

## **A Brief History of Racial Violence and the Death Penalty in North Carolina**

Seth Kotch

### **I. Qualifications**

I am the Director of the Southern Oral History Program and an Associate Professor in the Department of American Studies at the University of North Carolina at Chapel Hill. My curriculum vitae is attached as Appendix A.

I received my Ph.D and Masters from the University of North Carolina at Chapel Hill, and my Bachelors in History from Columbia University. While completing my Ph.D, I received the Graduate Education Advancement Board Impact Award, which recognized my doctoral work's impact on the state of North Carolina. In 2009, I received the M.E. Bradford Dissertation Prize for my doctoral dissertation "Unduly Harsh and Unworkably Rigid: The Death Penalty in North Carolina, 1910-1961," which was recognized by the St. George Tucker Society as the best dissertation on a southern subject. In 2018, I was a fellow at the Institute for the Arts and Humanities. In 2020, I was inducted into the Historical Society of North Carolina.

I have authored various pieces of scholarship on the death penalty and racial violence in North Carolina's history, including a 2010 law review article "The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina" and my 2019 book *Lethal State: A History of the Death Penalty in North Carolina*. I am also an accomplished digital scholar of racial violence in the American South. My digital project *A Red Record* built out a first-of-its-kind digital map of historic lynchings in North Carolina. This project aims to eventually include a comprehensive digital collection and mapping of lynchings in every state in the American South.

Counsel for Brandon Hill posed two referral questions: 1) Does North Carolina's history of public policy affecting race relations and racialized violence, provide a strong basis to believe that African American citizens in 2022 would have greater levels of skepticism about the fairness of the state's

administration of the death penalty than members of the white community, and 2) Does the history of North Carolina public policy and judicial practices and traditions provide persuasive evidence that current disparities in the participation of African American citizens as jurors in death penalty cases is a legacy of these discriminatory laws and practices? In this report and in my anticipated testimony, I answer both questions in the affirmative.

## **II. Introduction of Topic**

The administration of the modern death penalty in North Carolina draws upon a legacy of racial discrimination, violence, and terror that can be traced across nearly four centuries of history within the territory—from the colonial period to the Civil War, to the period of Black Codes and Jim Crow, all the way through present day. North Carolina’s capital punishment system is so tainted by discrimination against Black people and women, that their skepticism towards the death penalty and their ability to meaningfully contribute to a process that decides whether someone should live or die is warranted.

## **III. Criminal Punishment and Enslavement in the Pre-Statehood Colonial Era (1663—1789)**

When English King Charles II established the colony of Carolina in 1663, he bestowed upon eight of his lords and their subordinates the authority to punish crimes in the territory with imprisonment, dismemberment, and death. In the early Carolina colony, colonial authorities used their power to public humiliate and torture people who committed misdemeanor offenses, while stripping felony offenders of their property or punishing them with death.<sup>1</sup> From the earliest colonial period in Carolina, criminal punishment was utilized as a mechanism of social and economic control by the ruling class to subjugate other colonists or to exploit native populations in the territory.

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<sup>1</sup> Albert Coates, *Punishment for Crime in North Carolina*, 17 N.C. L. Rev. 205 (1939); Donna J. Spindel, *Crime and Society in North Carolina, 1663-1776*, 45 (Louisiana State Univ. Press. 1989).

In the late 1600s, European colonizers first brought enslaved peoples—captured often from their homelands in the West Indies and Africa—to Carolina territory.<sup>2</sup> From their brutal displacement and first arrival in North American territory, slavery stripped the first Black Carolinians of their humanity. Slaves were relegated to property of the white colonists, further legitimizing their social and legal subjugation. It took little time for Carolina’s ruling class to identify slave labor as indispensable to the development of the colony, and over the next several decades colonial authorities utilized Carolina’s harsh criminal punishment system to institutionalize slavery and the racial subjugation of Black Carolinians. Carolina’s earliest criminal codes supported the institution of slavery by either severely punishing slaves accused of wrongdoing or authorizing the severe punishment of slaves by their enslavers.<sup>3</sup> In 1715, colonial lawmakers developed a separate slave court system that was adjudicated by enslavers. This slave court system further solidified the enslavers’ dominion over their slaves by giving authority for white Carolinians to kill convicted or runaway slaves.<sup>4</sup>

Because of a slave’s status as property of their enslaver, when slaves were abused or even killed, they were not considered “victims” under the law.<sup>5</sup> When slaves were killed in legal executions, their enslavers were considered the party who had suffered a proprietary loss and could seek compensation through the state.<sup>6</sup> Accordingly, executing slaves became a profitable component of the Carolina slave

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<sup>2</sup> “The Growth of Slavery in North Carolina: Colonial Legacies,” ANCHOR, <https://www.ncpedia.org/anchor/growth-slavery-north#:~:text=Colonial%20legacies,number%20were%20brought%20from%20Africa>. (last accessed on August 15).

<sup>3</sup> Stuart Banner, *The Death Penalty: An American History*, 8-9 (Harvard Univ. Press 2002); Spindel, *Crime and Society in North Carolina*, 45.

<sup>4</sup> See Act Concerning Servants and Slaves, ch. 46, 1715 N.C. Sess. Laws 21, 21 (creating slave courts). Legislation enacted in 1741 gave the tribunal the power, upon a guilty determination, of discretion regarding the sentence imposed: "to pass such judgment upon such offender, according to their discretion, as the nature of the crime or offence shall require." Trial of Slaves, ch. XLVIII, 1741 N.C. Sess. Laws 65, 65.

<sup>5</sup> Seth Kotch & Robert P. Mosteller, “The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina,” 88 N.C. L. Rev. 2031, 2049 (2010) (discussing *State v. Hale*, 9 N.C. (2 Hawks) 582 (1823)).

<sup>6</sup> Marvin L. Michael Kay and Lorin Lee Cary, *Slavery in North Carolina, 1748-1775*, at 74, 77, 81-82, 136 (Univ. of North Carolina Press 1995); Kotch and Mosteller, “The Racial Justice Act” at 2045 (discussing that slave owners may have been compensated for more than 80% of confirmed slave

economy during the colonial period. Prior to 1758, enslavers whose slaves were executed received roughly 20% more in compensation from the colony's government than they would have received from selling their slaves.<sup>7</sup> In this way, executing slaves served the fiscal interests of the enslavers and the broader priorities of white Carolinians who sought to fortify slavery as an institution in the territory. Between 1726 and 1772, Carolina executed more than one hundred enslaved people—a number that is greater than the number of white people executed in the colony's entire history.<sup>8</sup>

When enslaved people were executed in Carolina territory, their torture was often appreciated as public spectacle. Many Black Carolinians suffered brutal public mutilation and torture before they were killed. Between 1760 and 1805, eight enslaved Black people were burned to death.<sup>9</sup> Many more Black people who were executed during Carolina's colonial period suffered castration and dismemberment before their deaths, and nearly half of the slaves executed during the colonial period suffered "comparatively brutal executions."<sup>10</sup> In a flex of the state's punitive authority and a warning to slaves, North Carolina courts were even known to order the public display of decapitated heads of executed slaves.<sup>11</sup> In 1774, the Carolina General Assembly passed a law that prohibited the killing of slaves.<sup>12</sup> However, if a white Carolinian was only found to have killed one slave, the maximum punishment for this offense was imprisonment for a single year. On second occurrence, killing a slave was punishable by death, but no one ever suffered that penalty.<sup>13</sup>

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executions). See Marvin L. Michael Kay & Lorin Lee Cary, "The Planters Suffer Little or Nothing': North Carolina Compensation for Executed Slaves," 1748-1772, 40 *SCI. & SOC'Y* 288, 306 (1976) (observing that compensation systems insured that "the capital punishment of slaves did not directly harm slave owners economically").

