

The Death Penalty in North Carolina, 2021

A Summary of the Data and Scientific Studies

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EXECUTIVE SUMMARY

This report summarizes what is known about capital punishment in North Carolina based on available empirical data as well as studies of the state's death penalty system through the year 2020. The goal is to establish the realities of the state's capital punishment system for the purpose of providing important information to policy-makers. *The guiding question of this work is, given the realities of the death penalty in North Carolina, should the state maintain its system of capital punishment or dismantle it and invest in other measures aimed at preventing crime and providing justice for victims, their families, and larger society?*

Note that this analysis does not address the morality of capital punishment, nor does this report assess the death penalty in theory. Instead, the focus is on capital punishment as a state policy, as it has actually been implemented within North Carolina. As such, the expectation is that the policy will be rational. Successful policies meet their stated or assumed goals and achieve greater benefits than they impose costs; failing policies are those that do not achieve their goals and that impose greater costs than benefits.¹ It is irrational to utilize policies that fail to meet their goals and that impose costs that exceed their benefits.

This report is motivated by the following approach. First, the author is a state employee and member of the University of North Carolina (UNC) educational system. Second, much of the research cited in this report is conducted by other employees of the UNC system, or other state university systems. Third, our salaries are paid for by taxpayers and therefore are in the service of residents of our states. Thus, our research should be used by policy-makers to address the findings of our work.

Empirical data utilized in this report include statistics pertaining to demographic

information of state residents, as well as on death sentences, death row populations, executions, and murder in the state of North Carolina. Studies of North Carolina's death penalty system summarized in this report were located using numerous academic databases (including Criminal Justice Periodicals Index, Sociological Abstracts, Academic Search Complete), as well as Google. The following search terms were used in searches to locate the studies summarized within: "capital punishment" OR "death penalty" AND "North Carolina." The goal of this report is to illustrate what is known about the death penalty in North Carolina, based on this information.

An analysis of these data and studies demonstrates the following realities of capital punishment in the state:

- 1) Relative to the number of murders, the numbers of death sentences and executions are extremely rare in North Carolina (this was true even before the state began its unofficial moratorium; the last execution in the state was August 2006).
- 2) When the state was still executing murderers, executions in North Carolina were not a greater deterrent to murder than alternative sanctions such as life imprisonment.
- 3) Capital punishment in North Carolina is more expensive than other major punishments including life imprisonment.
- 4) Capital punishment in North Carolina is arbitrary and characterized by serious disparities based on extra-legal factors such as race and gender.
- 5) Innocent people have been wrongly convicted of capital murder and sentenced to death in North Carolina.

The report concludes with policy-implications of these findings. The author asserts that, given these five facts, policy-makers should seriously consider whether capital punishment is a

necessary policy in North Carolina. Ideally, legislators will invest state resources in sanctions that actually save lives as well as money, and better serve crime victims, their families, and residents of North Carolina.

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INTRODUCTION

The death penalty (i.e., capital punishment) is allowable by law in North Carolina. Specifically, Sections 1 and 2 of Article XI of the North Carolina Constitution—“Punishments, Corrections, and Charities”—specify death as an acceptable punishment. Section 2 explains that with regard to “Death punishment”—“The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.”² Currently, only first-degree murder (including felony murder) is punishable by death in North Carolina. Further, the US Supreme Court has made it clear that the only crimes punishable by death are those that produce death, such as murder.³

Article 100 of Chapter 15A, the Criminal Procedure Act, is titled “Capital Punishment,” and approves capital punishment for capital felonies.⁴ Article 19 of Chapter 15, Criminal Procedure, is titled “Execution” and it pertains to the method and procedures of executions in the state.⁵

These laws specify the process of capital punishment in the state and thereby enumerate many protections to capital defendants. First, prosecutors must prove beyond a reasonable doubt that defendants committed capital murder. Second, prosecutors must prove in a separate trial (i.e., bifurcated trial) that statutorily-listed aggravated factors are present and that aggravation outweighs mitigation. Third, the jury can consider any mitigating factor, whether included in the statute or not, as long as it is introduced into evidence, and mitigating factors must not be proven beyond a reasonable doubt. Fourth, death sentences cannot be imposed by judges without a jury recommendation of death (both by state statute and because of the Supreme Court case of *Ring v.*

Arizona, 536 U.S. 584, 2002). Fifth, convictions and capital sentences receive an automatic appeal by the state Supreme Court and are subject to a proportionality review by the court to make sure sentences are appropriate to the crime when compared to similar crimes. Finally, convicts can appeal on any relevant issue of law to both state and federal courts, although only one federal appeal is guaranteed by law (additional appeals are discretionary). Together, these protections are often referred to as “super due process,” meaning that extra caution is taken in handling capital cases when compared to non-capital cases.

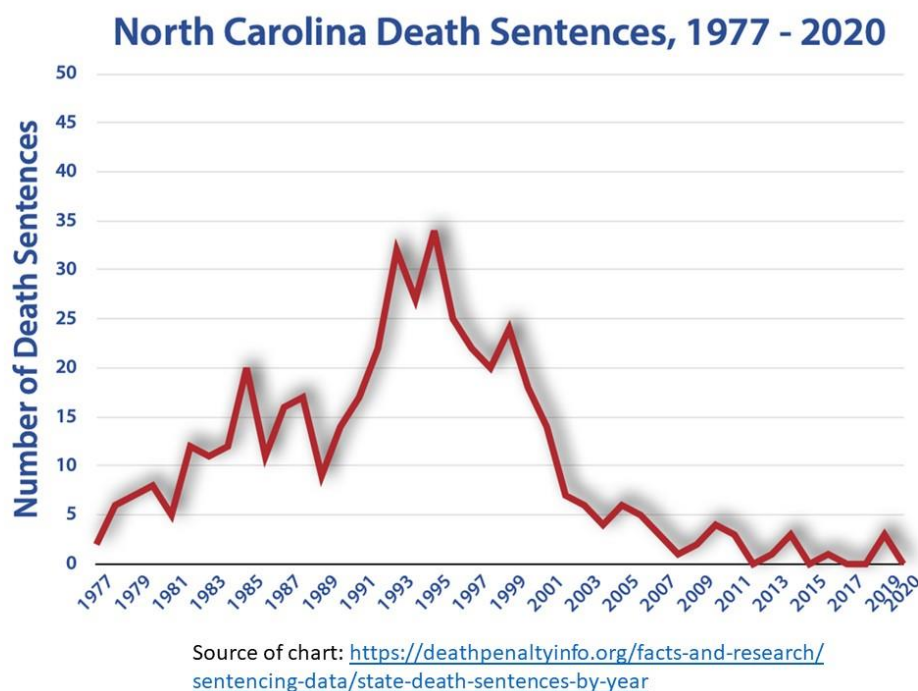
Historically, North Carolina was a leading death penalty state; the state was regularly among the top 10 most active states in terms of the number of death sentences imposed annually (ranked 6th in the country between 1977 and 2006), the size of its death row (ranked 7th in the country in 2010), as well as the number of people executed per year (ranked 6th in the country between 1977 and 2006). Further, for the years 1726 through 1961, the state ranked fifth in the nation in the total number of executions behind only Virginia, New York, Pennsylvania, and Georgia.⁶

However, the state’s recent history has been noticeably different, as death sentences have slowed dramatically and executions have halted entirely. In fact, the state had the largest decline in death sentences of all states in the nation when comparing the annual number of death sentences in each state in the 1990s with the 2000s.⁷ Figure 1 illustrates the significant decline of death sentences in the state. The figure shows that death sentences peaked in 1995, with 34 death sentences handed down that year, then declined to the point where there are less than 5 death sentences each year.

As noted earlier, the last execution in the state of North Carolina was in August 2006; there were four executions in the state that year. Since then, the state has had an unofficial

moratorium, caused first by disputes over the proper role of medical personnel in the lethal injection process. After Superior Court Judge Donald Stephens ruled in 2007 that a doctor must be present at an execution to monitor the vital signs of inmates to ensure there is no pain associated with their executions, the state's medical board said it would punish any doctor who did anything more than observe executions because it would violate their ethics policy enacted in 2007. The Medical Board was then sued by the North Carolina Department of Correction because doctors willing to actively participate in executions could not be located due to the doctors' fears of disciplinary action. The North Carolina Supreme Court ruled in 2009 that the state Medical Board cannot prevent doctors from participating in executions.⁸

Figure 1



North Carolina law (Chapter 15, Article 19, section 187) specifies that death by lethal gas is abolished and that people will be executed by “the drugs necessary to carry out the provisions of this Article,” referring to lethal injection. Incredibly, the names or types of drugs to be used

are not specified by state law. This method of execution—lethal injection—has been litigated in the state, as well.⁹ One reason for the lawsuit is because new protocols for execution were decided by the Department of Public Safety without first receiving public input.¹⁰

Section 188.1 of the law implies that lethal injection can be administered by “any licensed health care professional, including, but not limited to, physicians, nurses, and pharmacists” and that this “shall not be cause for any disciplinary or corrective measures by any board, commission, or other authority created by the State or governed by State law which oversees or regulates the practice of health care professionals, including, but not limited to, the North Carolina Medical Board, the North Carolina Board of Nursing, and the North Carolina Board of Pharmacy.” The legislature also declares that: “The infliction of the punishment of death by administration of the required lethal substances under this Article shall not be construed to be the practice of medicine.”¹¹ In spite of this language, executions still have not resumed in the state.

Figure 2

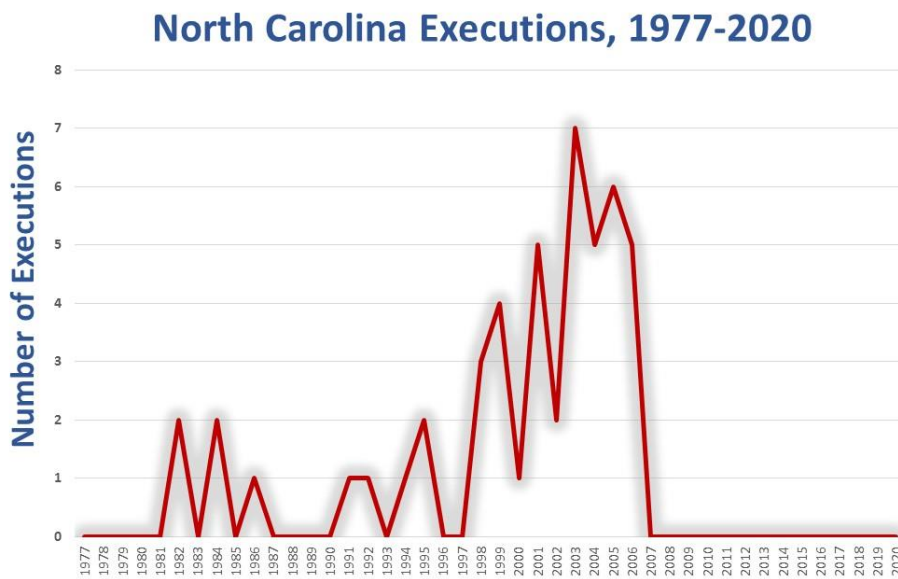


Chart by the author. Data from: <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>

Figure 2 shows the dramatic end to executions in the state. As you can see, executions peaked in the year 2003, with 7 executions that year, but since 2006, there has not been a single execution in the state.

Interestingly, a poll from late 2010 found that 68% of North Carolinians favored a moratorium on executions in the wake of a scandal involving the handling of blood evidence at the State Bureau of Investigation (SBI) crime lab. This problem has great import for capital punishment since flawed evidence from the SBI was used in seven capital cases, including against three men who were put to death.¹²

According to the Swecker Report—an analysis of the SBI crime lab’s blood analysis lab completed by former FBI agent Chris Swecker—there was a “policy of perjury” whereby SBI officials would intentionally or negligently represent test results against defendants.¹³ Studies of public opinion in 2004 also showed support for a moratorium on executions across the state of North Carolina, including 63% statewide, 62% in seven northeastern counties; 58% in five western counties, and 55% in five southeastern counties.¹⁴

More recently, in 2019, a poll by Public Policy Polling “found that nearly three quarters of North Carolina voters rejected capital punishment for people convicted of murder, with 35% preferring a combination of life without parole plus a requirement to work and pay restitution; 19% preferring life without parole; 12% favoring a lengthy prison term, plus restitution, with the possibility of parole; and 6% favoring a lengthy prison term, without restitution.” Only 25% of state residents chose the death penalty, and when asked if the state should keep the death penalty or replace it with the alternative of life imprisonment without parole, only 44% said to keep it (whereas 51% said replace it).¹⁵ This finding is likely at least in part due to the fact that 70% of respondents believe the state has likely executed an innocent person and that 57% believe race

impacts whether a person is sentenced to death. Research on the *Marshall hypothesis* suggests that the more people are aware of the problems of capital punishment practice, the less they support it.¹⁶

Even as death sentences declined and executions came to a halt, the rate of murder in the state nevertheless declined. Figure 3 shows the decline in the state's murder rate since the early 1990s. Note that, after the last execution in 2006, the murder rate actually declined but has risen since; the 2019 rate was nearly identical to that in 2006.

Figure 3

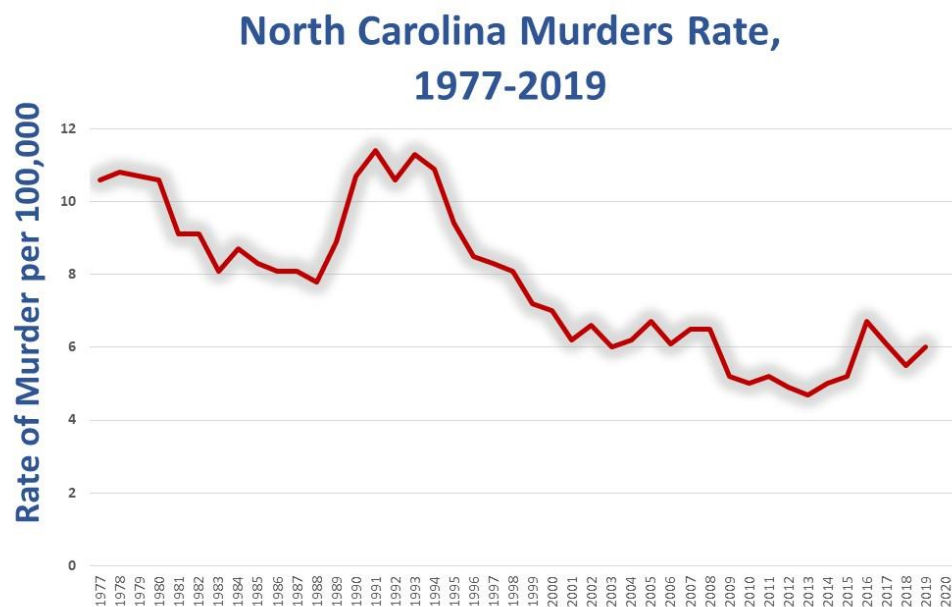


Chart by the author. Data from: <https://www.disastercenter.com/crime/nccrimn.htm>

It should be obvious that, with declining murder rates, citizens should expect fewer death sentences. One major reason is that there is less pressure on public officials (i.e., lawmakers, prosecutors) to seek death sentences. Another is there is simply less perceived need.

Given the realities already identified above—death sentences have declined in North Carolina, executions have been halted, murders have declined, and a large majority of state

residents support a moratorium on executions—this is an appropriate time to carefully assess the state’s capital punishment system. A fundamental question for policy-makers to consider is this—Is capital punishment a necessary practice for North Carolina?

