias is necessary to properly effectuate the protections of the Fourteenth Amendment.¹⁸⁸ As has been mentioned above, direct proof of racial bias

¹⁸² This concern was briefly mentioned by the Court in *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003).

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ “Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

¹⁸⁶ “Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.” *Callins v. Collins*, 510 U.S. 1141, 1143–44 (1994) (Blackmun, J., dissenting) (Supreme Court denial of review).

¹⁸⁷ Will Matthews, *ACLU Lens: North Carolina Repeals Historic Legislation Combating Racism in Death Penalty*, ACLU BLOG OF RIGHTS (Nov. 29, 2011, 2:45 PM), <http://www.aclu.org/blog/capital-punishment-racial-justice/aclu-lens-north-carolina-repeals-historic-legislation> (discussing harm from public perceptions of illegitimate convictions).

¹⁸⁸ *See generally* *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

is extraordinarily difficult to achieve.¹⁸⁹ Even if an individual has suffered from racial bias, it may be impossible to prove on an individual act level.¹⁹⁰ Recognizing this problem, the Court has decided that it is prudent and just to look for indirect proof outside the four corners of the case.¹⁹¹ The fact that some cases in which race may not have been a defining factor are called into question might be an unavoidable necessity.

Finally, cultures of discrimination have indirect effects. A prosecutor employed in a biased district may be more likely to strike a defendant due to race than he would have been absent the biased culture. Thus, regardless of the prosecutor's intent, the harm is essentially the same: An African American defendant is *more* likely to receive an unfair trial because he is an African American. While the justifiability of statistical evidence likely cannot hinge solely on indirect effects, the fact that racial discrimination produces often unmeasurable negative side effects counsels toward restraint and caution when dealing with a broken system.

IV. SOLUTIONS: STATUTES OR LAWSUITS?

Statistical evidence has rarely had its day in court against peremptory strikes. The most commonly discussed tactic for solving this problem is a political one: states could pass a racial justice act conferring the statutory right to use statistical evidence.¹⁹² Most advocates seeking to change the current evidentiary regime have advocated for a change in the laws.¹⁹³ Such a statutory conferral of rights would be an ideal outcome in many ways.¹⁹⁴ The right would be explicitly stated in the legislation and there could be little contestation over whether the statutory right applies. Moreover, as in the case with the North Carolina Racial Justice Act, a specific law could afford individuals who have exhausted their appeals the ability to raise a new argument. However, the political option is also plagued by problems, some inherent to the political system itself and some unique to capital litigation.

Political solutions—generally hard to come by—are especially difficult in the capital punishment context. From a pragmatic perspective,

¹⁸⁹ *Batson*, 476 U.S. at 79.

¹⁹⁰ See discussion of statistics and variability *supra*.

¹⁹¹ *Miller-El*, 545 U.S. at 231(2005).

¹⁹² This approach has been advocated in, among other places, Texas, Florida, Georgia, and Kentucky.

¹⁹³ Naidoff, *supra* note 104.

¹⁹⁴ See *id.* at 182–83 (discussing the successful litigation under North Carolina's statute).

political solutions are generally slow and often face challenges extrinsic to the issue's legal merit, such as public perception and political allegiances.¹⁹⁵ Passing legislation in the death penalty context raises an extra hurdle. Protections for individuals accused of capital crimes necessarily protect individuals who are accused of some of the most severe crimes.¹⁹⁶ Like the Fourth Amendment exclusionary principle that often operates to the advantage of the “guilty,” the obvious targeted beneficiary of a racial justice act is someone convicted of engaging in a capital offense.¹⁹⁷ Thus, elected officials, who often feel pressured to be “tough on crime,” might be even more hesitant to advocate reform that could vacate a death sentence.¹⁹⁸

Moreover, a “racial justice act” is, at its core, a humble acknowledgement of a state's flawed history and its failure to serve its citizens, especially members of minority groups.¹⁹⁹ Without at least implying that racial bias might have existed—or still does—in the criminal justice system, a racial justice act would appear unnecessary. Politicians and constituents must be willing to admit that the legal system suffers from some of the same racial biases that have plagued the American system since its founding. Finally, given the often-shocking nature criminal actions that spawn capital trials, it is all too easy to lose focus on the foundational constitutional protections and ask for some sort of “vengeance.”