<sup>7</sup> Kay and Cary, *Slavery in North Carolina*, 88.

<sup>8</sup> Banner, *The Death Penalty*, 8-9; Spindel, *Crime and Society*, 45.

<sup>9</sup> M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File* [Computer File], 4th ICPSR ed. compiled by M. Watt Espy and John Ortiz Smykla, Univ. of Ala. Ann Arbor, MI: Inter-University Consortium for Political and Social Research [producer and distributor], 2004 [hereinafter *Espy File*] (noting that eight slaves were burned to death between 1760 and 1805).

<sup>10</sup> Kay and Cary, *Slavery in North Carolina*, at 81.

<sup>11</sup> Alan D. Watson, "North Carolina Slave Courts, 1715-1785," 60 *N.C. HIST. REV.* 24, 33-34 (1983).

<sup>12</sup> See Act to Prevent the Willful and Malicious Killing of Slaves, ch. 31, 1774 N.C. Sess. Laws 189, 189.

<sup>13</sup> *Id.*

#### IV. Racialized Violence from Statehood to the Civil War (1789—1865)

Even after the Bill of Rights was signed in 1776 and the 8<sup>th</sup> Amendment prohibited cruel and unusual punishment, racist state-sanctioned violence continued once North Carolina achieved statehood in 1789. Between 1783 and 1861, North Carolina hanged or burned at least 109 enslaved people for crimes such as murder and rape.<sup>14</sup> Among those enslaved people executed during this period was a Black man from Rutherford County, whose “head [was] separated from his body and stuck on a pole as a terror to Evil doers and all persons in like cases offending.”<sup>15</sup> In 1805, a Black woman from Wayne County was burned at the stake for allegedly poisoning four people including her enslaver and his mistress.<sup>16</sup> In 1812, the Wake County Court ordered a Black man to be hanged and his body publicly burned. In a unique occurrence, after intense public outcry, the governor remitted the order of public execution against this Black man.<sup>17</sup>

By the early 1800s, North Carolina’s criminal code categorized 28 offenses as capital crimes.<sup>18</sup> Despite this large class of death-eligible offenses, relatively few North Carolinians were executed for property offenses; most were punished by death for murder and rape.<sup>19</sup> In 1815, elected officials in North Carolina began to advocate for a narrowed classification of capital offenses and the development of a criminal punishment system that left open a greater possibility for individual reform. Even so, it took four decades until a revision of North Carolina’s criminal code that narrowed the criminal offenses punishable by death. By 1855, the capital offenses under North Carolina criminal code included arson, burglary, murder, treason, robbery, bestiality, and sodomy.

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<sup>14</sup> See ESPY File.

<sup>15</sup> Guion Griffis Johnson, *Ante-Bellum North Carolina: A Social History*, 650 (Univ. of North Carolina Press 1937).

<sup>16</sup> *Raleigh Register*, July 22, 1805 (discussed within Johnson, *Ante-Bellum North Carolina*, 650).

<sup>17</sup> *Raleigh Register*, February 28, 1812 (discussed within Johnson, *Ante-Bellum North Carolina*, 650).

<sup>18</sup> Johnson, *Ante-Bellum North Carolina*, 646.

<sup>19</sup> See ESPY File.

## V. Chain Gangs, Lynchings, and Modernizing a Racist Death Penalty System (1865—1961)

After the Civil War, the Reconstruction Act of 1867 required Southern states to re-write their state constitutions as a condition to re-enter the United States. During a brief period following the Civil War, North Carolina's governance included notable political progress for Black citizens, many of whom received voting rights or were elected as representatives themselves. The state's Constitution of 1868 was progressive in various regards, but also reinvented the state's criminal punishment system. Within several years, North Carolina's government was again overrun by ex-Confederates who were eager to reassert their social, political, and economic dominion over recently freed Black people. Thus, even during the period of Reconstruction, the white supremacist ruling class in North Carolina was hard at work limiting the rights and controlling the labor of Black North Carolinians.

### a. *Chain Gangs and Prison Camps*

More than twenty years prior to the creation of North Carolina's 1868 Constitution, a petition to build North Carolina's first penitentiary lost in a statewide vote, primarily because North Carolina's voters were uncomfortable with relegating white wrongdoers to a slave-like status through confinement in a state prison. With the passage of the 1868 Constitution, however, North Carolina's legislature approved a plan to create the state's first penitentiary, which was to be funded by state taxpayers and constructed in southwestern Raleigh.<sup>20</sup> However, in the post-Civil War South, North Carolina's government lacked the authority to force slaves to build the penitentiary in Raleigh, and sought to develop a new system of cheap, forced labor to save valuable state dollars. The Legislature's plan was simple: the manual labor of the construction was to be shouldered by the same convicted prisoners who the penitentiary would later house.<sup>21</sup> The legislature argued that the forced labor of North Carolina's criminal population served the state's fiscal interests by constructing the prison at a discount. Further, the legislature argued that the

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<sup>20</sup> *Id.*

<sup>21</sup> For an extended discussion on the formation of North Carolina's state prison system and convict labor, see Seth Kotch, *Lethal State: A History of the Death Penalty in North Carolina*, 13-18 (The Univ. of North Carolina Press 2019).

prisoners' labor would serve a broader and more righteous social mission: to "reform the offender and thus prevent crime."<sup>22</sup> Within a few decades, however, it became clear that the state's expressed hope for criminal rehabilitation was subordinate to its financial and political interests in developing a complex system of convict labor.

And so, in the wake of the country's bloodiest battle over the institution of slavery, the same criminal punishment system that was designed to disproportionately subjugate and discipline Black North Carolinians for centuries was integral to a new iteration of slavery: an institution of dehumanizing and forced convict labor. On January 6, 1870, the first prisoners—two Black women and one Black man—were admitted to North Carolina's State Penitentiary, where they were housed in a small wooden structure.<sup>23</sup> By the end of January, 530 people had been brought to Raleigh to join in the convict labor construction of the State Penitentiary.<sup>24</sup> This construction project—the work for which spanned across 15 years of scalding summers and frigid winters—was the first of many prison system projects that relied upon the labor of North Carolina's chain gangs.