In this report, the empirical studies of capital punishment in North Carolina are examined and summarized. The goal is to establish the empirical realities of the state’s death penalty system for the purpose of providing important information to policy-makers.¹⁷

REALITIES OF CAPITAL PUNISHMENT IN NORTH CAROLINA

Empirical data on North Carolina’s death penalty system and published studies analyzing the imposition of death in the state suggest the following realities of capital punishment in North Carolina:

- 1) Relative to the number of murders, the numbers of death sentences and executions are extremely rare in North Carolina (this was true even before the state began its unofficial moratorium; the last execution in the state was August 2006).
- 2) When the state was still executing murderers, executions in North Carolina were not a greater deterrent to murder than alternative sanctions such as life imprisonment.
- 3) Capital punishment in North Carolina is more expensive than other major punishments including life imprisonment.
- 4) Capital punishment in North Carolina is arbitrary and characterized by serious disparities based on extra-legal factors such as race and gender.
- 5) Innocent people have been wrongly convicted of capital murder and sentenced to death in North Carolina.

Each of these issues is discussed below. Note that, in the discussion of each point, this report begins with developments that likely led to reductions in death sentences in the early

2000s, and these are followed up with more recent data and studies relevant for the death penalty in North Carolina through 2020.

1) Relative to the number of murders, the numbers of death sentences and executions are extremely rare in North Carolina (this was true even before the state began its unofficial moratorium; the last execution in the state was August 2006).

From 1977 (when capital punishment was reinstated in the state of North Carolina) until 2006 (the year of the last execution in the state), North Carolina sentenced 436 people to death and carried out 43 executions, an average of 14.5 death sentences and 1.4 executions per year.¹⁸ During this time, the state experienced thousands of murders, averaging hundreds per year. For example, one study of North Carolina's death penalty system from 1977 through late 1995 found the state averaged 617 murders per year.¹⁹ Another study of North Carolina from 1976 to 2008 found the state averaged 594 murders per year.²⁰ Comparing murders to death sentences and executions shows that far less than one percent of murderers were executed in North Carolina. A study of capital punishment from 1976 to 2008 found that killers of only 56 total victims were executed. During these years, there were 19,517 homicide victims. Thus, only 0.287% of murder victims produced executions.²¹ Even so, North Carolina ranked 10th in the nation in executions per capita through 2008, at 0.047 executions per 10,000 people.²²

A study of capital punishment from 1977 through 1999 found North Carolina's death sentencing rate to be 0.026, meaning the state sentenced to death only 2.6% of all killers; far less were actually executed. This was above average in states with the death penalty, as the average death sentencing rate in states with capital punishment was 2.2%.²³ An analysis of data from 1993 to 1997 found the state's death sentencing rate for homicide was 2.5%.²⁴ Finally, a study of homicides in the state between January 1, 1980 and December 31, 2007 found that of 15,281

murders, only 368 led to death sentences. This represents a death sentencing rate of 2.4%.²⁵

What these data demonstrate is that, the rate of death sentencing in North Carolina by time period only slightly varied. And no matter the period being considered, it is abundantly clear that the vast majority of murderers were not sentenced to death; specifically more than 97% of murderers did not receive death sentences. Of the 2.4%-2.6% of murderers who received death sentences, only a small percentage of them were ever executed. From 1977 through 2007, North Carolina ranked 17th in the nation in actually carrying out executions as a percentage of death sentences. Yet, the state has thus far executed only 9.9% of people sentenced to death since 1977.²⁶ Thus, about 90% of people convicted of murder and sentenced to death were not executed over a 30-year period from 1977 to 2006, and of course none have been executed in 15 more years.

What explains the decline in death sentences and executions in North Carolina? Research suggests that declines in death sentences were due to concerns about wrongful conviction and sentencing, financial costs, as well as other serious problems in the administration of capital punishment in the state including especially serious racial disparities.²⁷ These issues will be addressed later in this report.

However, it is important to note the reasons why capital punishment is so rare in the state of North Carolina in the first place, as it is in fact everywhere it is practiced. The reasons are these:

- (A) Only aggravated murderers can legally be executed; thus a large share of murder is not eligible for the death penalty.
- (B) Prosecutors rarely seek the death penalty; death penalty cases require significant investments of time and money.

(C) Juries only recommend death sentences to judges in some cases, who therefore can rarely impose them.

(D) States cannot afford to practice capital punishment more than they currently do.²⁸

Because of these four reasons, we should not expect to ever see a major increase in the number of death sentences and executions in the state of North Carolina (or any other death penalty state for that matter). Proponents of capital punishment might point to the case of Texas—which leads the nation in executions since 1977—to argue for more executions. But, an analysis of death penalty data there shows the state is actually *less* punitive than the average death penalty state. This issue is examined in Appendix A of this report.

Beyond these obvious reasons, capital punishment has become even rarer in North Carolina for additional reasons. First, the invention of the North Carolina Office of Indigent Service (IDS) in 2000 “did more than any other single action to revolutionize the practice of capital punishment in the state. It is no mere coincidence that numbers of death sentences have declined so dramatically since the passage of this reform.”²⁹ This reduced the representation of capital defendants by unqualified and inexperienced defense attorneys, thereby lowering the possibility of death sentences. Indeed, research shows that 73% of people on the state’s death row were sentenced to death prior to the creation of IDS. There is evidence of some death row inmates who were represented by clearly inadequate defense attorneys who offered little to no defense, including the presentation of no mitigating factors for juries to consider (even when clearly present) during the sentencing phase of trials.³⁰ The fact that a large portion of people on North Carolina’s death row were sentenced to death prior to the establishment of IDS led the Center for Death Penalty Litigation (CDPL) to call North Carolina’s death penalty system “obsolete.”³¹

Second, the number of mitigating factors that have been presented to and accepted by capital juries in the state doubled after the Supreme Court's decision in *McKoy v. North Carolina* 494 U.S. 433 (1990).³² In *McKoy*, the Court held that capital jurors do not have to be unanimous in their decisions about mitigating circumstances presented during trial. This makes it easier for jurors to reject death sentences based on evidence of mitigation (although a study of cases before and after *McKoy* found that mitigating factors exerted less influence on capital trials after that Court decision).³³

Thomas Maher, Executive Director of the Center for Death Penalty Litigation, explains these as well as other factors that help understand the decline of death sentences in the state. According to Maher, the state has:

- (1) Enacted a sentence of Life Without Parole as the only alternative for a sentence of death in first-degree murder cases. This became effective October 1, 1994 (N.C. GEN. STAT. § 14-17, 2008).
- (2) Granted death-sentenced inmates the right to open file discovery for the purpose of developing and pursuing claims in post-conviction. This was effective June 21, 1996 (N.C. GEN. STAT. § 15A-1415(e)-(f)).
- (3) Granted District Attorneys the discretion to not seek death in first-degree murder cases, even when there is evidence of an aggravating circumstance. This went into effect July 1, 2001 (N.C. GEN. STAT. § 15A-2004).
- (4) Created the Indigent Defense Services Commission ("IDS"), under which IDS has developed the following standards governing the qualifications of defense counsel: requiring counsel to seek consultations with the Center for Death Penalty Litigation prior to trial, assuming responsibility of appointing and compensating counsel through the Office of the Capital

Defender, providing increased training and supervision of attorneys, and assuming responsibility for allocating the resources for experts, investigators and other expenses incurred in defending a capital trial (N.C. R. IND. DEF. SERV. Rule 2A (App.) (2009)). IDS became active July 1, 2001 (N.C. GEN. STAT. § 7A-498, 2008).

(5) Provided for post-conviction DNA testing, as of October 1, 2001 (N.C. GEN. STAT. § 15A-269).

(6) Provided pre-trial open file discovery, which is not limited to capital cases, effective October 1, 2004 (N.C. GEN. STAT. §§ 15A-902-910).³⁴

These additional reasons help us understand why citizens should not expect major increases in capital punishment practice in North Carolina; they simply make it harder to convict and sentence people to death.

With regard to the issue of giving prosecutors the discretion *not* to pursue the death penalty in murder cases, North Carolina was “the *only* state in the nation to require prosecutors to seek the death penalty in any case where there was evidence of an aggravating factor, notwithstanding whatever mitigating circumstances might exist.” The result was that, in the 1990s, “North Carolina sentenced 245 defendants to death, far more than in any other decade.”³⁵ Note that, after the requirement to prosecute aggravated murders as capital cases was removed in 2001, the number of death sentences fell below 10 per year in every year since, and the death sentencing rate fell below 2% in every year since, bottoming out at far less than even 1%.³⁶ This decline came after North Carolina saw the largest decline of any state in death sentences from the 1990s to the 2000s, as noted earlier.

The most recent data show that death sentences remain extremely rare in the state. Table

1 shows that, in North Carolina, far less than 1% of killers are sentenced to death in any year, and the last time more than 1% of murderers received death sentences was in 2003 (1.2%).

Table 1. Murder, Death Sentences, and Executions in North Carolina

	Population	# Murders	# Sentences (rate)	# Executions
2000	8,049,313	560	18 (3.2%)	1
2001	8,206,105	505	14 (2.7%)	5
2002	8,305,820	548	7 (1.3%)	2
2003	8,421,190	506	6 (1.2%)	7
2004	8,540,468	532	4 (0.8%)	4
2005	8,672,459	585	6 (1.0%)	5
2006	8,856,505	540	5 (0.9%)	4
2007	9,061,032	585	3 (0.5%)	0
2008	9,247,134	605	1 (0.2%)	0
2009	9,380,884	489	2 (0.4%)	0
2010	9,560,234	474	4 (0.8%)	0
2011	9,651,103	498	3 (0.6%)	0
2012	9,748,364	479	0 (0%)	0
2013	9,848,917	463	1 (0.2%)	0
2014	9,940,387	498	3 (0.6%)	0
2015	10,035,186	517	0 (0%)	0
2016	10,146,788	678	1 (0.1%)	0
2017	10,270,800	622	0 (0%)	0
2018	10,381,615	574	0 (0%)	0
2019	10,488,084	632	3 (0.5%)	0

Sources: Disaster Center (2021). North Carolina crime rates 1960-2019. Downloaded from: <https://www.disastercenter.com/crime/nccrimn.htm>; Death Penalty Information Center (2021). Death sentences in the United States since 1977 by state and year. Downloaded from: <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>; Death Penalty Information Center (2021). Executions by state and year. <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>

A quick note about the impact of death sentences and executions on families of murder victims is in order here. There has not been systematic research into the effects of capital punishment on family members of murder victims.³⁷ Those studies that do exist demonstrate that family members of murder victims do sometimes achieve a sense of retribution as well as closure from the execution of their family member's murderer. Yet, most of the time they do

not, mostly because executions obviously do not bring back their loved ones. The delays in the capital punishment process also diminish the capacity of capital punishment to provide closure to crime victims' families.³⁸ As one example, the state of North Carolina executed 28 people this century (between 2000 and 2006). The average time spent on death row of these offenders was approximately 11.2 years.³⁹ And obviously, everyone on death row since 2006 has been there another 15 years without a single execution.

Advocates of alternatives to capital punishment—such as life imprisonment—argue that an advantage of these alternatives over capital punishment is that they provide a more immediate sense of closure for murder victims' families because closure begins immediately after sentencing when offenders begin serving their sentences (as opposed to having to wait for a death sentence to be carried out more than ten years later). In the wake of the state of Illinois abolishing the death penalty in March 2011, Kane County State's Attorney Joe McMahon suggested one result would be murder trials being concluded conclusion more quickly. McMahon said: "To the extent that we can bring these cases to resolution sooner, and help the families of the victims get some measure of closure and allow the healing process to begin sooner, [it] will be helpful."⁴⁰

Finally, considering how rare capital punishment is relative to the prevalence of murder in North Carolina, we can confidently conclude that family members of nearly every murder victim will not gain a sense of retribution or closure from capital punishment in the state, regardless of how long the process takes. A logical conclusion is that policy-makers ought to be promoting sanctions that actually hold offenders accountable and provide justice to crime victims. Life imprisonment would be one such alternative.

Given the realities discussed in this section of the report, rational questions for policy-

makers are: is the death penalty necessary? Are any of our goals related to justice and crime prevention being met with such a low death sentencing rate and lack of executions?

2) When the state was still executing murders, executions in North Carolina were not a greater deterrent to murder than alternative sanctions such as life imprisonment.

Given the rarity of capital punishment in the state, many have questioned its deterrent value. Unfortunately, not many studies have been conducted within the state of North Carolina that assess whether executions reduce murder here, consistent with the deterrence hypothesis. Yet, historically, studies in the state found little to no evidence consistent with deterrence.⁴¹ Further, studies conducted across the United States also generally fail to find evidence of any greater deterrent value of capital punishment above the deterrent value of alternative sanctions such as life imprisonment.⁴² Finally, murder rates are actually higher in death penalty states than in non-death penalty states, which might be the opposite of what one would expect. A figure illustrating this fact is found in Appendix B of this report.

Interestingly, in 2000, North Carolina's murder rate ranked it 9th highest in the nation, but by 2009, North Carolina's murder rate had fallen to only 15th highest in the nation.⁴³ Recall that death sentences and executions declined significantly during these years, the opposite of what you would expect if capital punishment were a deterrent to murder. By 2019, the latest year for which data are available, North Carolina was still ranked 15th in its murder rate.⁴⁴

As noted earlier, murder in North Carolina declined even as death sentences in the state fell. This is the opposite of what one would expect if capital punishment were a major deterrent to murder. A leading death penalty scholar in the state notes: "North Carolina reached its peak in death sentences with 34 inmates condemned in 1995. These numbers declined regularly until

they were in the single digits by 2002, and numbered just 4, 3, 1 and 2 from 2006 to 2009. No executions have taken place since 2006.”⁴⁵ He continues: “Are North Carolinians in greater danger because fewer executions and death sentences are taking place? A simple look at the numbers suggests otherwise. From 1995, death sentences and murder rates have declined in virtual lock-step, much to the surprise of those who would suggest that executions are a strong deterrent to violent crime. Data from our state suggest that we have paid no price in terms of violence as we have suspended executions after so many recent controversies relating to innocent men spending years on death row and concerns about the constitutionality of our execution method.”⁴⁶

Deterrence is based on the assumption that would-be offenders do not commit crimes out of fear of getting punished. In order for punishment to be an effective deterrent, it must be *certain* (i.e., the punishment must be likely to happen), *swift* (i.e., the punishment must quickly follow the crime), and *severe* (i.e., the pain associated with the punishment must outweigh the pleasure associated with the crime). Research shows that the most important element is *certainty of punishment*, meaning that if punishment is likely to occur, it will be more likely to deter.⁴⁷ Even when the state was still carrying out executions, capital punishment in North Carolina was not certain, and was, in fact, extremely rare, as demonstrated earlier. It is not logical to expect that executions will deter murder when they so rarely happen, especially during a time when death sentences and executions are becoming increasingly rarer.

Obviously, with no executions in the state since 2006, the only potential deterrent of capital punishment in North Carolina would come from death sentences rather than executions. As illustrated earlier, death sentences are exceptionally rare in contemporary North Carolina, especially when compared to murder. Take the years 2010-2019 as one example—during that

ten year period, the state suffered from 5,435 murders⁴⁸, yet only 15 people were sentenced to death during the same time period.⁴⁹ This means that, in the past decade, only 0.276% of murderers were sentenced to death. Clearly, when 99.724% of murderers are not sentenced to death, the most important element of punishment needed for deterrence—certainty—is absent.