Political tides may shift and wash away any hard won-victories. North Carolina's experience is an excellent paradigm for the often ephemeral nature of some political successes. In 2010, North Carolina was able to overcome several political hurdles and pass the Racial Justice Act.²⁰⁰ Through the work of dedicated advocates, especially those at the ACLU Capital Punishment Project and the NAACP, statistical evidence of racial bias in Cumberland County, North Carolina was used to vacate

¹⁹⁵ This paper will not discuss these issues in any length.

¹⁹⁶ In the criminal context, rights are often effectuated by the exclusion of otherwise relevant evidence. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁹⁷ That is not to say that the person is necessary guilty of the crime; however, he has been labeled “guilty” at some point.

¹⁹⁸ This paper assumes that the constituents who would oppose such measures also feel that there is some sort of benefit in imposing a sentence of death.

¹⁹⁹ *See, e.g.*, *THE TRIALS OF DARRYL HUNT*, (BREAK THRU FILMS 2006) (available on HBO); William J. Barber II, *Voices: Ending Racial Injustice and Prosecutorial Misconduct*, THE INST. FOR SOUTHERN STUDIES (July, 2007), <http://www.southernstudies.org/2009/07/post-44.html>; *Innocent North Carolina Man Exonerated After 14 Years On Death Row*, ACLU (May 2, 2008) (Levon “Bo” Jones, an African American who was wrongfully convicted and spent 13 years on death row because of false testimony).

²⁰⁰ *See* Naidoff, *supra* note 104 (discussing the political steps taken to enact the Racial Justice Act in North Carolina).

the death sentence against Marcus Robinson and commute it to a term of life in prison.²⁰¹ While this result garnered significant praise in many circles, the success of statistics in proving racial bias did not sit well with some North Carolina politicians. When the North Carolina Assembly experienced a radical political shift, it gutted the RJA and removed its statistical evidence provision.²⁰² While North Carolina was able to pull off a remarkable achievement by marshalling the political will to pass a law allowing the introduction of statistical evidence and using it to show that racial bias infected the criminal justice system, its advancements were short-lived.

Despite this result, this Article argues that the protections identified in the RJA are not lost; a defendant may still vindicate these rights through constitutional litigation. North Carolina's Act codified the Supreme Court's jurisprudence on Fourteenth Amendment protections against racially motivated peremptory strikes in three important ways. First, the RJA prevents the imposition of any capital sentence that was sought or obtained based on race.²⁰³ This component of the RJA flows directly from the Court's decisions from *Strauder* to *Brown* to the present day that the Fourteenth Amendment "denied any State the power to withhold from [minorities] the equal protection of the laws."²⁰⁴ Since the state clearly denies equal protection when it deliberately excludes members of the defendant's race from the jury, peremptory strikes must always be race neutral.²⁰⁵ This freedom from racial discrimination clearly lives in the Fourteenth Amendment and is a fundamental component of any fair system.²⁰⁶ Thus, to challenge the category of protections afforded by this first provision is to challenge the Fourteenth Amendment and over 150 years of Supreme Court jurisprudence.

Second, the RJA allows defendants and calls on the courts to look beyond the four corners of the case at hand.²⁰⁷ This provision permits evidence of pattern and policy that is not directly linked to the case at hand to be considered during trial.²⁰⁸ Evidence of patterns, custom, and policy are widely used to prove knowledge and intent, yet opponents of this practice successfully argued that courts should not be able to consider information or actions that do not flow directly out of the case

²⁰¹ *Id.*

²⁰² *See, e.g., DA's Seek Repeal of Death Penalty Law, supra* note 21.

²⁰³ Racial Justice Act, *supra* note 192, at §15A-2011(a).

²⁰⁴ *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879); *see also Brown v. Bd. of Education*, 347 U.S. 482 (1954).

²⁰⁵ *See id.* at 305–06.

²⁰⁶ *See* U.S. CONST. amend. XIV.

²⁰⁷ Racial Justice Act, *supra* note 192, at §15A-2011 (a).