Over the next several decades, the prison system developed convict work-camps that raised and slaughtered livestock and farmed commodities like soybeans, wheat, corn, oats, and vegetables. Other work camps served as license tag plants, mattress factories, tailor shops, and soap mills.<sup>25</sup> These various convict labor projects served as an engine for North Carolina's economy, while exploiting convict laborers who were required to dedicate more than 12 hours per day of burdensome manual labor, often in dangerous working conditions.<sup>26</sup> Prison and camp guards utilized every mechanism at their disposal to

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<sup>22</sup> The Constitution of the State of North Carolina, Article XI: Punishments, Corrections, and Charities (Section 2, Death Punishment), <https://www.ncleg.gov/EnactedLegislation/Constitution/NCCConstitution.html> (last accessed August 15, 2022).

<sup>23</sup> Tomberlin, "North Carolina State Penitentiary," *supra*.

<sup>24</sup> Kotch, *Lethal State*, at 13.

<sup>25</sup> *Id.* at 15.

<sup>26</sup> Heather Ann Thompson, "Blinded by a 'Barbaric' South: Prison Horrors, Inmate Abuse, and the Ironic History of Penal Reform in the Postwar United States," at 74-98, in Lassiter and Crespino, ed. *The End of Southern History?* (Oxford Univ. Press, 2009).

compel the convicted population at the prison to work harder, faster, and longer.<sup>27</sup> North Carolina afforded its jailers the full discretion to flog and physically torment inmates at the prison labor camps without any concrete state guidelines on when and how force should be used to compel prison labor.<sup>28</sup> Jail staffers also used brutal methods of psychological torture like solitary confinement to induce the physical labor from the prisoners.<sup>29</sup>

By the early 1900s, North Carolina's state prison system had in many ways optimized its systems of convict labor by developing and maintaining 40 satellite prison camps in the state—one for each county. In the 1907-1908 report on the state prison system, the superintendent of prisons described the following:

Without the least concert with one another, each county is in supreme control of its own gang, prescribes its own rules of discipline, of clothing, of feeding, of guarding, of quartering, and of working. Consequently, in addition to what is known as the State's Prison, North Carolina has forty wholly independent State prisons, under forty separate and distinct managements, with forty different and distinct sets of rules and regulations, and over which there is absolutely no State supervision and inspection. The hospital facilities, at least, of all these many prisons are inadequate and defective, for in none of the counties is there a place... where the sick or enfeebled or the demented can be cared for and cured. I have been informed... that the average life of a road convict is less than five years... None [of the prisoners] are mere working machines which the State should condemn to unremitting toil and endurable hardships, only to be worn out and buried within a few months or, at most, in a few years.<sup>30</sup>

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<sup>27</sup> Citizens' Commission on Alternatives to Incarceration, *Report*, 35 (1982).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *1907-1908 Reports of the Superintendent, Warden, and other Officials of the State's Prison, Raleigh, N.C.*, at 12, <https://digital.ncdcr.gov/digital/collection/p16062coll9/id/248321> (last accessed on August 15, 2022).



Of the 2,800 inmates of North Carolina's prison system between 1911 and 1912, all but seventy-five prisoners were serving as convict labor on county roads, railroads, or farms.<sup>31</sup> This trend persisted across decades, and even in 1940 nearly 90% of the state's prison population was sent to build and maintain the county roads.<sup>32</sup>

Throughout the early 1900s, the horrifying treatment of the chain gangs and prisoners in the State Prison's work-camps became well documented by state investigators and journalists throughout the state. Nevertheless, state officials and agencies held steadfast to the notion that the grievous forced labor of the prison work-camps remained in the best commercial interests of the state. Other organizations that remained hopeful that convict labor could help reform prisoners, such as the Board of Charities and Public Welfare, were highly critical of the state's management of the convict labor system. "It is for 'community service' that the State and county institutions exist. They are the concrete forms of our ideas of economic welfare and are not created from charitable motives alone," said the Board in a 1915 report.<sup>33</sup> In 1904, Superintendent J.S. Mann acknowledged the unlikeliness "that a term of imprisonment here can have any permanent reformatory effect upon the ordinary inmate. The association is vicious."<sup>34</sup> Mann's successors echoed these sentiments for years. Throughout the 20<sup>th</sup> century, the lack of state government oversight and regulation of prison labor camps in the state allowed for the brutal treatment of the same North Carolinians who built and maintained the highways and railroad lines across the state.

### ***b. Lynchings and Mob Violence in North Carolina***

From 1865 to 1877, Black North Carolinians found temporary and uneven protection under the Fourteenth Amendment and the federal government's Freedmen's Bureau. Once the federal government

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<sup>31</sup> Kotch, *Lethal State*, at 16.

<sup>32</sup> *Id.*

<sup>33</sup> *Annual Report of the Board of Public Charities of North Carolina, 1914*, Board of Public Charities of North Carolina, at 1.

<sup>34</sup> *1903-1904 Reports of the Superintendent, Warden, and other Officials of State's Prison, Raleigh, N.C.*, at 9, <https://digital.ncdcr.gov/digital/collection/p16062coll9/id/247353> (last accessed on August 15, 2022).

withdrew from the state in the spring of 1877, the recently freed Black population in North Carolinians endured a resurgent wave of racial violence. Threatened by the notion of racial equality under the law, many white North Carolinians adopted a role as enforcers of mob justice who sought to accomplish what the legal criminal punishment system could not: exacting swift vengeance upon the state's Black citizens.

Between the Civil War and the 1930s, mob lynchings and state-sanctioned executions were mutually reinforcing systems of racialized violence against the recently freed Black people in the state. There were more than 170 documented lynchings in North Carolina history from 1865 to 1946.<sup>35</sup> Of these reported lynching victims, twenty-six were white and two were Native American. The rest were Black North Carolinians.

*i. Lynching as Public Spectacle*

Reminiscent of the brutal system of legal executions that took place in the early-to-mid 1800s, lynchings in post-war North Carolina commonly involved the public humiliation, torture, and killing of Black citizens. Black lynch victims were killed in a variety of atrocious ways: by noose, by gunshot, by mutilation, by being drowned. In 1918 for example, George Taylor, an African American man from Rolesville, North Carolina, was attacked by a mob of 300 people who lodged over 100 bullets into his body and stabbed him through his back and sides.<sup>36</sup> Though Taylor's torture and death by the lynch mob was undeniably barbaric, the degree of cruelty he suffered was not uncommon—many lynching victims were unrecognizable after they were brutalized by the white mob.

Lynchings served as a violent, social occasion for members of the mob and public spectacle for the rest of the community. For example, in 1869 in Orange County, a Black man named Cyrus Guy was

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<sup>35</sup> See Kotch, *Lethal State*, Appendix C.

<sup>36</sup> "Negro Lynched by Mob in Wake Co.," *The News and Observer* (Raleigh), November 7, 1918, at 10. See also "Lynching in Wake," *Roanoke Rapids Herald*, November 15, 1918, at 4; "Start Lynching Hearing Today," *The Daily Times* (Wilson), November 9, 1918, at 1; *Rockingham Post-Dispatch*, November 7, 1918, at 2; "Wake County Negro Lynched By Mob," *Hickory Daily Record*, November 4, 1918, at 1.

killed by a mob that then left his body hanging from a tree next to a highly traveled intersection. The mob that killed Guy also used his blood to paint a warning sign above his lifeless body for all the community to see.<sup>37</sup> Lynch mobs often attached signs or letters to their victims to make clear their intentions of taking justice into their own hands, terrorizing Black North Carolinians, and advancing white supremacy.