Figure 4

Opinion of Deterrence and the Death Penalty	
<u>Study 1 (1996):</u> Presidents of American Society of Criminology (ASC), Academy of Criminal Justice Sciences (ACJS), and Law and Society Association (LSA):	
<i>Do you feel that the death penalty acts as a deterrent to the commitment to murder, that it lowers the murder rate?</i>	
Yes	12%
No	88%
<u>Study 2 (2008):</u> Fellows in the American Society of Criminology (ASC), Winners of the ASC's Sutherland Award, and Presidents of ASC between 1997 and 2008:	
<i>Do you feel that the death penalty acts as a deterrent to the commitment to murder, that it lowers the murder rate?</i>	
Yes	5%
No	88%
<u>Study 3 (2007):</u> Capital punishment scholars who published articles and books between 2001-2005:	
<i>Does capital punishment, as actually practiced in the United States, achieve deterrence? (i.e., prevent future murders by causing fear in would-be murderers so that they do not commit murder?)</i>	
Yes	9%
No	79%
<u>Sources:</u> <u>Study 1:</u> Radelet, M., & R. Akers (1996). Deterrence and the death penalty: The views of the Experts. <i>Journal of Criminal Law & Criminology</i> , 87(1), 10. <u>Study 2:</u> Radelet, M., & T. Lacock (2009). Do executions lower homicide rates? The views of leading criminologists. <i>Journal of Criminal Law & Criminology</i> , 99(2), 489; <u>Study 3:</u> Robinson, M. (2007). <i>Death Nation: The Experts Explain American Capital Punishment</i> . Upper Saddle River, NJ: Prentice Hall.	

Given the rarity of capital punishment (even in death penalty states) and the fact that a large majority of studies fail to find evidence of deterrence, almost no one believes the death penalty is a major deterrent to violent crime. This includes police chiefs across the country,⁵⁰ leading criminologists,⁵¹ widely known death penalty scholars,⁵² as well as citizens as measured in Gallup polls.⁵³ That between 79% and 88% of capital punishment experts believe the death penalty is not a deterrent (and that, among those who indicated it was, almost all suggested that

the effect was so small it probably could not even be measured) speaks volumes. Figure 4 presents the findings from three research studies.

A study of the deterrent value of capital punishment by the National Academy of Sciences is discussed in Appendix B of this report. Along with their findings, the author reveals the single-most demonstrative fact that illustrates the lack of evidence of deterrence when it comes to capital punishment: murder trends fluctuate in states with and without the death penalty in nearly identical ways, regardless of whether or not states carry out executions. This conclusively illustrates that what makes murder increase as well as decrease within states has nothing to do with capital punishment.

Given the realities discussed in this section of the report, rational questions for policy-makers are: is the death penalty necessary? Are any of our goals related to justice and crime prevention being met when the state is not even carrying out executions?

3) Capital punishment in North Carolina is more expensive than other major punishments including life imprisonment.

Studies in North Carolina consistently show that capital punishment costs more than alternative sentences, including life imprisonment. For example, research finds that the extra costs to taxpayers in North Carolina to adjudicate a capital case all the way through an execution is roughly \$329,000 more than a noncapital adjudication with a 20-year prison term. When also including the costs of capital cases that did not result in an execution, “the extra cost per death penalty imposed is over a quarter million dollars, and per execution exceeds \$2 million.” This number assumes that about 10% of death-sentenced defendants are executed; recall that from 1977 through 2006, 9.9% of people sentenced to death in the state were executed.⁵⁴ Figure 5

shows data from this study.

Figure 5

Costs of the Death Penalty	
<i>Two-year costs of capital punishment in North Carolina (FY 2005-FY2006):</i>	
Extra defense costs for capital cases in trial phase:	\$13,180,385
Extra payments to jurors:	\$224,640
Capital post-conviction costs:	\$7,473,556
Resentencing hearings:	\$594,216
Prison system:	\$169,617
Total:	\$21,642,414
 <u>Source:</u> Cook, P. (2009). Potential savings from abolition of the death penalty in North Carolina. <i>American Law and Economics Review</i> , Advance Access, published December 11. http://www.deathpenaltyinfo.org/documents/CookCostRpt.pdf	

Further research showed that the state could have saved at least \$11 million each year on criminal justice activities if it did not maintain its death penalty system. This projection is based on an analysis of the state's death penalty system during fiscal years 2005 and 2006. The figure of \$11 million per year includes "extra defense costs for capital cases in the trial phase, extra payments to jurors, post-conviction costs, resentencing hearings, and the extra costs to the prison system." Additional costs not included in the analysis include "resources that would have been freed up in the Office of the Appellate Defender and the North Carolina Supreme Court, the extra time spent by prosecutors in capital cases, and the costs to taxpayers for federal appeals."⁵⁵

According to the North Carolina Office of Indigent Service (IDS), the average cost of a capital case in the state of North Carolina between FY 2002 and FY 2006 was \$58,592, compared to an average of \$14,170 for non-capital cases. According to IDS: “Regardless of whether the case ended in a trial, plea, or dismissal, a proceeded capital case costs 3 to 5 times more than a proceeded non-capital case.”⁵⁶

The study of capital trial cases by IDS suggests that the state of North Carolina was spending an additional \$20 million each year at the trial level alone just to maintain the capital punishment system. This includes only defense costs and excludes additional expenses for prosecutors, judges, jurors, special investigators, and additional law enforcement costs.⁵⁷ \$20 million is the cost for only 3.6 death sentences per year during the period of the study. Presumably, additional capital cases would have raised this cost further.

According to the IDS report, the major factor that determines capital case costs is the prosecutorial decision to pursue a capital case. Prosecutors routinely charge alleged murderers with first degree or “undesigned murder” even though 83% of the cases will eventually be resolved as second degree murder cases or even less.

Of all potentially capital cases:

- * Over 83% ended in a conviction of second degree murder or less (including 45% that ended in convictions for less than second degree murder)
- * Over 12% ended in a voluntary dismissal, no true bill, or no probable cause finding.⁵⁸

For those cases proceeded or handled as capital cases:

- * 60% ended in a conviction of second degree murder or less.
- * 22% ended in a conviction of less than second degree murder.
- * 3% ended in a death verdict.⁵⁹

According to the report, capital defendants were 12 times more likely to have their cases dismissed than they were to receive death sentences. Further, even at trial, defendants were just as likely to be acquitted as they were to be sentenced to death.⁶⁰

A similar study found that, from 2001 to 2008, the state of North Carolina spent “at least \$36 million dollars by seeking the death penalty instead of life in prison without parole...just on defense costs.” The average cost of a death penalty defense during these years was \$63,700, and the state sought the death penalty 733 times. The average cost of the 1,785 “potentially capital cases” where the state sought life in prison instead of the death penalty was \$14,500 per case. From these figures, the estimate is that “the state would have saved \$49,200 on each of the 733 death penalty cases, totaling \$36.1 million, if a life sentence was sought instead.”⁶¹ The extra costs are due to additional attorneys, expert witnesses, and a separate trial and sentencing phase in capital cases.

Updated data from 2007 to 2015 show that only 2.2% of capital cases resulted in death sentences, whereas 60% resulted in convictions for second-degree murder or less. During these years in North Carolina, “the average costs were 4.4 times higher in a capital case (\$93,231 per case) than when prosecutors did not pursue the death penalty (\$21,022 per case).”⁶²

According to the Center for Death Penalty Litigation: “Continuing capital trials come at a high cost. Defense costs alone in death penalty trials, which are paid by taxpayers, average four times more than in non-capital trials.” Just in one county alone—Wake County—nine capital trials alone “averaged nearly \$350,000 per case. State taxpayers might have saved nearly \$2.4 million if the cases had been tried non-capitally.” This is a minimum because the estimates “do not include added costs for prosecutors, judges, and courts involved in in capital trials, which are longer and more complex.”⁶³

A top death penalty scholar in North Carolina explains why capital punishment is so expensive in the state: “Capital trials are ... much more expensive than non-capital trials because they last longer, they include an entirely separate penalty phase, and greater resources are provided for the defense.”⁶⁴ High costs are simply a reality of capital punishment as it is practiced in the United States under super due process.

The North Carolina Coalition for Alternatives to the Death Penalty also explains why capital cases cost more than non-capital cases:

- * A suspect who is charged capitally has the right to two specially trained attorneys, plus funds for experts and mitigation investigators who compile extensive reports to help jurors understand the defendant’s circumstances when they are deciding between life and death.
- * At trial, selecting a “death-qualified” jury of only people who are willing to impose a death sentence often takes weeks or months, while selecting a non-capital jury is typically completed in a few days.
- * Unlike non-capital trials, death penalty trials have a separate penalty phase, complete with witness and expert testimony.
- * These longer, more complex trials add up to thousands of additional hours for defense attorneys, prosecutors, law enforcement, and court officials.
- * Once they are sentenced to death, defendants are automatically entitled to many levels of appeals, which typically go on for at least a decade.
- * While in prison, they are housed on death row — a special, segregated unit with extra security — and they are not allowed to work as other prisoners do.

* As long as executions are possible, the prison must maintain a death chamber and a team of staff who are trained to carry out lethal injections. They also must procure increasingly scarce execution drugs, which some states are being forced to import or have specially made in compounding pharmacies. (That's not to mention the cost of continuing litigation in North Carolina over the state's lethal injection protocols.).⁶⁵

Studies from many additional states find that capital punishment generally costs two to five times more than alternatives such as life imprisonment and that it is extremely expensive to maintain state capital punishment systems that are rarely used.⁶⁶ Studies from multiple states and the federal government bare out these conclusions. Additionally, studies show that states have cut other areas of spending in order to maintain capital punishment systems that are rarely used, including spending for police, libraries, highways, health care, higher education, defense attorneys, and indigent care.⁶⁷ Some will say that financial costs are irrelevant when it comes to achieving justice. Others will disagree, especially during periods of budget deficits and financial crises.

Given the realities discussed in this section of the report, rational questions for policy-makers are: is the death penalty necessary? Is it worth spending taxpayer money on a policy that is so rarely used?

4) Capital punishment in North Carolina is arbitrary and characterized by serious disparities based on extra-legal factors such as race and gender.

Death sentences should be differentiable from non-death sentences based on only *legal factors* (i.e., things that may permissibly be used to determine which murderers should be executed and which should not). Aggravated and mitigating factors, discussed

earlier, are the most obvious examples. Yet, much research on the death penalty suggests death sentences tend to be arbitrary, meaning “determined by chance, whim, or impulse, and not by necessity, reason, or principle.”⁶⁸ Arbitrariness would be seen in disparities in capital punishment based on *extra-legal factors* (i.e., factors outside of the law that are not supposed to impact death sentencing, such as race, class, gender, etc.) that are not explained away by legal factors. Arbitrary death sentences often result from issues related to geography (e.g., some prosecutor offices are more likely to seek the death penalty than others), quality of defense (inadequate defense is a major contributor to death sentences), and issues of bias within prosecutor offices and juries that can lead to disparities in death penalty outcomes by demographic factors such as race and gender.⁶⁹

According to the Death Penalty Information Center, decades of “reports, research, and data have shown that the administration of capital punishment throughout the United States is not applied only to the worst of the worst but instead is affected by arbitrary and irrelevant factors.”⁷⁰ Its review of the evidence shows that race of victim, sex of defendant and victim, geography, quality of legal representation, and jury misperceptions of their duties all impact death sentences.⁷¹ This means that death sentences are not being handed down to the “worst-of-the-worst” murderers, those whose acts are so aggravated that they demand death. For example, the Death Penalty Information Center writes: “People who commit heinous crimes have received a life (rather than death) sentence while others who commit much less egregious crimes face execution.” Here are some well-known examples: “... after convicting Zacarias Moussaoui for his role as a terrorist responsible for the attacks against the U.S. on September 11, 2001, a jury decided that he should serve a life sentence in prison. Jared

Loughner—who pleaded guilty to killing six people, including a federal judge, and wounding 13 others, including a congresswoman, during a mass shooting in Arizona—was sentenced to life in prison as a result of a plea agreement with the U.S.

Government. James Holmes, who was convicted of killing 12 people and injuring dozens more after he opened fire in a movie theatre in Colorado, received a life sentence.”⁷²

A former North Carolina Supreme Court Justice (who served a Chief Justice for eight years) illustrates the many ways that capital punishment has been and is arbitrary in the state. One reason is because the state “has sent scores of people to death row whose cases cannot be meaningfully distinguished from the many other homicide cases that resulted in life imprisonment sentences.”⁷³ Justice James Exum, Jr. provides numerous examples, including actual cases where spouses hired people to kill their partners (and thus were equally culpable for murder) but who managed to avoid death sentences while the killers they hired did not. He also discusses two cases of child killings, one where the offender sexually assaulted his victim and the other where he did not; the former was sentenced to life imprisonment while the latter was sentenced to death.

According to Justice Exum Jr., the point of proportionality review is to compare death sentences imposed in some cases to other similar cases to make sure they are not disproportionate to other cases imposed in the state. Yet, between 1990 and 2020, when about 300 death sentences were imposed in the state, only one case was found to be disproportionate by judges.⁷⁴ Exum Jr. suggests that this is because, instead of using “objective analysis,” judges instead used their own “experienced judgments.”⁷⁵ Essentially, proportionality review does not seem to be serving its intended purpose of eliminating arbitrary sentencing.

Many studies conducted in North Carolina have implications for the issue of

arbitrariness. For example, one study examining the impact of age of victim on death sentences in North Carolina from 1977 to 2009 found that “death sentences are significantly less likely in direct proportion to victim age. Killers of elderly victims are less likely to receive the death penalty; conversely, the odds of death sentences are slightly higher for killers of child victims.”⁷⁶ Unless the differences in death sentences are explained by legal factors, this would be evidence of arbitrariness.

Another study of offenders who killed a total of 44 police officers in North Carolina found no increased likelihood of being sentenced to death compared to other murder cases. Yet, the researchers found that “the death penalty is reserved for those who either specifically seek out law enforcement officers, brutalize and degrade them, or kill them in an attempt to avoid arrest or to escape that is either unsuccessful or did not require the murder to succeed in those endeavors.”⁷⁷ This may be indicative of arbitrary sentencing but more likely this is accounted for by legal factors.

A study of 835 death penalty cases in North Carolina from 1990 through 2009 examined the impact of mental illnesses and disorders on mitigation. The analysis of mood disorders, psychotic disorders, anxiety disorders, and other brain disorders, as well as personality disorders (plus learning disabilities) found that capital cases against people with these issues tended not to be mitigated, with the exception of learning disabilities. But the authors also found that “jury rejection of a diagnosis of mental illness or the two mental health statutory mitigators, capacity impaired and extreme emotional disturbance, as a mitigating factor has a counter-mitigating effect in that it significantly increases the odds of a death penalty recommendation by about 85-200%.”⁷⁸ This is an odd finding strongly indicative of arbitrariness.

Sentences that are excessive or too lenient would also be indicative of arbitrary sentences. A study of 402 capital and 528 non-capital sentences in North Carolina from 1990 to 2010 found “a substantial number of death sentences that meet the standard of excessiveness” (the study used the standard of *comparative* or *relative proportionality*, measuring whether “a death sentence is more severe than the punishment typically imposed upon similarly culpable offenders”).⁷⁹ However, the study also found “a nearly equal number of life sentences that may be deemed too lenient.”⁸⁰ Specifically, the study found that “perhaps as many of 40% of all capital sentencing outcomes (life or death) in North Carolina...were identified as comparatively disproportionate.” This includes “up to one-fourth of those sentenced to death (85/361) as well as those sentenced to life (88/500).”⁸¹

These findings are difficult to explain because a sentence in a capital case is determined first by prosecutors when they charge, by juries who recommend sentences, as well as judges who impose sentences. The findings, are however, consistent with arbitrary sentencing.

Interestingly, the study also found that black defendants were less likely than white defendants to receive death sentences, as were killers of non-white victims relative to killers of white victims. This “race of victim” bias will be discussed later in this report. Those represented by private counsel were also less likely to receive death sentences. Such extra-legal factors should *not* be related to sentencing outcomes if capital punishment is to pass constitutional muster, but they may be at least partially explained by relevant legal factors. As noted simply by scholars, any factor outside of the law “should not influence death penalty sentencing.”⁸²

Perhaps the most important study of possible arbitrary sentencing and potential extra-legal bias comes from an analysis of 1,272 jury decisions in North Carolina over nearly 30 years. These data, part of the “North Carolina Capital Sentencing Project,” include “all known murder

trials having a capital sentencing phase that were conducted from the reinstatement of North Carolina's capital punishment statutes in June 1977 through December 2005.” The data include “both original capital trials and retrials that involved a penalty phase hearing.”⁸³ The major findings of the study are below:

- * Only 44% of jury decisions led to death sentences. One possible source of arbitrary sentencing comes from the fact that death penalty cases often do not even lead to death sentences.