²⁰⁸ *Id.*

before the court.²⁰⁹ However, the Supreme Court has consistently held that courts should look beyond the defendant's individual case to prevent discrimination, especially discriminatory strikes. The Court in *Swain* allowed for a finding of racial discrimination if the defendant could show a systemic pattern of strikes against African Americans in the prosecutorial district.²¹⁰ This holding necessarily required looking beyond the case at hand and examining the prosecutor's actions in the aggregate.²¹¹ In *Miller-El*, the Court, finding that confining the scope of evidence to one's own case was unduly burdensome and failed to adequately guard against acts of discrimination, expressly endorsed looking outside the "four corners" of a specific case.²¹² In fact, the Court cast a "wide net" to find evidence of discriminatory patterns and practices, including evidence from several years before the defendant's trial persuasive.²¹³ Even though there was no direct evidence that some of the actions had any direct effect on the specific trial in *Miller-El*, the Court found the danger of discrimination too great to uphold a capital sentence.²¹⁴

Finally, the RJA expressly allowed a defendant to prove racial bias through statistical evidence from his county, prosecutorial district, or state.²¹⁵ Though this is the most controversial component of the bill, the Court has allowed evidence of systemic discrimination to prove racial bias since its 1965 decision in *Swain*.²¹⁶ Under *Swain*, a defendant could prevail if he showed a systemic pattern of racially motivated strikes by the prosecutor in one's district.²¹⁷ *Batson* told the courts to look at "all relevant circumstances" and the "totality of relevant facts."²¹⁸ The Court took pains not to limit the scope of inquiry and provided a "merely illustrative" list of relevant considerations. It is hard to imagine that such a widely accepted form of evidence would fall outside the parameters of

²⁰⁹ Kim Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013, at A13 (reporting Representative Tim Moore's concern that "a white supremacist who murdered an African-American could argue he was a victim of racism if blacks were on the jury.").

²¹⁰ *Swain v. Alabama*, 380 U.S. 202, 226–27 (1965).

²¹¹ *See id.*; but *see generally* *Batson v. Kentucky*, 476 U.S. 79 (1986). Though *Batson* ruled that a showing of racial bias in one's own case was sufficient, nothing in *Batson* suggested a limitation of *Swain*.

²¹² *Miller-El v. Dretke* 545 U.S. 231, 240 (2005).

²¹³ *See id.* at 264–65.

²¹⁴ *See id.*

²¹⁵ North Carolina Racial Justice Act, 2009 N.C. Sess. Laws, 1213–14 (repealed 2013). Art. 101, §15A-2011 (a).

²¹⁶ *Swain*, 380 U.S. at 226.

²¹⁷ *Id.*

²¹⁸ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

the “totality of relevant facts.”²¹⁹ Finally, every constitutional right has a remedy; the Court has found that indirect evidence is an essential route to this remedy. Thus, a statistical evidence provision follows logically; statistics are among the most effective and efficient ways to look at a large sample of cases and actions.²²⁰

Despite the logical appeal of the constitutional rights argument set out above, a full-blown litigation effort has yet to be waged. This hesitancy is, in many ways, understandable. Courts have rejected several statistic studies. However, a careful reading of these opinions reveals that these rulings are less than damning. On the contrary, the Court has only rejected studies that did not adequately capture the facts at issue; the studies simply did not prove the fact that they set out to prove. For instance, the *McCleskey* study was not rejected because it was a statistical study or that it looked at cases outside the case at hand; it was rejected because it merely showed a correlation between race and the imposition of the death penalty.²²¹ Clearly, the Court was not comfortable with overturning a jury verdict based on statistical evidence of mere causation alone. However, inferential statistics have made significant advancements since that time and are now better able to isolate and control for certain variables, creating a strong *causation* argument. In other words, a proper study may be able to control for factors, such as “discretion,” which troubled the Court.

Therefore, the solution advocated by the Article is in some ways simple: create better statistical studies. The methodology employed by Barbara O’Brien and Catherine M. Grosso represents the type of statistical analysis that should be used in any future litigation campaign. The study controlled for outliers by analyzing peremptory strikes in North Carolina capital cases from 1990 to 2010. It found that, of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members.²²² More importantly, it controlled for the other race-neutral reasons cited by prosecutors, including death penalty views, criminal backgrounds, employment, marital status, and hardship.²²³ From this data, the trial court was able to undertake a meaningful examination of not only the

²¹⁹ *Id.* at 96–98.