White North Carolinians came from far and wide to view the bodies of lynch victims, which were often left hanging in popular public spaces. For example, in 1919 in Franklin County, a Black man named Walter Tyler was taken from police custody, stabbed, shot, and hung in front of the New Hope Church. It was reported that as many as 2,000 people came to the church the next day to view his body.<sup>38</sup> In the same year, a Black former soldier named Powell Green was hanged and shot in Franklin County, where his body remained hanging for the next days as crowds flocked to view his remains.<sup>39</sup> Though lynchings sometimes took place in small towns or communities across the state, the news of these public killings often spread like wildfire through communities across the state, fueled by lurid newspaper coverage in papers large and small.

However, lynchings did not require the public display of a mutilated victim to subjugate Black citizens and instill a fear of retributive white violence. Even the more surreptitious lynchings often received nationwide press and were a hot topic of discussion within surrounding communities. Whether serving as a dramatic public spectacle or only circulating by word-of-mouth, lynchings created a ubiquitous and uniquely horrific intimidation apparatus against Black North Carolinians.

*ii. Law Enforcement Complicity in Mob Violence*

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<sup>37</sup> *The Daily Journal* (Wilmington), December 10, 1869, at 3.

<sup>38</sup> “Negro Lynched in Franklin County,” *News and Observer* (Raleigh), August 22, 1919, 1-2; “Solicitor Starts Lynching Probe,” *News and Observer* (Raleigh), August 24, 1919, at 2; “Tyler Lynched by Parties Unknown,” *News and Observer* (Raleigh), August 28, 1919, at 12.

<sup>39</sup> “Negro Killed White Man After Former was Arrested by Officer,” *News and Observer* (Raleigh), December 29, 1919, at 1.

Many law enforcement officers also found significant value in the role of lynchings in post-war North Carolina. Some officers participated in or organized lynchings, though many others did not. However, law enforcement's cooperation both before and after lynchings took place was essential to the durability of lynch law in the state.<sup>40</sup>

Many, if not most, Black lynching victims were captured from law enforcement custody—broken out of jails or kidnapped from sheriff wagons. For example, in 1884 in Johnston County, two Black men named Charles Smith and Henry Davis were taken from a Clayton police station and lynched by a mob of approximately fifty people. Smith and Davis—accused of burglary—were wrapped in chains, handcuffed, and thrown off a bridge railing and into the Neuse River.<sup>41</sup> In 1900 in Rutherford County, a mob of around 100 men took a man named Avery Mills from a police wagon and shot him approximately 20 times.<sup>42</sup> In 1921 in Chatham County, a 16-year-old Black boy named Eugene Daniel was taken from Pittsboro jail by a mob of about 50, who then chained him, hung him from a tree, and shot him.<sup>43</sup>

Those participating in lynch mobs were often well-known within their communities across North Carolina. However, in the aftermath of a brutal lynching of a Black victim, few participants in the mobs were ever indicted, much less convicted or sentenced to time in jail for their violent acts. In 1901 in Moore County, nine men were indicted but none were found guilty of lynching a white man in downtown Carthage, North Carolina. In the previously discussed 1919 lynching of Powell Green, the Governor offered hundreds of dollars as reward to anyone who would identify members of the mob, but no name of a lyncher was ever reported.<sup>44</sup> In other cases, police commenced investigations against lynchings, but these investigations were allowed to trail off without the pursuit of criminal charges against the killers.

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<sup>40</sup> Kotch, *Lethal State*, 50-51.

<sup>41</sup> "More News in Regard to the Lynching of Smith and Davis," *News and Observer* (Raleigh), December 28, 1884, at 4.

<sup>42</sup> "Life Taken for a Life," *The Morning Post* (Raleigh), August 29, 1900, at 1; "Flack Shot Dead, Slayer Lynched," *The North Carolinian* (Raleigh), August 30, 1900, at 1.

<sup>43</sup> "Negro is Lynched By Mob Near Pittsboro," *The Concord Daily Tribune*, September 19, 1921, at 1.

<sup>44</sup> "Bickett Offers a Reward of \$400 Each for Lynchers," *Associated Press*, December 29, 1919.

iii. *The Ku Klux Klan and the Wilmington Massacre*

Though some lynch mobs formed spontaneously in communities across the state, some white supremacist organizations in North Carolina—such as the Ku Klux Klan—took a fraternal and systematic approach to pursuing racial violence and subjugation during this period.<sup>45</sup> In the post-Civil War era, the Klan formed as a political mechanism to oppose Reconstruction-era Republican Party policies. By 1870, the Klan had strongholds across the state, including Alamance, Rutherford, and Sampson Counties.<sup>46</sup> In the late 1800s, the Klan primarily targeted Black citizens—lynching, whipping, shooting, and assaulting them—but also targeted white Republicans who they identified as traitors to confederate ideals.<sup>47</sup>

For example, in 1869 in Moore County, a Black man named Daniel Blue testified against the Klan, alleging that Klansmen had burned down a Black freedman’s house. When news spread about Blue’s testimony, Klansmen broke into his house, killed his pregnant wife, and burned his property to the ground—killing five of his children.<sup>48</sup> In 1869 in Orange County, two Black farm workers were lynched by a mob, which left a note identifying themselves as members of the Klan.<sup>49</sup> In 1870 in Alamance County, Klansmen kidnapped and hung prominent Black leader Wyatt Outlaw from a tree in Graham Courthouse square.<sup>50</sup> The next month, Klansmen drowned another Black man in Alamance County for confronting them about Outlaw’s murder.<sup>51</sup>

Organized white supremacist groups sustained the legacy of the Confederacy throughout the 1800s. In 1898, the Confederate-sympathizing Democratic party organized to overturn what they called a “Negro domination” in 1898 state legislative elections.<sup>52</sup> In advance of North Carolina’s state legislative

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<sup>45</sup> Allen W. Trelease, “Ku Klux Klan,” excerpt from the Encyclopedia of North Carolina, ed. William S. Powell, (Univ. North Carolina Press 2006) (digitally accessible at <https://www.ncpedia.org/ku-klux-klan>).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> “Outrages in Moore County,” *The Daily Standard*, March 11, 1869, at 2.

<sup>49</sup> *The Milton Chronicle*, July 8, 1869, at 5.

<sup>50</sup> “The Outrage at Graham,” *The People’s Press*, March 18, 1870, at 2.

<sup>51</sup> “Alamance County—Starting Revelations,” *Tri-Weekly Era*, December 21, 1871, at 3.