- * White defendants were more likely than black defendants to receive death sentences (45.8% versus 42.4%). Another possible source of arbitrary sentencing comes from race of defendant.

- * People who killed whites were more likely than people who killed blacks to be sentenced to death (47.3% versus 40.3%). Additionally, both black and white killers of black victims were less likely than killers of white victims to be sentenced to death (33.3% versus 41.5%). Another possible source of arbitrary sentencing comes from race of victim.

- * White and black defendants who killed whites were equally likely to be sentenced to death (46.7%).⁸⁴ Another possible source of arbitrary sentencing comes from the interaction of race of defendant and race of victim.

Below, the evidence is reviewed with regard to the degree to which extra-legal factors impact capital punishment in North Carolina. Factors including race and sex of offender and race and sex of victim are examined. Some studies have completed further examination of data from the North Carolina Capital Sentencing Project, discussed above; these are included in the review below

Demographic data of death row

One way to determine if death sentences are arbitrary is to look for the impact of extra-legal factors such as race and sex on death row populations. In North Carolina,

there is clear evidence of significant racial disparities in North Carolina's death row. Though the state of North Carolina has not carried out an execution since 2006, convicted murderers continue to be sentenced to death and 137 people remain on death row as of May 2021.⁸⁵

Figure 6

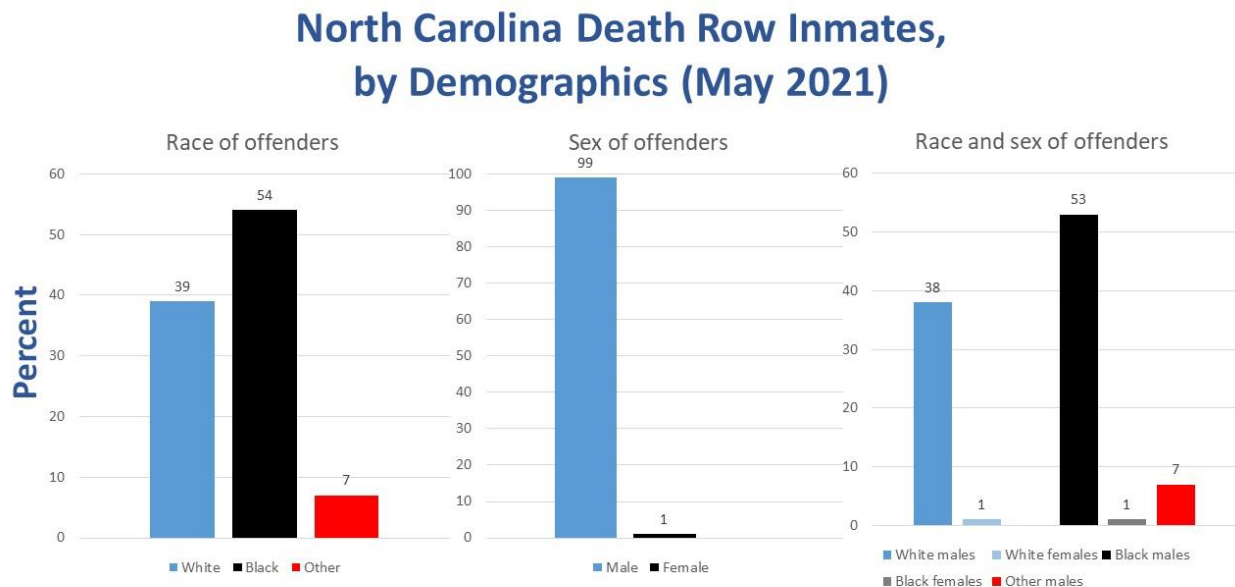


Chart by the author. Data from: <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster>

African Americans are overrepresented among death row inmates, making up 54% of all death row inmates in the state, and nearly all of those are men. The US Census reports that, in July 2019, Whites made up 71% of the state's population, and African Americans comprised 22% of the state's population. Females made up a majority of the population (51%), and males made up the remaining 49%.⁸⁶ Thus, roughly 11% of the North Carolina population were Black males (22% multiplied by 49%), yet they make up 53% of all those on death row. Figure 6 illustrates some demographic factors of North

Carolina's death row, as of May 2021. As you can see, black males are the most likely to be under sentence of death in the state.

Demographic data of executions

Examining execution data also allows one to look for the impact of extra-legal variables on capital punishment. Figure 7 shows some demographic factors of North Carolina's recent execution history from 1984 (the first execution in the state after capital punishment resumed in the US) to 2006 (the state's last execution). As you can see, of the 43 people executed in the state since 1984, 13 were African American (and all of them were men). This means 30.2% of the state's contemporary executions were of African American men, who again made up only between 10-11% of the state's population.⁸⁷

Of course, these disparities do not prove racial discrimination, as they may be explained by other factors including legally relevant factors such as differential involvement in capital murder.⁸⁸ As one example, national data show that, in 2019, Blacks made up 51% of all people arrested for murder in the US.⁸⁹ The above data on death row, executions, and murder are not technically comparable since they come from different years, yet they are merely offered here to show that one must consider legally relevant variables such as involvement in murder before one draws conclusions about racial disparities in capital punishment.

It is one thing to acknowledge that African Americans are overrepresented on death row and among those executed in the state of North Carolina, based on comparison to their proportion of the state's population. It is another to conclude that the state discriminates based on race. In fact, the data above actually show that African Americans

are underrepresented among those sentenced to death and executed, relative to the percentage of murder they reportedly commit. Studies of race and capital punishment in the state take this issue into consideration, and will be reviewed shortly. These studies show the complex relationship between race and capital punishment in North Carolina.

Figure 7

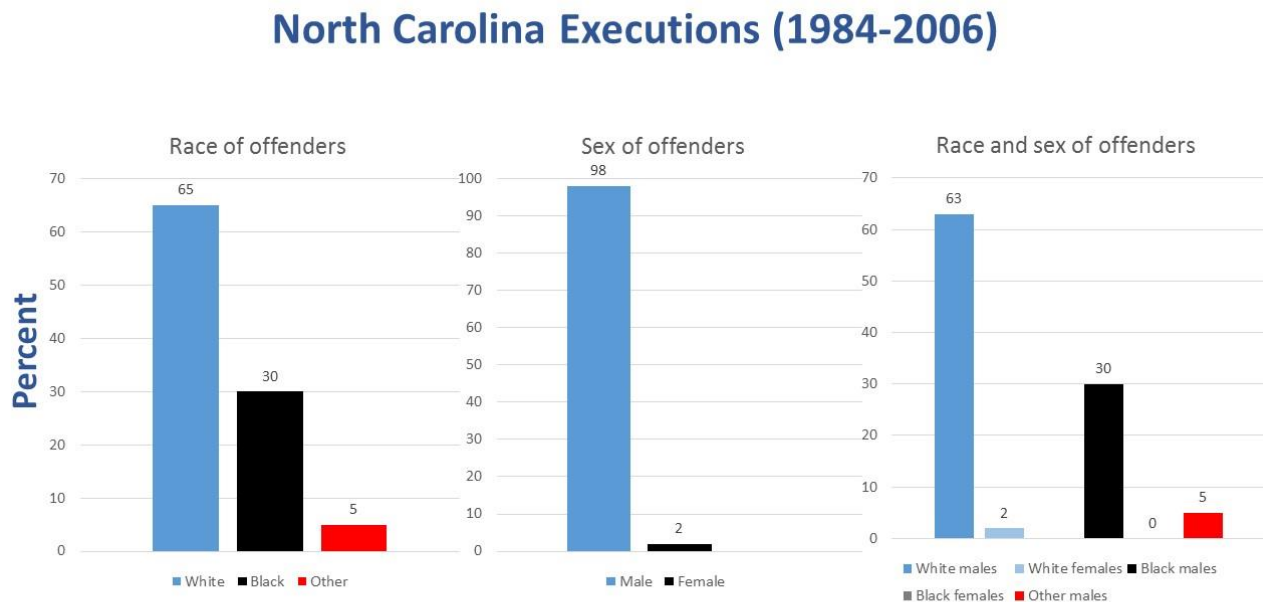


Chart by the author.

Data from: <https://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/List-of-persons-executed/Executions-1984-2006>

Appendix C discusses the history of race and capital punishment in North Carolina going back to the 1720s. There, you will see that the relationship between race and the death penalty was not at all complicated—instead, executions were overwhelmingly used for black people, especially black men.

Race of victim studies

“Race of victim” bias suggests that the race of murder victims helps determine which murderers are sentenced to death and which are not. An example of race of victim bias comes from a study of the death penalty in North Carolina from 1999 to 2006. The

study found that whites made up less than half (45%) of all victims of those arrested for murder, yet, nearly four out of five (78%) of those executed by the state killed whites. Offenders who killed white females were the most likely to be executed, followed by killers of white males. In contrast, blacks—who made up more than half (55%) of murder victims in North Carolina from 1999 to 2006—comprised only 22% of victims of offenders executed by the state. Offenders who killed black females were more likely to be executed than killers of black males. Further, blacks who killed whites were far more likely to be executed than whites that killed blacks.⁹⁰

During the analysis period, there were 3.78 times more killings of whites by blacks than killings of blacks by whites in the state. However, between 1999 and 2006 in North Carolina, blacks who killed whites were 14 times more likely to be sentenced to death than whites who killed blacks. Additionally, there were 6 executions of blacks who killed whites during the time period, yet zero executions of whites who killed blacks.⁹¹ The issue of inter-racial murder is reviewed later in this report.

Several other studies in the state show clear evidence of a race of victim bias in the administration of capital punishment. For example, research finds that racial factors—“specifically the race of the homicide victim”—played “a real, substantial, and statistically significant role in determining who received death sentences in North Carolina” between 1993 and 1997. According to the authors: “The odds of receiving a death sentence rose by 3.5 times or more among those defendants (of whatever race) who murdered white persons.” This conclusion comes from the analysis of all 3,990 homicide cases that occurred in the state during those years. Of those 3,990 cases, only 99 first-degree murders resulted in death sentences (2.5%), compared with 303 murders that

resulted in life sentences.⁹²

A subsequent re-analysis of the data found that, from 1993 to 1997, white victims' cases led to death sentences 3.4% of the time, versus 1.6% for nonwhite victims. In fact, the study showed that killing a white victim had a larger impact on the likelihood of receiving a death sentence than the aggravating factor of killing multiple victims.⁹³

The authors attribute these racial disparities to prosecutorial decision-making (e.g., "prosecutors are more likely to reject a plea deal in cases that involve nonwhite defendants and white victims, but interestingly are less likely to seek the death penalty in such cases") and to juries (e.g., "When prosecutors do seek the death penalty ... jurors ... are significantly more likely to award the death penalty during the penalty phase. Conversely, the death penalty is significantly less likely to be awarded when a nonwhite individual kills another nonwhite").⁹⁴

A follow-up study—a multivariate analysis controlling for the effect of legally relevant variables on capital punishment outcomes—concluded that "race remains ... a non-statutory aggravating factor for the death penalty" and that "[t]he impact of race in sentencing is present and nontrivial" even after controlling for legally relevant factors. The authors found that "[w]hen a nonwhite defendant kills a white victim, the death-sentencing rate is 5.1 percent. However, when a nonwhite defendant kills a nonwhite victim, the death-sentencing rate is only 1.5 percent ... The highest death-sentencing rate occurs where a nonwhite kills a white; the lowest occurs where a nonwhite kills another nonwhite." Part of this owes itself to the fact that the former cases are more likely to be stranger homicides.⁹⁵

In this study, racial disparities did not arise out of abuses of prosecutorial

discretion but rather from jury decision-making. That is, “prosecutors are not exhibiting racially conscious tendencies in their decision to seek the death penalty” but instead it is jurors that are to blame. Keep in mind this does not mean prosecutorial decision-making is irrelevant for racial disparities in capital punishment, since these authors only accounted for decisions to seek death sentences but not other decisions such as dismissing potential jurors during voir dire (jury selection). According to the authors: “If we focus on the jury’s decision at the penalty phase, we find evidence of continuity in that race remains in essence a non-statutory aggravating factor for the death penalty. The impact of race in sentencing is present and nontrivial. In particular, the race of the victim still exerts a significant amount of influence in determining which homicide defendant lives or dies.”⁹⁶

Similar research included an examination of 15,281 homicides in North Carolina between 1980 and 2007. Of these cases, only 368 resulted in death sentences (2.4%). The study found that death sentences for defendants who killed whites were more than three times higher than for those who killed blacks. Specifically, 1.2% of those who killed blacks were sentenced to death, versus 3.9% of those who killed whites. This finding held true across different decades of the study. In the 1980s, those who killed whites were 3.3 times more likely to be sentenced to death, and between 1990 and 2007, those who killed whites were 3 times more likely to be sentenced to death.⁹⁷

According to the authors, other factors that might explain the disparity in death penalty sentencing (including multiple victims or homicides accompanied by an additional felony, such as rape or robbery) only “partially explained death penalty decisions, but even after statistically controlling for their effect, race remained an

important predictor of who was sentenced to death.” The authors explain that the disparities in sentencing do not likely arise due to a higher level of aggravation in killings of whites by blacks than killings of blacks by whites: “Regardless of whether there are zero, one, or two additional legally relevant factors present, cases with White victims are more likely to result in a death sentence than are cases with Black victims.”⁹⁸ The authors acknowledged that they did not control for all legally relevant variables.