²²⁰ *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

²²¹ Again, a correlation that the jury did not have a chance to explain.

²²² Catherine M. Grosso & Barbara O’Brien, A Stubborn Legacy: The Overwhelming Importance of Race in Capital Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 IOWA L. REV. 1531, 1548 (2012).

²²³ *Id.* at 1547.

correlation between race and strikes, but also whether it was race and not some other reason that caused it. Additional studies should also borrow from the methodology used in the *McCleskey* study. Evidence of racially-biased strikes, coupled with racially-influenced outcomes, creates, to borrow a term from Title VII jurisprudence, a more “convincing mosaic” of decimation.

V. CONCLUSION

Racial discrimination is a tragic but very real part of our past and our present. The Racial Justice Act attempted to keep it from being part of our future. It ensured that each person was afforded equal treatment under the law. It ensured that punishment was more commensurate with the crime and not affected by his race. It ensured that our criminal system was seen as more legitimate, fair, and impartial. However, despite its lofty goals, the RJA was not without precedent. Indeed, it embodied the protections that live in the Fourteenth Amendment²²⁴ and are found in cases from *Brown* to *Batson*: Each citizen must be afforded equal protection of the law regardless of his or her race. To this end, the Court has required states to follow such prohibitions on racially motivated jury selection similar to that in the RJA since *Strauder* in 1880. More recent jurisprudence only confirms this statement.

The RJA’s statistical tools are not without precedent either. On the contrary, the Court has accepted statistical analysis in Title VII and venire-selection cases in the past. It has accepted proof of systemic patterns of discrimination in a district. It has called on courts to look beyond the “four corners” of a case and at the “totality of relevant facts.” It has accepted these showings to give effect to the promise of equal protection.

The evidentiary safeguards in the RJA followed Supreme Court precedent and are essential to enforcing a defendant’s right to equal protection. The Fourteenth Amendment provides that all people will receive equal protection of the law. In order for this right to have any significance, defendants must be able to enforce this right in court and enforce it effectively. Essential to this enforcement is the ability to prove violations when they occur. The Court in *Miller-El* has recognized that confining the racial bias inquiry to the “four corners” of a defendant’s case is unduly burdensome and constrains the defendant from enforcing

²²⁴ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (“As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it.”).

this right.²²⁵ Given the broad array of acceptable reasons for peremptory strikes, prosecutors can often defeat a meritorious *Batson* challenge on a case-by-case. Therefore, it might only be by looking at a large group of cases that show a clear and consistent pattern of strikes against blacks that the defendant can overcome these explanations and prove racial bias. Since the Fourteenth Amendment is principally concerned with preventing racial discrimination, it must give defendants this right to look outside their own case to prove racial bias.

This jurisprudence has to include the use of statistics. If defendants are allowed to look at evidence of pattern and practice outside of their own case to create a presumption of racial bias, it follows that defendants need to have an effective way of compiling, examining, and showing this data. Statistical analysis is arguably the best way to look at large amounts of data and come to a conclusion from that data. Furthermore, statistics are commonly used in many other legal contexts and there is no clear reason why jury selection in the capital punishment context should be any different.

The Racial Justice Act was heralded, and rightly so, as a profound step towards securing racial equality in sentencing and punishment. However, these steps are made pursuant to the Fourteenth Amendment and Supreme Court precedent and secure essential evidentiary rights for all defendants. Any attempt by the state to frustrate the achievement of such equality, must be seen as an unconstitutional attempt by the states to limit the efficacy of the Fourteenth Amendment. Given the repugnant nature of racial discrimination and the difficulty of proving it without the help of statistics, legislatures cannot shrink the wide net that the Supreme Court demands.²²⁶ Accordingly, advocates should continue presenting statistical evidence of discrimination, even after the RJA's repeal and *McCleskey*'s frustrating holding.

²²⁵ *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

²²⁶ *See id.* at 240.