<sup>52</sup> “Nov. 10, 1898: Wilmington Massacre,” Zinn Education Project, <https://www.zinnedproject.org/news/tdih/wilmington-massacre-2/>, (last accessed on August 15, 2022).

elections, former Confederate colonel Alfred Waddell gave a speech to a large crowd of white supremacists, where he suggested that white citizens “choke the Cape Fear (River) with carcasses” to keep Black North Carolinians from the polls.<sup>53</sup> Wilmington—an integrated port city along the Cape Fear River—was one key target. There, a white supremacist group called the “Red Shirts” showed up to intimidate Black citizens and prevent their votes from being cast. On election day, Democrats achieved decisive victories across the state after Red Shirts patrolled the Black neighborhoods with guns. However, Black representatives maintained several elected positions within Wilmington’s city government.

On November 9, 1898, Waddell and a group of 800 white supremacists including a number of prominent white North Carolinians, marched on the county courthouse and developed a “White Declaration of Independence,” where they stated that they “[would] no longer be ruled and will never again be ruled by men of African origin.”<sup>54</sup> The next day, Waddell led a mob of more than 2,000 white citizens who marched through Wilmington, burning Black-owned businesses (such as the *Wilmington Daily Record*), and killing Black citizens. The white supremacist posse arrested the city’s Black leaders and killed between 60 to 250 people. Following what has been called the “Wilmington Massacre,” more than 2,000 Black people were displaced, leaving behind their businesses and properties out of fear that they would be tortured and killed by Waddell’s white supremacist mob.<sup>55</sup> The result was an all-white, Democratic city government and the irreplaceable loss of a successful and storied Black community. The Wilmington Massacre is recognized today as one of the only coups d’état, or violent overthrows of a duly elected government, in United States history.

#### *iv.. Lynchings and the Courts in North Carolina*

After the 1869 lynching of Black man in Orange County, lynchers attached a note to the victim’s foot that read “If the law will not protect virtue, the rope will.”<sup>56</sup> This view—that mob violence would

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> “Hung in the Woods,” *The Tri-Weekly Examiner* (Salisbury), October 1, 1869, at 2.

exact a particular style of justice against Black citizens if the legal system would not—was widely believed in North Carolina during the late 1800s and early 1900s. In fact, it was common for prospective lynchers to impose their will on the formal legal process by congregating within courthouses to intimidate the judge and jurors into imposing harsh criminal sentences.

For example, in 1927, a 24-year-old Black man named Larry Newsome was attacked by prospective lynch mob members during his murder trial.<sup>57</sup> To stop the scrum, the trial judge fired a pistol into the ceiling of the courthouse and ordered deputies to usher Newsome from the courthouse to safety. According to the news report, the judge kept his pistol fixed at the prospective lynchers as Newsome was escorted out.<sup>58</sup> Newsome was convicted of murder and sentenced to death. When his conviction was reversed due to a legal technicality, a lynch mob raided his new court proceedings and demanded of the judge “will you promise us if we don’t kill him that he will be convicted and hanged?”<sup>59</sup> The judge would not agree to the promise, but nevertheless Newsome was convicted and suffered death by electrocution in September of 1927.<sup>60</sup>

In other cases, the threat of lynching in North Carolina courthouses caused the court to order additional support from armed officers who were tasked with keeping the courtroom peaceful. In one notable example in 1925, a Black 17-year-old named Alvin Mansel was tried for the alleged rape of a white woman in the presence of armed National Guardsmen. One journalist covering Mansel’s case noted that the “machinery of the court was speeded up” due to the hostile environment of the trial.<sup>61</sup> After Mansel was convicted and sentenced to death despite compelling evidence of innocence, the hostile courtroom environment was one of several factors raised in his appeal before the North Carolina Supreme Court. Mansel’s defense attorneys argued the following:

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<sup>57</sup> “Judge Grady, Pistol in Hand, Foils Attempt to Lynch Negro Murderer,” *News and Observer* (Raleigh), December 12, 1927, at 1.

<sup>58</sup> *Id.*

<sup>59</sup> Kotch, *Lethal State*, at 39.

<sup>60</sup> *Id.*

<sup>61</sup> “Alvin Mansel Sentenced to Die in the Electric Chair,” *The Ashville Citizen*, November 6, 1925, at 1.

“... it was impossible in the presence of the armed Militia to remove the idea from the public generally, including the jury, that the court was simply protecting the defendant to the end not that he should have a fair trial, but, that the law should have its course and that the law should execute him instead of the mob. The whole atmosphere of the Court House spoke out and said: ‘Let the law have him. It will do what ought to be done and let individuals stand back and let have its way.’”<sup>62</sup>

Mansel lost his appeal, but his punishment was eventually commuted to a sentence of life imprisonment following wide public acknowledgement that he was innocent. In October 1930, he left prison on parole.

*v. Tensions between Lynching and the Death Penalty*

While prosecuting a 1904 murder trial of a Black man named Will Exum, one state prosecutor argued that “lynching would be the result” if the jury did not issue a guilty verdict.<sup>63</sup> This prosecutor continued: “Strike down the strong arm of the law, and bloodshed will run riot in the land.”<sup>64</sup> The prosecutor’s logic in this case was simple: the jurors had an obligation to punish the Black defendant for his alleged offense, but could do so in a *more conscionable, sanitized* manner through the state’s capital punishment system. To the all-white jury, sentencing Exum to death and allowing him to be legally executed served as a more respectable and restrained form of criminal punishment than allowing him to die at the hands of the lynch mob.

Lynching in North Carolina was necessary to the state’s construction of an alternative—but still discriminatory and brutal—legal execution process. However, especially during the era of Jim Crow, North Carolina’s legal execution process was tasked with convincing its citizens that it could reliably target and punish Black individuals as effectively and efficiently as the lynch mob. As a result, lynching

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<sup>62</sup> Brief for the Defendant, *State v. Mansel*, 192 N.C. 20 (1925), 7.

<sup>63</sup> Kotch, *Lethal State*, at 50 (discussing *State v. Exum*, 213 N.C. 16 (1938)).

<sup>64</sup> *Ibid.*



and the state death penalty formed symbiotic, mutually reinforcing systems of violence primarily towards Black citizens. By the early 20<sup>th</sup> century, it became expressly clear that the mob and the state were competing to punish and subjugate Black North Carolinians. Thus, even as the number of lynchings waned, the deaths of Black citizens convicted of crimes and later executed for offenses for which they might have been lynched continued.

### *c. The Formation of North Carolina's Modern Execution System*

Lynchings and threatened lynchings began a slow decline by the 1930's, not because racial animus in the state had ceased to exist, but because lethal racial violence had become deeply embedded within North Carolina's state criminal punishment system.<sup>65</sup> From 1930 to 1940, North Carolina's capital punishment system executed 141 people—more than 75% of which were Black men.<sup>66</sup> The section below explores the rise of the state's legal capital punishment system.

#### *i. The Mandatory Death Penalty*

After the Civil War, North Carolina law mandated a death sentence for four crimes: first degree murder, rape, first degree burglary, and arson.<sup>67</sup> It was not until the 1940s that the death penalty for these crimes became a matter of discretionary judgment for the jury.<sup>68</sup> While this mandatory death penalty system existed, North Carolina's 362 executions from the end of the Civil War to World War II placed it sixth nationally and third in the South.<sup>69</sup>

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<sup>65</sup> *Id.* at 55.