Another study found that prosecutorial decision-making in capital trials is partially responsible for racial disparities in North Carolina’s capital punishment system. The authors analyzed charging and sentencing decisions in about 1,500 death eligible cases in North Carolina, including all 307 cases since 1990 in which a death sentence was ordered, as well as 449 cases where a death sentence was sought but the jury issued a life sentence following a capital penalty trial. An additional 750 cases were randomly selected where prosecutors could have sought death sentences but did not. The authors’ jury selection study analyzed more than 4,000 strike decisions to assess the role of race in the exercise of peremptory strikes in capital cases.⁹⁹

The study found that prosecutors were twice as likely to use peremptory strikes to exclude eligible black jurors as white jurors during voir dire. This means defendants were disproportionately likely to have their legal fate determined by whites. The research found that, of the 159 death row inmates in North Carolina at the time of the study, 31 were sentenced by all-white juries (19%), and another 38 were judged by only one minority on the jury (24%). Thus, 43% of people on North Carolina’s death row were judged by juries where between 92-100% of jurors were white. Finally, defendants convicted of killing whites were 2.6 times more likely to be sentenced to death than those

who killed blacks.¹⁰⁰

The North Carolina Task Force for Racial Equity in Criminal Justice issued a 2020 report where it covered issues of racial biases, including in capital punishment.¹⁰¹ The report finds: “North Carolina’s death penalty prioritizes executions for cases with white victims and relies on the sentencing verdicts of juries, many of which have been all-white, that violate constitutional rules regarding jury selection.” According to the report, for all those defendants on death row in 2010, “at least thirty were tried by juries that had no African American members”; in above “40 additional cases, only one person of color served on the jury.”¹⁰²

There are significant racial disparities in prosecutors’ use of peremptory challenges to eliminate blacks as jurors in murder cases.¹⁰³ Peremptory challenges are limited in number but do not require an attorney to offer an explanation as to the reason for removing potential jurors through this mechanism. According to research in the state, blacks are twice as likely to be removed from jury service as whites.¹⁰⁴

In one North Carolina county—Forsyth County—evidence came to light that prosecutors there used information from a training session organized by the North Carolina Conference of District Attorneys that was aimed at helping them justify eliminating potential jurors from service on juries. A handout titled, “Batson Justifications: Articulating the Negatives” reportedly offered at least ten potential explanations prosecutors could offer judges if they were challenged by defense attorneys after blacks were removed from jury pools. The list included “‘inappropriate dress,’ which may signal a ‘lack of respect for the system,’ and ‘physical appearance,’ said to indicate ‘resistance to authority’.” Another mentions “‘attitude,’ arguing that lack of eye

contact with a prosecutor signals an ‘air of defiance.’” Still another “references ‘body language’... “noting that it could convey ‘anti-prosecution tendencies.’” Evidence in one North Carolina case show prosecutors struck black jurors for reasons given that they did not apply to whites in the same jury pool.¹⁰⁵

Studies like that above were motivated by legal challenges to death sentences by death row inmates under the state’s Racial Justice Act of 2009 (RJA). According to authors Catherine Grosso and Barbara O’Brien: “The North Carolina Racial Justice Act of 2009 provides capital defendants a claim for relief based on statistical evidence that ‘racial considerations played a significant part in the decision to seek or impose the sentence of death’ or that ‘[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection.’” In such cases, courts “must convert the death sentence to a life sentence or, for pending cases, order that death not be sought.”¹⁰⁶ Given the realities of capital punishment in North Carolina, it is not surprising that a large share of inmates in the state challenged their death sentences under the law alleging racial bias.¹⁰⁷

The state’s Racial Justice Act was ultimately repealed by the General Assembly. Yet, the state’s Supreme Court ruled the repeal was a violation of the US and North Carolina Constitutions as a violation of ex post facto laws. The Court noted the “egregious legacy of the racially discriminatory application of the death penalty” and cited evidence of “pervasive racial bias in capital sentencing.”¹⁰⁸

According to the Death Penalty Information Center: “The court also invalidated the retroactive application of earlier legislative amendments that had limited the types of evidence death-row prisoners could use to prove that race had been a substantial factor in

their death sentences. Those amendments, enacted in 2012 after death-row prisoner Marcus Robinson had overturned his death sentence under the RJA, also violated state and federal prohibitions against ex post facto laws, the court ruled.”¹⁰⁹

The four defendants who originally had their death sentences overturned by the repeal of the RJA were resentenced to execution after the law was repealed. Yet, that was challenged in the state Supreme Court, as well, and the Court held being sentenced to death again was a violation of double jeopardy.¹¹⁰

The following have been offered by researchers and activists as examples of the kinds of racial bias that has impacted capital punishment practice in North Carolina:

- * individuals being sentenced to death after virulent and graphic calls from community members for lynching;
- * a prosecutor who invoked the image of a lynching during his closing argument;
- * an openly bigoted white juror who said he believed Black people did not care as much about living as white people; and
- * a jury selection process in which a prospective Black juror was excluded because he expressed concern upon overhearing white jurors say the police should have killed the defendants in the woods.¹¹¹

In one case, an all-white jury that convicted and sentenced to death a black killer included a juror who “deliberately concealed contempt for all African Americans and a particular bias against [the defendant] in order to serve on [his] jury.” According to former North Carolina Chief Justice James Exum Jr.: “The juror ‘intentionally concealed’ from the trial court that his own mother ‘had been robbed, raped, and murder by a man who was later executed for the crimes’ so that he could serve on [this] jury and

sentence him to death. The jury also expressed virulently racist views of Black citizens, claiming that they ‘rape white women in order to brag to their friends.’”¹¹² A study of rape-involved capital murders and the significance of race is examined later in this report.

While racist attitudes of attorneys could explain differential treatment of blacks and whites during jury selection, more subtle differences in how potential jurors are addressed by attorneys during voir dire could also help understand the reality of racial disparities during this stage of the trial process.

For example, a study of 792 potential jurors in 12 randomly selected capital cases in North Carolina utilized conversational analysis to examine how race influence conversations between jurors. The goal was “to document the conversational dynamics of actual questioning of potential jurors that precedes the decision to seat or strike a juror, or to excuse her for cause.” The researchers found that “more subtle disparities in the process of questioning jurors may contribute to the disparate exercise of the kinds of peremptory strikes documented in ... earlier research.”¹¹³ Examples of actual language used in specific cases reveal that prosecutors treat white and black jurors differently (e.g., in one case, a potential black juror was excused by a prosecutor after expressing a general concern about the death penalty, whereas a white juror who did the same thing was “rehabilitated” by the prosecutor, or saved, to remain on the jury). Different standards for white and black jurors were also noted earlier in this report.

Other studies show the effects of prosecutorial discretion on capital punishment in particular jurisdictions in the state.¹¹⁴ For example, a study of capital prosecutions in Durham County, North Carolina examined all homicide cases (in those cases where

defendants were identified) that were prosecuted from 2002 to 2007. During this time, 149 death eligible defendants were prosecuted, but prosecutors only sought 20 death sentences (13% of all cases). The author found: “The vast majority of these capital prosecutions involve homicides committed by defendants who are male (94 percent) and black (85 percent). According to the data, blacks are far more likely to be homicide victims in Durham County, roughly 75 percent compared to 21.5 percent white. Males constitute a much higher proportion of homicide victims (80 percent) than females. Only 7 percent of the homicides in Durham County in the period we examine are multiple homicides. In terms of racial configuration, there are disproportionately more black-on-black homicides than any other racial configuration.”¹¹⁵

Even given these realities of homicide in the courts, the author found that in the 32 white murder-victim cases, prosecutors sought the death penalty 25% of the time, versus only 10.8% of the 111 black murder-victim cases. The author notes: “By far the most striking result is in the black defendant/white victim category. When a black defendant is accused of murdering a white victim, 37 percent of the time prosecutors seek the death penalty in the case. The proportion is significantly higher than in any other racial combination” including than when whites killed whites (9%), when blacks killed blacks (8%), and when whites killed blacks (0%).¹¹⁶

Using logistic regression analysis, the author found:

- * Black defendants who murder white victims are 5.153 times more likely to face the death penalty compared to black defendants who kill black victims.
- * After controlling for sex of the victim and defendant, the odds that prosecutors will seek the death penalty when a black defendant kills a white victim remain virtually

unchanged at 5.037, even after controlling for the sex of the victim and sex of the defendant.

* After controlling for offense severity, prosecutors are 6.391 times more likely to seek the death penalty when a black defendant kills a white victim compared to situations where a black defendant kills a black victim.¹¹⁷

In support of the final finding noted above, in contemporary North Carolina (from 1984 to 2006), the state executed six blacks who killed whites, versus only 1 white who killed a black (and 27 whites who killed other whites). During this time, 43% of murder victims were white, yet 79% of people executed killed whites.¹¹⁸ As alluded to earlier, these findings suggest that prosecutors and jurors seem to react more harshly to murder when it involves an inter-racial crime by a black person against a white person. National data are consistent with this idea: In the United States since 1977, there have been 297 executions of black people who killed whites but only 21 executions of white people who killed blacks.¹¹⁹

It may be difficult for prosecutors to abuse their discretion when it comes to the most serious of crimes, such as murder. Yet, evidence from studies shows that it is in the “borderline cases” where it is not clear whether prosecutors could seek the death penalty or an alternative sentence that bias is actually most possible.¹²⁰ The *liberation hypothesis* posits that the impact of extra-legal factors on sentencing outcomes will be higher in cases where there is weaker evidence or a less clear determination of a probable sentence. The idea is that, in these cases, criminal justice officials will be more liberated to consider extra-legal factors in their deliberations.¹²¹

It is in these cases we should most expect to see factors such as race impacting

sentencing. Indeed, a study of capital cases in North Carolina from 1977 to 2009 found that “Black defendant-White victim dyads demonstrated an increased probability of death sentences at high levels of severity, but decreased probabilities at lower levels of severity.”¹²² Presumably, interracial murders are thus most likely to receive death sentences when they have the highest levels of case aggravation.

Newer studies in the state of North Carolina have called into question some of the findings of race of victim bias. For example, a study of 1,113 capital cases in North Carolina from 1977 to 2009 found “an apparent ‘White victim effect’ that can be observed in death penalty decision-making in traditional logistic regression models” like those used in the studies reviewed above. However, once researchers matched cases using propensity score matching “on approximately 50 case characteristics/cofounders ... the relationship is rendered insignificant.”¹²³

The methodology used—propensity score matching (PSM)—“involves the estimation of propensity scores that represent conditional probabilities of receiving a treatment based on a number of potential relevant covariates or confounders.”¹²⁴ More specifically, PSM “involves the estimation of propensity scores or the conditional probabilities of receiving a treatment on a vector of covariates/cofounders...these propensity scores can be considered balancing scores in the sense that the distribution of the observed covariates/cofounders are independent of the treatment assignment and the resultant propensity scores remove imbalances or systematic differences between the treatment and control groups prior to evaluating the outcome of interest.”¹²⁵

This methodology allowed the researchers to compare “a defendant of any race [who] kills a White victim and cases where a Black defendant kills a White victim” with

“cases where a defendant of any race kills a Non-White victim and cases where a non-Black defendant kills a Non-White victim.”¹²⁶ They achieve this by matching “treatment cases” (where anyone killed a white person and where a black person killed a white person) with “control cases” (where anyone who killed a non-white person and where non-Black defendants killed non-White victims). According to the researchers, this is similar to a quasi-experimental design that is superior to logistic regression models used in other studies.

The researchers conclude that the “White-victim effect” is a “case effect” rather than a “race effect,”¹²⁷ yet, it is important to note that some of the variables included in the researchers’ model found to impact death sentencing were extra-legal factors, factors outside of the law that are not supposed to impact death sentencing. The researchers used such variables to match treatment group versus control group cases.

Further, according to the authors, PSM only accounts for observed and observable covariates” so there is a “potential for hidden bias.”¹²⁸ This is a problem when it comes to issues like the death penalty, given that unconscious or “innocent bias” is thought to impact decision-making during the capital punishment process.¹²⁹ Another major limitation of the study, acknowledged by the authors, is it does not include data from the prosecutorial stage of the capital process. This is particularly problematic given the significant problems including apparent racial biases inherent in this stage of the process (e.g., removing blacks from jury selection through peremptory challenges, as noted earlier in this report, and using more serious charges in cases with black male defendants and white female victims).

Still, the study is important for being one of only a couple of studies that have

even included certain measures of aggravation and mitigation in death penalty cases. The authors explain that they include variables yet to be introduced into other studies, including “the type of aggravators and mitigators accepted” by juries.¹³⁰ And the study helps us understand the complex ways in which race and sex impact death sentencing in North Carolina. For example, the authors write that “in cases with White victims, a significantly greater proportion of homicides were committed for monetary gain and/or involved a victim who was a law enforcement officer or criminal justice official.” Also, “a significantly greater proportion of cases that have been considered ‘most disadvantaged’—cases with Black defendants and White victims—were committed for monetary gain and during the course of another felony.”¹³¹ This suggests that legal factors partially help account for why killers of white victims are more likely to be sentenced to death.

The authors conclude by saying, “it is not our contention that race plays no role in juror’s capital sentencing decision-making, but instead, we join other scholars ... in their arguments that the relationship between race and capital punishment is more complex and nuanced than much of the extant literature has suggested.”¹³² In fact, the authors lay out a case in an attempt to explain their findings that seems to prove arbitrariness of death sentencing in North Carolina. They write, “when a young black male robs a store and kills a white clerk (who is a non-offender) then the death penalty decision is certainly more likely in contrast to when a young black male who has a prior criminal history kills another similarly situated young black male in the course of committing another felony.”¹³³ It appears the argument is that some murder victims are worth more than others, and that race and sex of victim are among the many factors considered by

prosecutors (who decide to charge with capital murder) and jurors (who recommend death sentences to judges) when making life or death sentencing decisions.

Another study in North Carolina which did find a race of victim and a gender effect—where killers of white women are more likely to receive death sentences—could not confirm that the effect was real because, after the introduction of control variables via logistic regression, the effects disappeared.¹³⁴ The best predictor of death sentences in this study was the number of aggravating circumstances accepted by the jury, an appropriate legal factor. Another study also failed to find an impact of defendant or victim race on sentencing outcomes in the state.¹³⁵

Still, it should be noted that evidence of serious racial disparities based on race of victim has been found across the country. Studies from numerous states and the federal government have illustrated that killers of whites are between two and five times more likely to be executed over various time periods.¹³⁶ Further, a review by the US General Accounting Office (GAO) of 28 studies by 21 sets of researchers with 23 data sets concluded “a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty...” since 1976.¹³⁷

The study concluded that: “In 82 percent of the studies, race-of-victim was found to influence likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.”¹³⁸ Continuing on: “The finding held for high, medium, and low quality studies. The race-of-victim influence was found at all stages of the criminal justice system process, although there were

variations among studies as to whether there was a race-of-victim influence at specific stages. The evidence for the race-of-victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendants with a capital offense, decision to proceed to trial rather than plea bargain).”¹³⁹

A review of 18 more recent studies found results that “are consistent with those summarized in the GAO report.”¹⁴⁰ Twelve of these 18 studies found race-of victim effects but not race-of-defendant effects.¹⁴¹ These findings lend credence to the great bulk of studies in North Carolina that find strong evidence of race of victim bias. They are also consistent with the argument of leading scholars that discrimination in the death penalty is closest to being systematic in nature, because it has always been and remains biased based on factors such as race.¹⁴²

Sex of offender and victim studies

As noted earlier, women are underrepresented on North Carolina’s death row, as only 2 of 137 offenders are females, or about 1.5% of the death row population.¹⁴³ According to the US Census, in 2020, females made up 51.4% of the population of North Carolina.¹⁴⁴ The major reason women are underrepresented on death row relative to their portion of the population is because women commit so much less murder than men, meaning the disparity by sex of offender is largely explained by legal factors. Yet, given that women commit about 10% of all murders nationally, we might expect them to make up a higher proportion of death row than we see in most states, including North Carolina.¹⁴⁵ The nature of murders committed by men and women in North Carolina, however, does show some significant differences on legal factors. This issue is addressed later in this report.

The study of death penalty cases in Durham County from 2002 to 2007 noted earlier in the report also examined sex of offender and victim. It found the cases most likely to lead to capital prosecutions were those involving male defendants and female victims: “Prosecutors seek the death penalty in 25 percent of all death eligible cases in which a male defendant was accused of killing a female victim” versus only one in seven (14%) of female defendants accused of killing male victims. The author reports that “male victims are .420 times less likely to precipitate a capital charge compared to female victim homicides.”¹⁴⁶

Other studies demonstrate a sex bias in capital punishment in North Carolina, showing a lower likelihood that a woman will receive a death sentence and a higher likelihood that a killer of a woman will receive the death penalty.¹⁴⁷ For example, a study of 953 jury decisions in capital cases from 1979 through 2002 found that the cases least likely to result in death sentences were those with black male and white male victims, but that cases with white female victims were not more likely than black female cases to receive death sentences. This study controlled for numerous legal factors, including aggravating factors accepted by the jury and prior criminal history of defendants.¹⁴⁸

Another study of 1,285 capital cases in North Carolina from June 1977 through December 2009 found that the cases most likely to receive death sentences included “cases with a female victim who was not involved in illegal activity at the time of the murder” as well as “acquaintance female victim cases.”¹⁴⁹ With regard to the issue of involvement in criminality, murderers of victims who were involved in criminality were least likely to be sentenced to death. The authors suggest that “females with unquestionable conduct would be extended the privilege of chivalry (harsher punishment

for their perpetrators) or that their perpetrators would be seen as the most blameworthy.”¹⁵⁰ This is suggestive of arbitrary sentencing.

However, in this study, “the relationship between victim sex and jury sentence recommendation” was not found to be significant “when controlling for other factors.”¹⁵¹ Importantly, some of the control variables were extra-legal factors, such as “defendant sex, victim race, victim age, defendant age, country rurality, type of attorney.”¹⁵² This suggests that, even when one extra-legal factor is not found to be impacting death sentencing, other extra-legal factors are still impacting it. This is the same finding as noted earlier with regard to the impact of race of victim on death sentencing in the state.

The issue of county rurality may very well be related to race: Urban jurisdictions have lower rates of death sentencing as well as higher rates of black residency. Perhaps because a larger portion of both killers and victims in urban areas are black, prosecutors are less likely to seek death sentences there, consistent with the idea of race of victim bias. Summarizing research from the 1980s through early 2000s, several notable death penalty experts claim: “There appears to be a racial difference in charging and sentencing decisions between urban and rural jurisdictions where a capital crime is processed, with black defendant cases less likely to result in areas where the black population is high and more likely where the population of white victims is high.”¹⁵³

Another important factor measured in the study was whether rape was included and accepted as an aggravating factor at sentencing. It makes sense that one reason killers of women are more likely to be sentenced to death as that they are more likely to also suffer from rape victimization. In this study, when that legal factor was present, “there is no longer a significant female victim effect.” This aggravator was found to be “the

strongest predictor of a capital sentence in all models.”¹⁵⁴

Another study of 312 capital cases that involved only white female victims in North Carolina from 1977 to 2009 discovered that “only 39 (12.5%) were rape involved (i.e., the state presented evidence to the jury in support of the rape–sexual assault aggravating factor).” Of these 39 cases, “24 involved a White offender and 15 involved a Black offender.” Cases with black, rape-involved capital murders were more likely than cases of white-involved capital murders to be sentenced to death (85% versus 67%). The authors suggest “that both offender’s race and rape involvement may influence the likelihood of a death sentence and may do so in a manner consistent with the expectations of the enduring cultural legacy hypothesis,” which suggests that the impact of race on serious punishment continues to be found, especially in the southern United States.¹⁵⁵

The authors find that “Black offenders were at greater odds (18–26 percentage points more likely) than White offenders of receiving a death sentence for the capital murder of a White female victim and rape-involved offenders were 2 to almost 2.5 times more likely to be sentenced to death than nonrape-involved offenders.” Further, the authors note that “the unique odds of a death sentence for Black, rape-involved killers of White females were increased almost 35– 70% ... [and] “the probability that a Black rape involved killer of a White female victim receives a death sentence is .75–.84; for White rape-involved offenders, the predicted probability of a death sentence is .65, almost 10– 20 percentage points less.” Meanwhile, “the racial disparity in the predicted probability of a death sentence for offenders who were not found to be rape involved is much smaller (four percentage points) as well as their likelihoods of receiving a death

sentence (.52 vs. .48).”¹⁵⁶ Thus, it appears that being black and sexually assaulting a white female, in particular, significantly increase the odds of being sentenced to death in North Carolina. Race of offender and victim are not supposed to impact death sentencing.

Another study of 1,069 cases from 1977–2009, also using propensity score matching, found that: “capital cases involving a female victim are significantly different than capital cases involving a male victim across 18 legal and extralegal case characteristics. Results revealed that prior to matching, cases involving a female victim are approximately 1.5 times more likely to receive the death penalty than cases involving a male victim. Yet, once cases are matched across the host of confounding variables, the significantly different odds for receipt of the death penalty across capital cases involving female and male victims are reduced to non-significance.”¹⁵⁷

The confounding variables included extralegal case characteristics that are not supposed to be related to sentencing outcomes. That extra-legal factors remain important in death sentences is troubling.

The authors explain: “The present findings lead us to suggest that the ‘female victim effect’ demonstrated in prior studies regarding the implementation of the death penalty is actually the result of real differences in extralegal and legal case characteristics across capital cases involving female victims compared to cases involving male victims that have not been apparent in research using more traditional regression-based designs.”¹⁵⁸ They go on to explain, using examples: “cases of homicides including female victims were significantly more likely to involve another felony besides murder, to include rape prior to the homicide, and/or to be considered heinous and cruel.” Further, “female victims were significantly less likely than male victims to be involved in illegal

activity at the time of the murder.” The authors thus reason that “female victim cases may achieve heightened perceptions of dangerousness and blameworthiness from jurors, but not simply because of the victim’s sex, but instead, because of differences across the legal and extralegal case characteristics.”¹⁵⁹ Again, extra-legal factors should not impact death sentences.

The authors note: “We do not maintain, however, that victim sex plays no role in the capital sentencing process; instead, we suggest that the relationship is more complex than a direct association between the sex of the victim and juror decision-making.”¹⁶⁰ Just as noted by the authors in their studies reviewed earlier, “acceptance of the aggravators that there is victim rape prior to the homicide” is one of the main reasons for disparities in capital cases between male and female victims. The authors note that “the relationship between victim sex and rape is easy to explain. Overall, females experience significantly higher rates of rape than males so female victim cases will naturally ‘benefit’ from this aggravator in greater numbers than male victim cases.”¹⁶¹

Yet, the finding that murders against women were more likely to be deemed heinous and cruel “is not as easily explained.” The authors speculate on possible reasons, noting that: “violent crimes against women are inherently perceived as more serious offenses than violent crimes against men, and as a result, they more readily meet the threshold in the eyes of the jurors as being viewed as heinous and cruel. Or, it may be that offending behavior is different such that the circumstances in which defendants murder women are more brutal than those in which they murder men.”¹⁶² Continuing on: “Further, prosecutors may utilize different criteria for choosing which female victim cases and which male victim cases should be charged and prosecuted as first-degree

murders. Thus, the pool of capital cases involving male and female victims may be different regarding case designation as heinous and cruel based on selection bias.”¹⁶³

Another study of 709 capital cases from North Carolina, during the time period April 1991 to December 2008, found that “different extralegal and legal characteristics predict jurors’ decisions to choose the death penalty in cases with male victims versus female victims.”¹⁶⁴ Importantly, aggravating and mitigating factors influenced the likelihood of receiving a death sentence, as should be expected and as is legally permissible, but: “The total number of accepted aggravators and the total number of victims killed were demonstrated to be important factors associated with an increased likelihood of receiving the death penalty for male victim cases but not female victim cases.”¹⁶⁵

One clear reason for the difference between male and female victim cases deals with the application of the aggravator of “heinous and cruel” in North Carolina. But, for some reason, the legal aggravator was more relevant for cases with female victims than male victims. The study illustrated “that female victim cases are disproportionately affected by the legal variable of case designation as heinous and cruel such that female victim cases with the heinous and cruel aggravation alone have an increased odds of receiving the death penalty, whereas male victim cases with the same designation receive the death penalty only if the case also includes other significant legal and/or extralegal factors.”¹⁶⁶ The authors note that “for male victims, older victim age, younger defendant age, urban jurisdiction” were related to jury decision-making, whereas these factors did not impact cases with female victims.¹⁶⁷ These extra-legal factors should not be influencing jury-decision making. The possible relationship between urban jurisdiction

and race was noted earlier.

Further, victim rape, “disproportionately found among cases involving female victims,” means a greater likelihood of death sentences, as noted in earlier studies. The authors conclude that “the presence of these ‘gendered aggravators’ creates a ‘legal’ channel for discretion beyond the guidance of the statute and/or the court and arguably resulting in juror discrimination of defendants based on the sex of their victim, indicative of arbitrary sentencing.”¹⁶⁸

The authors suggest that their research seems “to indicate that victim sex, a fact that may not be considered when determining aggravating factors ‘without running afoul’ of both the Fourteenth Amendment’s equal protection clause and the Eighth Amendment’s cruel and unusual punishment clause, may be at the center of jurors’ decision to designate a first-degree murder case as heinous and cruel in North Carolina.”¹⁶⁹ This claim suggests at arbitrary sentencing based on sex of victim.

Indeed, at least one analysis of potential gender bias in North Carolina’s death penalty system suggests that North Carolina’s statutory aggravating and mitigating factors may assure continued disparities in death sentences between men and women. The author writes: “Current death penalty statutes provide specific aggravating and mitigating factors that may significantly affect the punishment inflicted upon the particular offender.” Even though gender or sex of offender is not mentioned in the statute, the state’s aggravating and mitigating factors “may tend to inherently encourage capital punishment for male defendants.”¹⁷⁰

Some predictable aggravators are generally less present for female killers. For example, women are less likely to commit felony murders, murder multiple victims, and

have “less significant criminal histories.” The result is that “North Carolina’s statute tends to discriminate *in favor* of women.”¹⁷¹ Further, women are less likely to commit murder for monetary gain, while resisting law enforcement, and to kill with “exceptional cruelty.”¹⁷² Women also may be more likely to be motivated in their killings by emotional responses that may lead to mitigation, particularly in domestic situations that end up leading to murders.

According to the author, generally speaking, when women are involved in murders with male co-defendants, the male tends to be considered the more dominant person in the relationship.¹⁷³ Whether this explains the type of arbitrary sentences discussed earlier by Chief Justice Exum Jr. remains to be seen, but the cases he describes include women who hired men to kill others, and in spite of being the driving (or more dominant) force behind those killings, those women received sentences of less than death. In both situations, such death sentences appear to be arbitrary.

The analysis of the specific crimes of both women and men on North Carolina’s death penalty found that “the aggravating factors enumerated by the state disproportionately sentence men to death while their female counterparts receive a lesser sentence.” The author goes on to note that, “when a man commits a murder, it appears to take relatively little for a jury to sentence him to death. When a woman commits a murder, she must violate, and violate egregiously, society’s gender stereotypes in order to be put to death; otherwise, society’s chivalrous nature will find a way to spare her from the ultimate penalty.”¹⁷⁴ This is one factor that may help explain female underrepresentation on North Carolina’s death row.

Juries matter

Finally, the gender composition of juries is found to impact death sentencing in North Carolina. A study of 675 capital cases from North Carolina, during the time period of April 1991 to December 2009, found that “jury sex composition was independently related to sentencing outcomes. Equal male-female juries were significantly more likely and female-majority juries were significantly less likely to choose the death penalty versus a sentence of life in prison.”¹⁷⁵ Specifically, male-majority and female-majority juries assessed the death penalty about half of the time (50% and 49%, respectively), but equal male/female juries assigned death sentences 60% of the time.

This same study also found that capital cases with defendants 25 years of age or younger and that were tried in urban jurisdictions less likely to receive death sentences. The latter finding is suggestive of possible racial bias, as noted earlier. The former finding is a clear example of an extra-legal factor that should not impact death penalty decision-making. Similarly, in cases with equal male/female jury participation, other extra-legal factors that impacted death sentencing included victim illegal activity, victim marital status, defendant sex, urban versus rural jurisdiction—things that should not be related to death penalty outcomes.¹⁷⁶

The study determined that offender culpability was associated with higher death sentences, as one would expect; victim worthiness was also associated with a higher probability of being sentenced to death. Yet, the authors note: “It is interesting, and not easily explainable, that the number of accepted aggravators and the defendant’s prior record were not associated with death sentenced for juries with equal numbers of female and male jurors.”¹⁷⁷ This is a troubling finding given that such factors would be related to death sentencing. For some reason, female majority juries did not appear to be

impacted by extra-legal factors as only legal factors were found to be related to death sentences.

Nationally, capital juries are most likely to impose death sentences when white males are serving on the jury, especially when offenders are black. These findings come from The Capital Jury Project, which studied 1,198 jurors from 353 capital trials in 14 states.¹⁷⁸ The states include North Carolina, along with Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia (incidentally these states account for nearly all of the nation's death penalty activity). Many troubling findings about the reality of capital juries have been discovered through studies using data from this project, including the very large role that extra-legal factors play in death penalty decision-making.¹⁷⁹

A Final Word: Intersectionality

Based on all the research reviewed above, it is clear that legal factors interact with extra-legal factors to help determine which murderers in the state are sentenced to death and which are not. Extra-legal factors also impact each other. The concept of *intersectionality* asserts that factors such as race, gender, social class, and others impact one another in ways that make some people more likely to be impacted by criminal justice processing.¹⁸⁰

One recent research study on the impact of extra-legal factors on death sentences is an example of this; it shows that race, sex, and age matter when it comes to the death penalty in North Carolina. The author explains that, whereas young black males have “extremely high rates of homicide victimization as compared to other categories,” the death penalty is rarely imposed in black male victim cases.¹⁸¹ Specifically, from 1976

through 2008, 42% of all murder victims in North Carolina were black males, yet only 4% of those executed in the state killed black males. White females made up only 13% of all murder victims during the same years, yet 43% of those executed in the state killed white females.¹⁸² The execution rate per thousand homicides in North Carolina is thus highest for certain classes of victims.

Elsewhere, the same author notes that “the difference in likelihood that the death of a black man versus a white woman will lead to the execution of the perpetrator is 40:1.” He notes this is consistent with a “‘racial hierarchy’ in the victims for whom an execution is most likely to be carried out.”¹⁸³ Table 2 shows these data. Again, such findings may be attributable to other factors besides sex or gender, as noted earlier, but they are indicative of arbitrary sentencing, based on numerous intersecting factors that impact death sentencing.

Table 2. Odds of Execution by Race and Gender of Murder Victims in North Carolina, 1976-2008

	<u>Execution rate per one thousand homicides in North Carolina</u>
White females	10.05
Black females	3.53
White males	3.42
Black males	0.24

Sources: Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008. <http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

Given the realities discussed in this section of the report, rational questions for policy-makers are: is the death penalty necessary? Are disparities based on extra-legal

factors such as race and gender of offenders and victims tolerable?

5) Innocent people have been wrongly convicted of capital murder and sentenced to death in North Carolina.

There is literally no doubt that people are wrongly convicted of capital murder in North Carolina. For example, 12 people have been freed from North Carolina's death row since 1973, ranking the state fourth in the nation in the number of mistakes discovered.¹⁸⁴ According to the North Carolina Coalition for Alternatives to the Death Penalty, the state has released one person from death row for every five it has executed.¹⁸⁵

Seven of the 12 people released from death row in the state were wrongly convicted after the death penalty was reinstated in 1977 and thus were convicted under the current North Carolina death penalty statute, or super due process. More specifically, seven men were wrongly convicted between 1984 and 1998 and ultimately exonerated between 1999 and 2014. The duration between conviction and exoneration in these cases ranged between 2 and 30 years, and all but 2 of the wrongful convictions took more 12 years or longer to be corrected; the average duration was just over 14 years.¹⁸⁶ Another inmate was exonerated in 2019, but his conviction was in 1976 (prior to due process), meaning he spent 43 years in prison after being sentenced to death (however, his death sentence was vacated by the North Carolina Supreme Court in 1977 after the state's mandatory death sentencing law was struck down by the US Supreme Court, and he was resentenced to life in prison).¹⁸⁷

Interestingly, of the 12 men exonerated from death row in North Carolina, ten

(83%) are African American, and 11 (92%) are nonwhite.¹⁸⁸ A scholar who reviewed data on wrongful convictions in North Carolina wrote (at the time when only seven people were freed from death row): “By no reasonable measure are these numbers racially proportionate” to the state’s population or criminal population, including even the death row population in the state. And all of these seven men (100%) were convicted and sentenced to death for killing whites. She thus notes: “Ultimately, race puts a nonwhite capital defendant at an immediate disadvantage, and on its own heightens the risk of wrongful conviction. If the defendant’s alleged victim was white, the hurdles to justice and the risk of error are dramatically compounded. Other factors statistically related to race, such as the likelihood that a nonwhite defendant will be tried and convicted on weaker evidence than a white defendant, further thwart a reliable conviction. On appeal and post-conviction, it may be less likely for an innocent nonwhite defendant to obtain the resources necessary for eventual vindication. And, in the end, even if the defendant is finally granted relief, it will likely come after he has spent many more years on Death Row—and after the State has spend many more years expending resources on wrongful prosecution and incarceration—than if the defendant had been white.”¹⁸⁹ Clearly, wrongful conviction and race are related.