<sup>66</sup> *See* ESPY File.

<sup>67</sup> Cindy F. Adcock, "The Twenty-Fifth Anniversary of Post-Furman Executions in North Carolina: A History of One Southern State's Evolving Standards of Decency," 1 *ELON U. L. REV.* 113, 16 (2009).

<sup>68</sup> *Id.* at 117 (describing how mandatory death sentenced were replaced with a discretionary system for burglary and arson in 1941, and then for murder and rape in 1949).

<sup>69</sup> North Carolina executed 362 people under state authority between 1910 and 1961. The Espy File lists 360 of these executions but does not include the execution of Taylor Love on December 1, 1911, or Edward Floyd on October 25, 1946. *See* Espy File; "Slayer Executed in Gas Chamber," *News and Observer* (Raleigh), October 26, 1946, at 10; "Taylor Love Pays Death Penalty," *News and Observer* (Raleigh), December 2, 1911, at 5; N.C. Dep't of Corr., Persons Executed in North Carolina, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/list-of-persons-executed> (last accessed on August 15, 2022).

ii. *Death Penalty for Rape and Burglary*

Central to understanding the death penalty's legacy of racial terror in North Carolina is an exploration of how the perceived threat of interracial sexual contact spurred racial violence throughout state history.<sup>70</sup> Many white North Carolinians identified interracial sexual contact as a direct assault against the white community.<sup>71</sup> A rape accusation against a Black man by a white woman, whether credible or not, often induced the wrath of the lynch mob. Even if the rape accusation was litigated in court, the accused was unlikely to encounter a sympathetic jury or impartial judge. One Black newspaper the *Carolinian* called a rape charge by a white woman against a Black man the equivalent of an automatic death sentence.<sup>72</sup>

North Carolina's historical punishment of sexual contact between Black men and white women extended to its treatment of executions for burglary. Those executed for burglary in North Carolina were all Black and their victims were all white. For decades, the state's capital burglary statute purported to protect "the sanctity of the home."<sup>73</sup> However, the statistics on those charged and convicted of first-degree burglary suggests that only white homes, and the white women who lived within them, were considered sacred in North Carolina.<sup>74</sup> In effect, the death penalty for burglary gave juries the opportunity to sentence Black men to death for the suspicion that they intended to commit a rape, or to execute a Black man for rape without publicly describing the crime as such.

Between the end of the Civil War and 1910, North Carolina executed twenty-four men convicted of rape. Of this group, just one of these executed people was white—a man who had been found guilty of

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<sup>70</sup> Kotch, *Lethal State*, 43-48.

<sup>71</sup> W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880-1930*, 58-60 (Univ. of Illinois Press 1993).

<sup>72</sup> "Toward Straight Thinking," *Raleigh Carolinian*, January 4, 1947, at 4.

<sup>73</sup> Rex Gore, "Facing Controversy: Struggling with Capital Punishment in North Carolina," a panel sponsored by the Southern Historical Collection and Wilson Library Special Collections, February 5, 2008.

<sup>74</sup> Kotch, *Lethal State*, 44.

raping his own daughter.<sup>75</sup> In cases where race-of-victim data is available, the rape convictions that resulted in death sentences for Black men involved white victims except in one case, where the victim was a child.<sup>76</sup> From 1910 to 1950, North Carolina executed 67 men for rape, almost 20 percent of the 256 people who were executed during this period.<sup>77</sup> Nearly all of them were Black, and nearly all of them were convicted of sexual attacks on white women.

In 1938, the Black-owned *Carolina Times* castigated the lethal power of the white woman's word. After a Black man was jailed following an accusation of rape by a white teenager, the paper opined, "It is plainly another case of a white woman's word being used instead of simple reasoning and thorough investigations on the part of those who have the strings of law and justice around their fingers."<sup>78</sup> Black men executed in North Carolina, especially those accused of rape, often evaded lynch mobs or were saved from lynching by local law enforcement officers only to receive a state-sanctioned execution.<sup>79</sup> As one journalist described, "the best ticket a man [on death row] can hold is that of being a white man."<sup>80</sup>

### iii. *From County to State-Administered Executions*

From 1865 to 1910, legal executions in North Carolina were administered by the state's individual counties. During this period, the state government provided little regulation or oversight on how counties conducted executions, and accordingly there was a great variance in execution procedures across the state. County sheriffs constructed their own scaffolding for hangings and often required support from sheriffs in neighboring counties to adequately tie the knots used during executions.<sup>81</sup> County-conducted executions were occasionally botched, such as during the 1901 hanging of a Black man where the rope broke as the

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<sup>75</sup> *Id.* at 45.

<sup>76</sup> "The Gallows," *The Weekly Star* (Wilmington), January 17, 1890, at 1.

<sup>77</sup> Kotch, *Lethal State*, 45.

<sup>78</sup> "Orange County Sheriff Refuses to Release or Indict Man for Rape," *Carolina Times* (Durham), December 10, 1938, at 4.

<sup>79</sup> Kotch and Mosteller, "The Racial Justice Act," at 2064 (noting that between 1900 and 1941, at least ten of the Black men executed for rape of white women were saved from lynchings before their trial).

<sup>80</sup> C.J. Parker, Jr., "The State's Death Lottery," *News and Observer* (Raleigh), January 15, 1928, at 4.

<sup>81</sup> Kotch, *Lethal State*, at 60.

scaffolding trap was sprung.<sup>82</sup> Other counties conducted hangings without ropes, such as the 1905 hanging of a 16-year-old Black boy named Walter Partridge, who was hung with fishing twine.<sup>83</sup>

Even after the North Carolina legislature passed a 1868 bill mandating that sheriffs conduct execution out of the public view, counties did little to limit the public's spectatorship of capital punishment. For instance, in Ben Williams' 1906 execution at the Wake County jail, the *News and Observer* noted "the waiting throng in the jail yard surged behind [Williams] like the crowd clamoring at the tent-gate of a circus... Unvoiced, but strong and sinister, there went forth from the black figure on the gallows to the brains of the watching crowd, the message, the shudder, of mystery, of awe."<sup>84</sup> The next winter, a "morbid crowd" trekked through ice and snow to congregate for an execution of two men in Durham.<sup>85</sup>

In 1908, North Carolina Attorney General Robert D. Gilmer urged the state legislature to revise its capital punishment administration. Gilmer argued that legal executions should take place only at state-operated prisons where the state government could ensure "a speedy death at the hands of persons familiar with the work, rather than a bungling execution at the hands of sheriffs who are totally unfamiliar with hangings."<sup>86</sup> In 1909, a North Carolina legislator introduced a bill that established State's Prison in Raleigh as the permanent location for the state's executions.<sup>87</sup> The bill also proposed that death sentences be carried out by electrocution rather than by hanging.<sup>88</sup> Thus, in 1910 North Carolina simultaneously ushered in the era of state-conducted executions and the era of the electric chair.

iv. *The Electric Chair and the Gas Chamber*

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<sup>82</sup> "The Rope Broke and Louis Council Fell," *News and Observer* (Raleigh), November 20, 1901, at 1.