According to a study of error rates in capital cases across the country, researchers found that the error rate of capital cases in the United States is 68%. This figure is based on a comprehensive study of 4,578 federal habeas corpus appeals in state capital cases between January 1, 1973 and October 2, 1995. The conclusion of the authors is that capital punishment in the United States is “collapsing under its own mistakes ... a system that is wasteful and broken and needs to be addressed.”¹⁹⁰

Some of the key findings of this report include:

- * Nationally, the overall rate of prejudicial error was 68%—that is, “courts found serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period.”
- * Serious error was error substantially undermining the reliability of capital verdicts.
- * Capital trials produce so many mistakes that it takes three judicial inspections to catch them leaving grave doubt whether we do catch them all.
- * State courts dismissed 47% of death sentences because of errors, and a later federal review dismissed 40% of the remaining cases.
- * The most common errors found in the cases were (1) egregiously incompetent defense attorneys who missed evidence of the defendant’s innocence or evidence that he or she did not deserve a death sentence and (2) suppression of evidence by police and prosecutors.
- * Eighty-two percent of those whose death sentences were overturned by state courts were found to be deserving of less than a death sentence, and 7% were found to be innocent of the crimes for which they were convicted.
- * Serious errors have been made in every year since the death penalty was reinstated, and more than half of all cases were found to be seriously flawed in 20 of the 23 study years.
- * Serious errors are made in virtually every state that still executes people, and over 90% of these states make errors more than half of the time.
- * In most cases, death row inmates wait for years for the lengthy review procedures needed to uncover all this error. Only then were their death sentences reversed.
- * This much error, and the time needed to cure it, impose terrible costs on taxpayers,

victims' families, the judicial system, and the wrongly condemned. And it renders unattainable the finality, retribution and deterrence that are the reasons usually given for having a death penalty.

* The death penalty ranges from 2.5 to five times as expensive as life imprisonment without parole. When you add the costs of posttrial reviews, executions become about 24 times as expensive as life imprisonment without parole. The death penalty is so much more expensive than life imprisonment because of the high rates of error that occur at each stage and the persistence of high error rates over time and across the nation, which mandate multiple expensive judicial inspections.

* The death penalty is rarely applied ... of the 5,760 state death sentences handed down between 1973 and 1995, only 313 (5.4%) led to an execution during this time; Additionally, since 1984 when post Furman executions began in earnest, we have executed only about 1.3% of our nation's death row inmates each year. This makes the retributive and deterrent credibility of the death penalty very low.

* Homicide rates were slightly higher in death sentencing states than in non-death-sentencing states during the study years.¹⁹¹

Many of these kinds of results were identified earlier in this report.

From their findings, the authors conclude that the administration of capital punishment in America is irrational. Further, there is no relationship between death-sentencing and execution rates.

North Carolina's error rate was also 68%.¹⁹² The data for North Carolina are shown in Table 3.

Table 3. Errors and Outcomes in North Carolina Capital Cases, 1973-1995

Number of cases reviewed on Direct Appeal	218
Number of cases reversed on Direct Appeal	132
Percentage of cases reversed on Direct Appeal	61%
Number of cases awaiting Direct Appeal	53
Percentage of cases awaiting Direct Appeal	20%
Number of cases forwarded to State Post-Conviction	86
Number of cases reviewed on Post-Conviction	Unknown
Number of cases reversed on Post-Conviction	9
Percentage of cases reversed on Post-Conviction	10%
Number of cases forwarded to Federal Habeas Corpus	Unknown
Number of cases reviewed on Habeas Corpus	11
Number of cases reversed on Habeas Corpus	2
Percentage of cases reversed on Habeas Corpus	18%
Overall error rate	68%

Source: Liebman, J., Fagan, J., Rifkind, S., & V. West (2000). A Broken System: Error Rates in Capital Cases, 1973-1995. <http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study/!index.html>

An updated study of North Carolina's death penalty system from 1977 through January 1, 2010 found the error rate in the state to be 67%; meaning two out of every three death sentences were overturned on appeal.¹⁹³ The findings of this study shown in Table 4.

Table 4. Errors and Outcomes in North Carolina Capital Cases, 1977-2009

Death sentences	388
On death row (January 2010)	158
Executed:	43
Removed from death row pending new trial	12
Sentence commuted by Governor	5
Found guilty in new trial	5
Resentenced to life in prison	130
Resentenced to less than life in prison	10
Resentenced to death after second trial	3
Died in prison of natural causes	19
Died in prison of suicide	6

Source: Baumgartner, F. (2010). Rates of reversals in the North Carolina death penalty. March 22. http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner_NC_Death_Reversals-March-202010.pdf

According to the author of the latter study, when cases are overturned on appeal, the most likely outcome is “a subsequent trial ending in a sentence of life in prison”; 60% of appeals result in this outcome. This means most people who have their death sentences overturned are guilty of serious crimes but that the errors found in their cases were too serious to allow death sentences to be imposed. The author explains that “substantial procedural errors plague highly emotional capital trials. Cases are not reversed and inmates guilty of vicious crimes do not find themselves sentenced to lesser penalty because of trivial errors or slight imperfections in their initial trials. Only substantial errors can cause a reversal, but these are found in approximately 67 percent of all the cases over the past 30 years in this state. We all know that no government institutions are perfect, but this rate of error, quite typical of the national average, is shocking indeed.”¹⁹⁴ Interestingly, the author found the rate of error has increased from 63% to 83% since the passage of the federal Antiterrorism and Effective Death Penalty Act of 1996. Former North Carolina Chief Justice Exum, Jr. reports that, from 1977 through 2014, in 249 cases where death sentences were imposed and where sentences were reviewed by courts, 71% ended with the death sentences reversed.¹⁹⁵

Part II of the national study—*Broken System II: Why There Is So Much Error in Capital Cases*—attempted to assess the causes of the errors in America’s capital punishment processes. According to the study’s authors: “This study uncovered a number of conditions related to error in capital cases, including politics, race, crime control and the courts. But running through all the data was a simple finding—the more a state or county sentences people to death, the more often they make mistakes. ... Everything else being equal, when death sentencing increases from the lowest to the highest rate in the study, the reversal rate increases six-fold, to about 80%. The more often states and counties use the death penalty for every, say 10 or 100 homicides, the

more likely it is that any death verdict they impose will later be found to be seriously flawed, and the more likely it is that the defendant who was found guilty and sentenced to die will turn out to be not guilty.”¹⁹⁶

Earlier in this report, the reasons for the rarity of executions were identified and discussed. The results of the study above suggest that, even if these reasons could be addressed so that executions could be increased in the state, one likely outcome would be more mistakes (i.e., more wrongful death sentences).

Additionally, the authors found that there are four key factors which lead to errors: “homicide risk to whites and blacks; the size of the black population; the rate at which police catch and punish criminals; and politically motivated judges ... Everything else being equal, when the risk of a white person getting murdered is high relative to the risk of an African-American getting murdered, twice as many appeals are reversed than where that risk is low ... when whites and other influential citizens feel threatened by homicide, they put pressure on officials to punish as many criminals as severely as possible—with the result that mistakes are made, and a lot of people are initially sentenced to death who are later found to have committed a lesser crime, or no crime at all.”¹⁹⁷ This is further evidence of how race matters when it comes to errors in capital cases.

The study also found a relationship between politics and the death penalty; political pressure plays a role in capital punishment. The authors explain: “In general, the more electoral pressure a states judges are under, the higher the state’s death-sentencing rate, but the lower the rate at which it carries out its death sentences. [This] suggests that political pressure tends to impel judges or to create an environment in which prosecutors and jurors are impelled—to impose death sentences, but then tends to interfere with the state’s capacity to carry out the death

sentences that are imposed...a desire to curry favor with voters may lead elected prosecutors and judges to cut corners in an effort to secure that premium – simultaneously causing death-sentencing rates, and error rates, to increase.”¹⁹⁸

In the study of North Carolina’s death penalty from 1993 to 1997, evidence emerged of a “politics” effect on capital prosecutions, as well. Specifically, prosecutors from Republican districts were more likely to seek death sentences when they were up for reelection in the next year, and when they represented counties with large nonwhite populations.¹⁹⁹ Such findings are clear evidence of arbitrariness in the state’s death penalty system.

Other studies have identified problems in capital cases that lead to false convictions: false confessions; eyewitness identification mistakes; inappropriate use of forensic evidence; false statements by jailhouse informants; shoddy investigative policies (police work); sloppy lab work; dishonest prosecutors (misconduct); political pressure on judges; death-qualified jury bias; flawed jury instructions, and defense counsel inadequacies.²⁰⁰ The latter finding has played a significant role in North Carolina. In the state, at least 16 death row inmates, including 3 who were executed, were represented by lawyers who have been disbarred or disciplined for unethical or criminal conduct.²⁰¹ Obviously, when inmates are executed by the state, no steps can be taken to rectify these problems.

Given the realities discussed in this section of the report, rational questions for policy-makers are: is the death penalty necessary? Are wrongful convictions, death sentences and potential executions of the innocent tolerable?

CONCLUSION

An analysis of empirical data and the existing studies of capital punishment in the state

demonstrates five facts. First, relative to the number of murders, the numbers of death sentences and executions are extremely rare in North Carolina (this was true even before the state began its unofficial moratorium; the last execution in the state was August 2006). Death sentences are rarely handed down, and even among those sentenced to death, few were actually executed even when the state was still carrying out executions. A death row inmate in North Carolina has a much greater likelihood of having his or her death sentence overturned on appeal than ever being executed.

Stated simply, the vast majority of murders do not lead to death sentences or executions. So, if retribution and justice demand capital punishment, the state is failing citizens more than 99% of the time. Given the barriers to imposition of death sentences and executions identified in this report, citizens should not expect major increases in capital punishment practice in North Carolina. Capital punishment in the state should be assessed as it is (and as it will be) practiced, rather than in theory. Given the facts discussed above, a safe prediction is that death sentences will remain rare in North Carolina; executions in the state could resume at any time but will always remain rare.

Policy-makers should thus seriously consider whether capital punishment is a necessary punishment in North Carolina. It is irrational to maintain a policy that is not even being used. The rarity of capital punishment in the state is the first reason policy-makers should dismantle the system and replace it with something that better serves crime victims, their families, and people in North Carolina.

Second, when the state was still executing murders, executions in North Carolina were not a greater deterrent to murder than alternative sanctions such as life imprisonment. Further, both death sentences and executions are so rare in the state of North Carolina that it is not

logical to expect that the practice will act as a meaningful deterrent to would be murderers. Even as death sentences declined and executions stopped, murder declined in the state. Given the barriers to imposing more death sentences identified in this report, policy-makers ought to thus invest in sanctions that actually save lives. Criminological research has discovered many programs and policies that help reduce murder; most of these are outside of the realm of criminal justice.²⁰² Policy-makers should enact laws, policies, and programs rooted in empirical evidence about what works.²⁰³

Third, capital punishment in North Carolina is more expensive than other major punishments including life imprisonment. This may be counterintuitive, but nonetheless remains true. The simple fact is that super due process is expensive: every stage of a capital case is more expensive than a non-capital case. The state spends enormous sums of money even when capital prosecutions do not result in death sentences, which is the typical outcome of capital cases. Citizens of the state may thus want to see policy-makers in the state invest resources in alternative punishments rather than continuing to maintain a system of punishment that is almost never used anyway, especially during periods of serious budget deficits.

Fourth, capital punishment in North Carolina is arbitrary and characterized by serious disparities based on extra-legal factors such as race and gender. Careful, systematic studies of the state's death penalty system generally find that the race of the murder victim meaningfully impacts the likelihood of receiving a death sentence—a “race of victim” bias— even after controlling for legally relevant factors. Those studies that do not find this still conclude that there is extralegal bias impacting death sentences in the state of North Carolina.

A similar effect is found for sex of victim; most studies in the state find that killers of females are more likely to be sentenced to death. The studies that fail to find this also agree that

extra-legal factors continue to impact death sentences in North Carolina. These biases emerge both from prosecutorial and jury decision-making. Given that these kinds of biases are found across the country at nearly all times and places, a reasonable conclusion is that this problem is not fixable.

Policy-makers in the state thus ought to decide, once and for all, whether these extra-legal biases are an acceptable cost of doing justice in the state of North Carolina. Dismantling the death penalty system in North Carolina will not rid the state of bias based on extra-legal factors such as race and gender. But, we can be sure that no one is ever sentenced to death and executed as a result of these biases.

Fifth, and perhaps most serious, innocent people have been wrongly convicted of capital murder and sentenced to death in North Carolina. The state has wrongly convicted and sentenced to death at least 12 people in its recent history. Others have been convicted (and even executed) in cases that included potentially tainted evidence from the State Bureau of Investigation's crime lab. While wrongful conviction may be an inevitable cost of criminal justice, executing an innocent person is final and uncorrectable. State policy-makers ought to now take whatever steps necessary to make sure this kind of mistake never happens in the name of its citizens. One reasonable way to protect the lives of the innocent is to replace the death penalty with alternatives such as life imprisonment, where errors can be corrected once discovered.

This report concludes that North Carolina's death penalty system fails to meet its goals of retribution and crime prevention through incapacitation and deterrence. Further, financial and other social costs (e.g., extra-legal bias and wrongful conviction) clearly outweigh its meager benefits. By any approach to policy evaluation, capital punishment in North Carolina is a failed

policy. Measured, responsible people will conclude it is irrational to continue to maintain this policy in the face of all the available evidence about the realities of the death penalty in North Carolina.

Appendix A: The Case of Texas

According to the Death Penalty Information Center, there were 570 executions in Texas from January 1977 through the end of 2020. No other state was even close, as the second most executions occurred in Virginia (113 executions), and then Oklahoma followed (112 executions). No other state had even 100 executions (Florida had 99 executions and Missouri had 90 executions).¹ From 1976 through the end of 2020, the state of Texas carried out 37% of all executions in the United States.²

One might thus think that Texas is tougher on murder than other states, and it is indeed possible for North Carolina to carry out significantly more executions than we currently do. In fact, data from 1977 through 1999 showed that Texas suffered 37,897 murders, yet only handed down 776 death sentences. Its sentencing rate of 0.02 (i.e., 2% of murderers were sentenced to the death penalty) is lower than the national average in death penalty states of 0.022 (i.e., 2.2% of murderers were sentenced to the death penalty.)³

From 2011 through 2020, death sentences in even Texas fell dramatically. During this ten-year period, the state handed down only 60 death sentences, for an average of six per year. During that decade, Texas executed a total of 106 people, for an average of 10.6 executions per year.⁴ For context, from 2010 through 2019, there were 12,795 murders, for an average of

¹ Death Penalty Information Center (2021). Executions in the United States. Data set from January 17, 1977 through December 31, 2020.

<https://deathpenaltyinfo.org/executions/executions-overview>

² Death Penalty Information Center (2021). Executions by state and region since 1976.

<https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976>

³ Death Penalty Information Center (2021). Death sentencing rate by state.

<https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentencing-rates>

⁴ Death Penalty Information Center (2021). Executions by state and year.

<https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>

1,279.5 murders per year.⁵ So, one reason Texas has so many death sentences and executions is that it has so many murders.