<sup>83</sup> "Partridge Paid the Death Penalty," *Greensboro Patriot*, April 12, 1905, at 6.

<sup>84</sup> "Nothing to Say on the Scaffold," *News and Observer* (Raleigh), December 21, 1906.

<sup>85</sup> "Durham Agog over First Hangings," *News and Observer* (Raleigh), February 8, 1907, at 1; "Two Hanged on Same Gallows," *News and Observer*, February 9, 1907, at 1.

<sup>86</sup> *Biennial Report of the Attorney General of the State of North Carolina* (1907-1908), 11, NCC.

<sup>87</sup> S.B. 37, *Journal of the Senate of the State of North Carolina at Its Session of 1909* (Raleigh: E.M. Uzzell, 1909), 18.

<sup>88</sup> *Ibid.*

On March 18, 1910, North Carolina electrocuted its first convicted prisoner at the State Penitentiary: Walter Morrison, a Black man accused of rape.<sup>89</sup> Morrison was strapped into the electric chair before a white audience at the prison, wires running head-to-toe, and pulsed with minute-long shock intervals of 1,800 volts. In a prison report, the warden reported that “the operation of the first electrocution was perfect, and I believe that the death was almost instantaneous.”<sup>90</sup> However, it took four minutes of electrocution to kill Morrison, which the press described as “the usual resistance of a strong negro’s body.”<sup>91</sup> The deliberate use of a lower-cased letter n in the word “Negro” reflected the lack of regard for Morrison, even in death.<sup>92</sup>

Over the next decades, the state-conducted electrocutions proved to be as gruesome and torturous as any form of criminal punishment in North Carolina’s history. For example, when a Black man named Will Frazier was executed in 1921, the contraption significantly burned his flesh, the smell of which emanated throughout the execution and viewing chambers.<sup>93</sup> The crowd in attendance described feeling sickened by Frazier’s wails and smoke that emanated from his body after he was pronounced dead.<sup>94</sup> During the 1931 executions of 17-year-old J.W. Ballard and 18-year-old Bernice Mathews, both Black teens were severely burned by the chair’s electric currents.<sup>95</sup> In front of the chamber audience, Matthews’ ear was almost burnt off and Ballard’s head caught on fire.<sup>96</sup> North Carolina used the electric chair at the

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<sup>89</sup> See ESPY File; Kotch, *Lethal State*, 67-69.

<sup>90</sup> *1909-1910 Reports of the Superintendent, Warden, and other Officials of the State’s Prison, Raleigh, N.C.*, at 15, <https://digital.ncdcr.gov/digital/collection/p16062coll9/id/247598> (last accessed on August 15, 2022).

<sup>91</sup> “First Electrocution Ends Walter Morrison’s Life,” *News and Observer* (Raleigh), March 19, 1910, at 5.

<sup>92</sup> Donald L. Grant and Mildred Bricker Grant, “Some Notes on the Capital ‘N,’” *Phylon*, vol. 36, no. 4 (4<sup>th</sup> Qtr., 1975), 435-43.

<sup>93</sup> “Shrieks of Negro Drown Death Roar,” *News and Observer* (Raleigh), May 28, 1921, at 3.

<sup>94</sup> *Ibid.*

<sup>95</sup> “Negroes Who Assaulted White Woman Pay Penalty of Death,” *News and Observer* (Raleigh), September 16, 1922, at 1.

<sup>96</sup> *Ibid.*

State Penitentiary to execute 166 convicted prisoners from 1910 to 1938. Nearly 80% of those executed by electrocution were Black.<sup>97</sup>

In 1935, a North Carolina legislator named Charles A. Peterson introduced a bill to change the state's method of execution from electrocution to asphyxiation by gas, which Peterson argued would be "more humane for the witness."<sup>98</sup> The bill passed, and by 1936, the execution room at the State Penitentiary was reconfigured to operate as a gas chamber.<sup>99</sup> The first person executed by asphyxiation in North Carolina was Allen Foster, another Black teen convicted of raping a white woman. Though state officials noted that they hoped Foster would die "without howling, without squirming," his execution was described as one of the most horrific in the state's execution history.<sup>100</sup> For at least three minutes, Foster "suffered obviously and consciously" before he passed out from the cyanide gas, and eight minutes later Foster was pronounced dead.<sup>101</sup> Following the execution, Warden H.H. Honeycutt, who attended 158 executions by electrocution, acknowledged being sickened by the asphyxiation process and noted that electrocutions and hangings were far preferable.<sup>102</sup> The Wake County coroner noted that Foster's execution was "one of the most terrible and horrible things [he] ever looked at."<sup>103</sup> From 1935 to 1961, North Carolina executed 194 people through asphyxiation by gas, more than 75% of whom were Black men.

## **VI. Capital Punishment and the Civil Rights Era (1961—Present)**

During the 1960s, the southern civil rights movement posed the most significant challenge to the state's white racial hierarchy since the Civil War and era of Reconstruction. Nonviolent, organized efforts to advance Black freedom found footing in North Carolina but were met with resistance from white

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<sup>97</sup> See ESPY file.

<sup>98</sup> Kotch, *Lethal State*, 72-73.

<sup>99</sup> *Id.* at 73-74.

<sup>100</sup> *Id.* at 75.

<sup>101</sup> "First Lethal Gas Victim Dies in Torture as Witnesses Quail," *News and Observer* (Raleigh), January 25, 1936, at 1.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

elected officials who disingenuously framed institutional racial integration as federal overreach into the South. Opposition to the civil rights movement also galvanized white supremacist organizations such as the resurgent North Carolina Realm of the United Klans of America, which in the 1960s accounted for more than half of the Klan's membership in all the South.<sup>104</sup> While North Carolina's death penalty lied dormant from 1961 to 1984, it would soon be reestablished as a vessel of white rage during the eras of "law and order" policing and punishment.

***a. Disparities in the rate of participation of African American citizens as jurors in death penalty cases is a legacy of race discrimination in public policy and judicial practices and traditions.***

In *Flowers v. Mississippi* (2019) the Supreme Court reversed the conviction and death sentence of a Black man who had been tried six times by the same prosecutor in trials that excluded nearly all (41 of 42) potential African American jurors.<sup>105</sup> The Court named the state's motivation, "[t]he State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury."<sup>106</sup>

The *Flowers* opinion reviewed the nation's long struggle against the pernicious exclusion of Black citizens from jury service. Starting with the Civil Rights Act of 1875 and its explicit extension of the jury franchise to the formerly enslaved, the Court surveyed several civil rights landmarks, including *Strauder v. West Virginia* (1880), *the Slaughter-House Cases* (1873), *Brown v. Board of Education* (1954), *Swain v. Alabama* (1965) and *Batson v. Kentucky* (1986).

Justice Kavanaugh wrote with evident frustration with the culture and practices that continued to deny Black citizens the right to serve as jurors. "In the aftermath of *Strauder*, the exclusion of black jurors became more covert and less overt—often accomplished through peremptory challenges in individual

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<sup>104</sup> David Cunningham, *Klansville, U.S.A.: The Rise and Fall of the Civil Rights-Era Ku Klux Klan*, at 5 (Oxford Univ. Press 2012).

<sup>105</sup> *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019)

<sup>106</sup> *Id.* at 2.

courtrooms rather than by blanket operation of law. But as this Court later noted, the results were the same for black jurors and black defendants, as well as for the black community's confidence in the fairness of the American criminal justice system."<sup>107</sup>

The Court referred to a basic math principle that make peremptory challenges such a lethal tool of race discrimination. "Simple math shows how that [widespread discrimination continuing after *Strauder*] happened. Given that blacks were a minority of the population in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So, prosecutors could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white jurors."<sup>108</sup> In North Carolina, prosecutors' challenge to secure all-white juries became easier when in 1977 the legislature increased prosecutors' peremptory challenges in death penalty cases to fourteen.

The 2009 Session of the North Carolina General Assembly (following the election of the first African American president) passed the Racial Justice Act to redress "the egregious legacy of the racially discriminatory application of the death penalty in this state."<sup>109</sup> That legacy included:

Facially race-neutral statutes, such as poll taxes and literacy test, and the separate but equal" fallacy were instituted to legally discriminate against African-Americans. In the early 1900's, African-Americans were excluded from jury service in North Carolina through laws requiring that jurors: (1) had paid taxes the preceding year; (2) were of good moral character, and (3) possessed sufficient intelligence. \*\*\*

The same racially oppressive beliefs that fueled segregation manifested themselves through public lynching, disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries.

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<sup>107</sup> *Id.* at 11.

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *State v. Robinson*, 375 N.C. 173, at 175 (2020)



Given the racially oppressive practices and beliefs that permeated every level of American society during the Jim Crow era, the constitutionally protected right of African-American defendants to be tried by a jury of their peers became increasingly important.<sup>110</sup>

The legacy of discrimination in the jury box persisted even as Jim Crow gave way to the Civil Rights era.<sup>111</sup>

Even as periodic court rulings continued to affirm the value of equal representation in the jury box, the proponents of exclusion pursued more covert tactics. The *Robinson* Court identified the problem:

As progress was made toward ensuring equal representation in juries, discrimination shifted from the composition of the venire to the composition of the jury itself. Peremptory challenges became the next tool for limiting African Americans from serving as jurors because there were previously no African American jurors on the jury panel against whom peremptory challenges could be used. In North Carolina, the number of peremptory challenges increased from six to fourteen during this period.<sup>112</sup>

The *Robinson* opinion discusses at length the extraordinary legislative and judicial course of the Racial Justice Act. While a thorough analysis of the RJA is beyond the scope of this report, the dramatic jousting between the legislative, judicial, and executive branches of government is resonant of earlier periods of Reconstruction in the American South, and informative of persistence of discrimination in the exercise of juror franchise.<sup>113</sup> Four important markers of the struggle cited by the *Robinson* Court are:

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<sup>110</sup> *Id.* at 178-179.

<sup>111</sup> *State v. Lord*, 225 N.C. 354 (1945) (citizens excluded because they were not tax-paying property owners) *State v. Speller*, 229 N.C. 67 (1948) (Bertie County clerk admits using different colored ink to identify jurors by race, the scheme excluding any Black citizen from ever serving on a jury, in a county with 60% Black population.)

<sup>112</sup> *Id.* at 179.

<sup>113</sup> This topic is explored at length within Kotch and Mosteller, “The Racial Justice Act,” 2043-2077.

- The trial court in its meticulously detailed findings, laid out how Robinson had shown that race was a significant factor during jury selection in his case.<sup>114</sup>
- Following Robinson’s hearing the General Assembly Amended the RJA, limiting the scope of statistical evidence for future hearings.<sup>115</sup>
- On December 13, 2012, trial court granted relief to three other Cumberland County RJA petitioners following a consolidated evidentiary hearing.<sup>116</sup>
- After the four RJA petitioners showed that their death sentences were sought or imposed based on race, the General Assembly repealed the RJA, and made the Repeal retroactive.<sup>117</sup>

The court concluded that because Robinson met the requirements of the RJA, and the trial court pursuant vacated his death sentence, he was constructively acquitted of the death penalty. Retroactive application of the RJA Repeal would therefore violate the Double Jeopardy Clause.

More than 130 RJA petitioners had filed for relief under RJA but had not gone to hearing before the legislature repealed the RJA in 2013. Thus, while the highly partisan legislative reversal appeared unseemly, it is clear that double jeopardy was not implicated. In *State v. Ramsey* (2020) the Supreme Court applied a precedent protecting an 1866 pro-confederacy session (the Amnesty Act) from a Repeal of the law (1868) by a Reconstruction-era legislature.<sup>118</sup> In *State v. Keith* (1868) Colonel James Keith, a former confederate officer, charged in the 1863 Laurel-Shelton massacre, with the murder of 13 Union sympathizers.<sup>119</sup> At the end of the Civil War the legislature passed an amnesty law protecting soldiers and officers from war crime prosecutions committed in the exercise of their military duties. By the time

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<sup>114</sup> *Id* at 181

<sup>115</sup> *Id.*

<sup>116</sup> *Id* at 182.

<sup>117</sup> *Id.*

<sup>118</sup> *State v. Ramsey*, 374 N.C. 658 (2020)

<sup>119</sup> *State v. Keith*, 63 N.C. 140 (1868)

Colonel Keith went to trial the amnesty act had been repealed, and Keith was prosecuted and convicted. On appeal the Supreme Court found the Repeal to violate the *Ex Post Facto* Clause. In *Ramseur*, the court held “the right is to challenge a sentence of death on the grounds that it was obtained in a proceeding tainted by racial discrimination ...Repealing the RJA took away that right, and the repeal cannot be applied retroactively consistent with this state’s constitutional prohibition on *ex post facto* laws.”<sup>120</sup>

## **Conclusion**

In reversing the death sentence of Marcus Robinson pursuant to the Racial Justice Act in 2020, the North Carolina Supreme Court), reviewed the same history discussed in the *Flowers* opinion.

The same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries. Given the racially oppressive practices and beliefs that permeated every level of American society during the Jim Crow era, the constitutionally protected right of African-American defendants to be tried by a jury of their peers became increasingly important. The Supreme Court of the United States recognized that facially neutral statutes could violate the Fourteenth Amendment because, “equal protection to all must be given—not merely promised.”<sup>121</sup>

As is discussed within *Robinson* and has been explored at length within this report, the history of capital punishment in North Carolina is situated within a deeply engrained and complicated legacy of racial terror. Punishment by death—whether administered by enslavers, the lynch mob, or the state—has proven malleable across nearly four centuries of our territory’s history, but its principal target has remained Black North Carolinians. Throughout our state’s history, capital punishment has served as a unique component of a complex intimidation apparatus that has eroded Black citizens’ faith in the

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<sup>120</sup> *State v. Ramseur* at 679.

<sup>121</sup> *State v. Robinson* at 178.

criminal justice and death penalty systems. As our state's death row population increases year by year, North Carolina's capital punishment system serves as both a somber memento of our state's violent past and a sobering glimpse into our state's punitive future.