Table 5. Murder, Death Sentences, and Executions in Texas

	<u>Population</u>	<u># Murders</u>	<u># Sentences</u>	<u>#Executions</u>
2000	20,851,820	1,238	34 (2.7%)	40
2001	21,370,983	1,332	26 (2.0%)	17
2002	21,736,925	1,302	37 (2.8%)	33
2003	22,103,374	1,422	29 (2.0%)	24
2004	22,471,549	1,364	23 (1.7%)	23
2005	22,928,508	1,407	14 (1.0%)	19
2006	23,507,783	1,384	11 (0.8%)	24
2007	23,904,380	1,407	14 (1.0%)	26
2008	24,304,290	1,384	9 (0.7%)	18
2009	24,782,302	1,330	8 (0.6%)	24
2010	25,253,466	1,249	8 (0.6%)	17
2011	25,631,778	1,130	8 (0.7%)	13
2012	29,060,796	1,148	9 (0.8%)	15
2013	26,505,637	1,140	9 (0.8%)	16
2014	26,979,078	1,192	11 (0.9%)	10
2015	27,429,639	1,317	2 (0.2%)	13
2016	27,862,596	1,478	4 (0.3%)	7
2017	28,322,717	1,405	4 (0.3%)	7
2018	28,628,666	1,327	7 (0.5%)	13
2019	28,995,881	1,409	4 (0.3%)	9

Sources: Disaster Center (2021). Texas crime rates 1960-2019. Downloaded from: <https://www.disastercenter.com/crime/txcrime.htm>; Death Penalty Information Center (2021). Death sentences in the United States since 1977 by state and year. Downloaded from: <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>; Death Penalty Information Center (2021). Executions by state and year. <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year>

The point of all this is that, even in Texas, the death penalty is extremely rare. Table 5 illustrates this reality. Even in Texas, far less than 1% of killers are now sentenced to death in any year, and the last time more than 1% of murderers received death sentences was in 2004

⁵ Disaster Center (2021). Texas crime rates 1960-2019. Downloaded from: <https://www.disastercenter.com/crime/txcrime.htm>

(1.7%). Further, death sentences in the state fell dramatically over the past 20 years.⁶ This suggests, even in Texas, the death penalty is dwindling.

⁶ Death Penalty Information Center (2021). Death sentences in the United States since 1977. Downloaded from: <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>

Appendix B: National Academy of Sciences

The National Academy of Sciences (NAS) is “a private, non-profit society of distinguished scholars ... (e)stablished by an Act of Congress, signed by President Abraham Lincoln in 1863... charged with providing independent, objective advice to the nation on matters related to science and technology.”⁷

According to an extensive review of the published evidence by leading scholars associated with NAS, as part of its Committee on Deterrence and the Death Penalty, contemporary studies on the death penalty “have reached widely varying, even contradictory, conclusions. Some studies conclude that executions save large numbers of lives; others conclude that executions actually increase homicides; and still others conclude that executions have no effect on homicide rate.”⁸ Incredibly, in spite of a large consensus among both criminologists and death penalty experts that the death penalty does not deter murder, the committee concluded that the enormous amount of published research “on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.”⁹ It concludes: “Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.”¹⁰

Depending on how one looks at the report, it is possible to find proponents of capital

⁷ National Academy of Sciences (2021). Mission. <http://www.nasonline.org/about-nas/mission/>

⁸ National Academy of Sciences (2012). Deterrence and the death penalty, p. 1.

⁹ National Academy of Sciences (2012). Deterrence and the death penalty, p. 1.

¹⁰ National Academy of Sciences (2012). Deterrence and the death penalty, p. 2.

punishment to argue that the evidence does not say that the death penalty does *not* deter murder and for opponents of capital punishment to argue that the evidence does not say that the death penalty does deter murder. Both of these statements would technically be true. Supporters then turn to the so-called “best bet hypothesis.” This hypothesis suggests that if we do not know if the death penalty is a deterrent, we should bet that it is.¹¹ It asserts that it would be better to assume there is a deterrent (*when there is not*) and use the death penalty (because this only unnecessarily kills guilty murderers), than to assume there is not a deterrent (*when there is*) and not use the death penalty (because this allows innocent people to die through murders that could have been deterred). Under these conditions, executions become a moral imperative.¹²

While this is a logical argument, it ignores the obvious reality of contemporary capital punishment—death sentences and executions are so uncertain that it is illogical to assume that the death penalty deters murder, because the most important element of punishment (certainty or the likelihood of punishment) is absent. The committee notes this fact, writing: “The theory of deterrence is predicated on the idea that if state-imposed sanction costs are sufficiently severe, certain, and swift, criminal activity will be discouraged. Concerning the severity dimension, a necessary condition for state-sanctioned executions to deter crime is that, at least for some, capital punishment is deemed an even worse fate than the possibility of a lifetime of imprisonment. Severity alone, however, cannot deter. There must also be some possibility that the sanction will be incurred if the crime is committed. For that to happen, the offender must be

¹¹ van den Haag, E. (1968). On deterrence and the death penalty. *Ethics* 78.

¹² Pojman, L. (1998). For the death penalty. In Pojman and Reiman (Eds.), *The death penalty: For and against*. Lanham, MD: Rowman & Littlefield.

apprehended, charged, successfully prosecuted, and sentenced by the judiciary ... none of these successive stages in processing through the criminal justice system is certain.”¹³

The committee thus acknowledges that what is most needed for an effective deterrent—certainty of punishment—is lacking when it comes to the death penalty.

Still, the committee concludes: “Having reviewed the research that purports to provide useful evidence for or against the hypothesis that the death penalty affects homicide rates, we conclude that it does not provide such evidence.”¹⁴ It continues: “A lack of evidence is not evidence for or against the hypothesis. Hence, the committee does not construe its conclusion that the existing studies are uninformative as favoring one side or the other side in the long-standing debate about deterrence and the death penalty.”¹⁵

The committee is correct to point out: “Properly understood, the relevant question about the deterrent effect of capital punishment is the differential or marginal deterrent effect of execution over the deterrent effect of other available or commonly used penalties, specifically, a lengthy prison sentence or one of life without the possibility of parole.”¹⁶ This means that, the most important question with regard to the death penalty is not whether it deters murder, but rather, does it deter murder more than other available punishments such as life imprisonment without the possibility of parole. The committee does not examine this issue for it did not assess any non-lethal punishments.

One thing is certain about the relationship between imprisonment and capital punishment: imprisonment is far more certain a punishment than the death penalty. For example, the US is the

¹³ National Academy of Sciences (2012). Deterrence and the death penalty, p. 29.

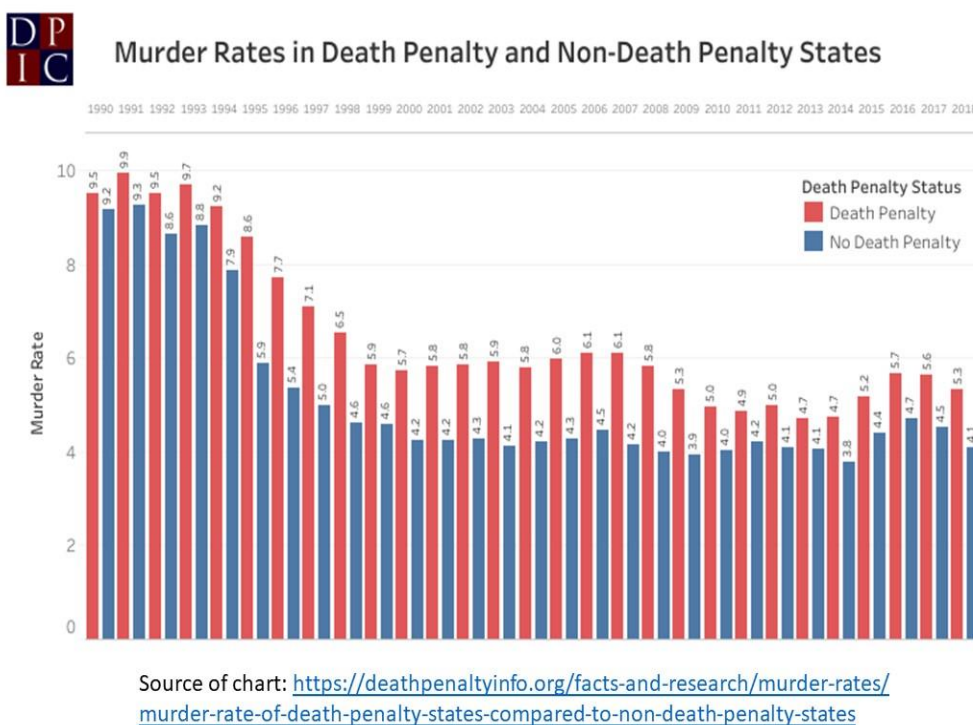
¹⁴ National Academy of Sciences (2012). Deterrence and the death penalty, p. 2.

¹⁵ National Academy of Sciences (2012). Deterrence and the death penalty, p. 2.

¹⁶ National Academy of Sciences (2012). Deterrence and the death penalty, pp. 1-2.

world's leader in incarceration, with the most people imprisoned and the highest imprisonment rate in the world.¹⁷ Given that imprisonment is more certain for murderers than death sentences and executions, the logic of deterrence theory would suggest that the former should be a greater deterrent than the latter.

Figure 8



Perhaps the most conclusive evidence related to deterrence and capital punishment comes from observations of murder trends in death penalty states and non-death penalty states. As shown in Figure 8, rates of murder increase and decrease in the same direction and to the same magnitude in all states, regardless of whether they utilize executions. This strongly suggests that

¹⁷ Sentencing Project (2021). Criminal justice facts. <https://www.sentencingproject.org/criminal-justice-facts/>

the factors that impact murder rates have nothing to do with the death penalty. The committee did not address this issue in its report.

Appendix C: Race in the History of North Carolina's Death Penalty

Historically, in the state of North Carolina, African Americans made up a majority of those executed. For example, between 1726 and 1961, 569 of 764 (74%) people executed (in cases where the race of the convicted is known) were African Americans.¹⁸ Further, from 1910 to 1961, when the state was still executing people for crimes other than murder, North Carolina executed 71 rapists, 62 of whom were African American (87%), and 11 burglars, all of whom were African American (100%).¹⁹

According to a leading death penalty scholar in North Carolina: "Whether we look at the entire historical record or only the most recent period, we see that over 70 percent of those executed have been African-Americans and that this number has commonly been 100 percent: the death penalty has often been *exclusively* reserved for African-Americans, if we look at any single year."²⁰ Further, not only were African Americans more likely to be sentenced to death in the first place, but a study of executions in North Carolina from 1909 to 1954 found that a higher percentage of African Americans sentenced to death than whites sentenced to death were executed (58% versus 43%, respectively).

Another study of five North Carolina counties from 1930 to 1940 found that 32% of African American defendants received death sentences versus only 13% of white defendants, in cases where victims were white. Further, death sentences were returned in 17.5% of all cases

¹⁸ Radelet, M., & G. Pierce (2010). Race and death sentencing in North Carolina 1980-2007. Working paper requested by author.

¹⁹ Robinson, M. (2007). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.

²⁰ Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008. <http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepanciesNC-homicides-executions.pdf>

with white victims versus 0.4% of all cases with African American victims.²¹ Race of victim bias appears to already have been an issue at the time.

According to an analysis of capital punishment in the state, there has been a “strong, pernicious, and persistent influence of race upon the death penalty in North Carolina from the state’s first execution well into the twentieth century ... race and the death penalty have been constant companions throughout history, with racial discrimination exerting a profound and discriminatory impact on the imposition and disposition of death sentences. In short, the race of defendants and victims played a crucial role in determining who died and who did not.”²²

According to these authors, race still plays a role in the administration of capital punishment in the state, but its form has changed from overt racial bias based on defendant race to more subtle forms such as race of victim in combination with other factors, as shown in this report.

The point is that, in states such as North Carolina, death penalty scholars have long shown connections between the most severe sanction available (i.e., capital punishment) and race. One notable connection is the link between lynching and capital punishment.²³ Counties and states with the highest rates of lynching in the past are generally found to be the counties and states with the highest rates of capital sentencing and executions in contemporary America. For example, death penalty expert Franklin Zimring found that the “states and the region where

²¹ Johnson, G. (1941). The negro and crime. *Annals of the American Academy of Political and Social Science*, 217, 93-104.

²² Kotch, S., & R. Mosteller (2010). The Racial Justice Act and the long struggle with race and the death penalty in North Carolina. *North Carolina Law Review*, 88, 2031.

²³ Beck, E., Massey, J., Tolnay, J., & E. Stewart (1989). The gallows, the mob, and the vote: Lethal sanctioning of blacks in North Carolina and Georgia, 1882 to 1930. *Law & Society Review*, 23(2), 317; Phillips, C. (1987). Exploring relations among forms of social control: The lynching and execution of blacks in North Carolina, 1889-1918. *Law & Society Review*, 21(3), 361-374; Streiker, C., & J. Streiker (2010). The American death penalty and the invisibility of race. Paper presented to the annual meeting of the American Society of Criminology. November. San Francisco, CA.

lynching was dominant show clear domination of recent executions, while those states with very low historic lynching records are much less likely than average to have either a death penalty or execution late in the twentieth century.” The median number of executions in high lynching states was 24, versus zero in low lynching states. Zimring explains that: “The statistical contrast between these two groups of states shows that they occupy the same extreme positions on the distribution of two distinct varieties of lethal violence in the United States separated by almost a century and the formal participation of government authority in the killing.”²⁴ Zimring’s main thesis has been replicated. Other studies show relationships between county level lynchings and murder rates, as well as state level lynchings and executions²⁵; executions have replaced lynchings as a means to deal with perceived racial threats.²⁶

In North Carolina, we see a similar relationship between lynching and capital punishment. For example, the North Carolina Task Force for Racial Equity in Criminal Justice (2020) notes: “The death penalty is our harshest punishment and is clearly irrevocable once carried out. To see its relationship to white supremacy, one need only overlay a map of executions of Black defendants between 1972-2020 on a map showing the lynching of Black victims between 1883-1940. Evidence demonstrates that the use of capital punishment in our state has been tainted by racial bias.”²⁷

²⁴ Zimring, F. (2003). *The Contradictions of American Capital Punishment*. New York: Oxford University Press.

²⁵ Jacobs, D., Carmichael, J., & S. Kent (2005). Vigilantism, current racial threat, and death sentences. *American Sociological Review*, 70, 656; Messner, S., Baller, R., & M. Zevenbergen (2005). The legacy of lynching and Southern homicide. *American Sociological Review*, 70, 633.

²⁶ For example, see Kotch, S. (2019). *Lethal state: A history of the death penalty in North Carolina*. Chapel Hill, NC: University of North Carolina Press; Center for Death Penalty Litigation (2021). *Racist roots. Origins of North Carolina’s death penalty*. <https://racistroots.org/>

²⁷ North Carolina Task Force for Racial Equity in Criminal Justice (2020). *Report 2020*. https://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal_12132020.pdf, p. 124.

Another extensive review of the impact of race on the death penalty throughout North Carolina's history found that "racial prejudice exerted a consistent, strong, and pernicious influence on the imposition and disposition of death sentences." The authors note that: "From colonial times into the 1960s, the overwhelming majority of those executed were African American, and although most victims and perpetrators of crime are of the same race, the overwhelming majority of victims in cases where executions took place were white." The disparity between executions for inter-racial crimes is particularly notable: "Hundreds of African Americans have been executed for a variety of crimes against white victims, including scores of African American men executed for rape. However, just four whites have been executed for crimes against African American victims, all murders."²⁸

The authors also note the relationship between lynching and executions: "In many cases in the first half of the twentieth century, juries sentenced African Americans to death in the shadow of lynch mobs. Newspaper reports of executions of African Americans included overtly racist images."²⁹

While the overwhelming use of executions for black people in the state has changed in North Carolina's contemporary use of the death penalty (i.e., from 1977 to the present day), the authors also find evidence of racial bias in the state's most recent history. For example, they write that "discretionary determinations by prosecutors and jurors continue, allowing racial motivation-particularly unconscious racial prejudice toward defendants or empathy for victims-

²⁸ Kotch, S., & Mosteller, R. (2010). The Racial Justice Act and the long struggle with race and the death penalty in North Carolina. *North Carolina Law Review*, 88(6), 2031.

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to influence decisions.” The impact of prosecutorial discretion and unconscious bias were discussed in this report. The authors also claim that “jury participation by African Americans has remained limited in many cases, and the disproportion of white victims seen throughout North Carolina's history is virtually unchanged.”³⁰ This, too, was noted in the report.

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