

AS COMPARED WITH WHAT? A RESPONSE TO BROOKS EMANUEL'S CRITIQUE OF NORTH CAROLINA'S COMPARATIVE PROPORTIONALITY REVIEW

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The death penalty in North Carolina, as in many places across the country, appears to be at a crossroads. Within the last decade, fewer death sentences are being imposed¹ and executions have been rare.² Yet with the sixth most populous death row in the country³ and persistent efforts in the General Assembly to re-start executions,⁴ the next chapter in the state's long and ugly history with the death penalty remains unclear.

Brooks Emanuel's article, *North Carolina's Failure to Perform Comparative Proportionality Review*,⁵ offers a strong argument that North Carolina's death penalty system is constitutionally infirm. Emanuel asserts that because the North Carolina Supreme Court fails to perform its statutorily mandated comparative proportionality review in capital cases and because the state otherwise fails to prevent discriminatory death sentences from being imposed, North Carolina's imposition of the death penalty violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

While Emanuel's argument is well grounded, I question the practicality of some of his arguments based on my following observations.

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1. There has been one new death sentence thus far in 2016. There were no new death sentences imposed in 2015. Since the last execution in North Carolina on August 18, 2006, a total of 18 people have been sentenced to death. *See, e.g.*, N.C. DEP'T OF PUB. SAFETY, DEATH ROW ROSTER, <http://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/Death-Row-Roster> (last visited Apr. 13, 2016).

2. Samuel Flippen was the last North Carolina inmate executed on August 18, 2006. *See* N.C. DEP'T OF PUB. SAFETY, EXECUTIONS 1986-2006, <http://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/List-of-persons-executed/Executions-1984-2006> (last visited Apr. 13, 2016).

3. *See* CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW U.S.A WINTER 2016 (2016), http://www.naacpldf.org/files/publications/DRUSA_Winter_2016.pdf

4. For example, the Restoring Proper Justice Act, House Bill 774, was passed and signed into law in 2015. The law permits executions to occur without the participation of a physician and exempts from the State's public records laws information relating to drugs being used in executions. *See* H.B. 774, 2015-198 Gen. Assemb. (N.C. 2015), <http://www.ncleg.net/gascripts/BillLookup/BillLookup.pl?BillID=H774&Session=2015>.

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

First, central to Emanuel's argument that the North Carolina Supreme Court's failure to properly conduct comparative proportionality review in capital cases reaches constitutional proportions is that evidence produced during litigation of North Carolina's Racial Justice Act (RJA) demonstrated that the state's death penalty system has otherwise permitted arbitrary and discriminatory death sentences.⁶ Largely unaddressed in his article, however, is the legislative and legal status of the RJA and whether the historic litigation and important findings described by Emanuel will ultimately survive in order to provide support for the argument he offers.

As Emanuel details, in the robust April 20, 2012 opinion in Marcus Robinson's case,⁷ Cumberland County Superior Court Judge Gregory Weeks found the North Carolina Conference of District Attorneys trained prosecutors statewide "on how to avoid a finding of a *Batson* violation."⁸ These methods of evasion enabled prosecutors to evade the strictures of *Batson v. Kentucky*⁹ between 1990 and 2010 while nonetheless striking 52.6% of eligible black venire members, compared to only 25.7% of all other eligible venire members.¹⁰ As Judge Weeks found, the probability of this disparity occurring in a race-neutral jury selection process was less than one in ten trillion.¹¹ Emanuel forcefully argues that evidence that prosecutors across the state struck eligible black venire members at twice the rate of eligible white venire members—occurring at the same time that the North Carolina Supreme Court was failing to adequately perform its comparative proportionality review—strongly indicated that North Carolina failed to prevent discriminatory sentences when not following its own statute.

Yet the strength of this argument to support Emanuel's thesis is threatened by the current state of the RJA, which hangs precipitously in the balance. As Emanuel briefly notes, the RJA, originally passed in 2009, was drastically undermined by North Carolina lawmakers in 2013.¹² How this repeal will affect pending RJA claims remains unclear. The North Carolina Supreme Court just recently granted

6. Emanuel, *supra* note 5, at 447-63. Emanuel discusses the cases of Marcus Raymond Robinson, *supra* note 5, at 451-57, as well as Tilmon Golphin, Christina Walters, and Quintel Augustine, *supra* note 5, at 457-62 [hereinafter Racial Justice Act Litigation]. Mr. Robinson obtained relief under the North Carolina Racial Justice Act, § 15A-2012(a)(3), S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214 (repealed 2013). See Emanuel, *supra* note 5, at 451. Mr. Golphin, Ms. Walters, and Mr. Augustine received relief under the revised version, Act to Amend Death Penalty Procedures, § 15A-2011(a) & (c), S.L. 2012-136, 2012 N.C. Sess. Laws 471, 471 (amending North Carolina Racial Justice Act, § 15A-2011, S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214 (repealed 2013)). See Emanuel, *supra* note 5, at 457-58.

7. Order Granting Motion for Appropriate Relief, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) [hereinafter Robinson Order], <http://www.deathpenaltyinfo.org/documents/RobinsonRJAOrder.pdf>.

8. Robinson Order, *supra* note 7, at 156-57.

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

10. Robinson Order, *supra* note 7, at 58.

11. Robinson Order, *supra* note 7, at 58.

12. Emanuel, *supra* note 5, at 460.

certiorari in a case that will likely decide whether the legislative repeal of the RJA will apply retroactively.¹³

As with the law itself, the viability of Judge Weeks' order in *Robinson* is also presently very much in question. On December 18, 2015, the North Carolina Supreme Court issued decisions in two RJA cases, including the *Robinson* case.¹⁴ While the court did not overturn the key findings by the trial court (*i.e.*, that African-Americans have been systematically excluded from serving on capital juries, producing unfair outcomes for defendants on trial for their lives), the court indicated that the State deserved more time to review the findings of a comprehensive statistical study presented by defendants, which reviewed hundreds of capital cases from 1990-2010 and found that prosecutors used peremptory strikes to remove qualified black jurors at more than twice the rate of white jurors.¹⁵ The court remanded all of the cases to Superior Court and suggested that "the trial court may, in the interest of justice, consider additional statistical studies presented by the parties."¹⁶ Thus, the sustainability of the important findings made by Judge Weeks—who has since retired and will not preside over the remanded cases—is very much in question.

Second, while Emanuel credibly details how North Carolina's prescriptive safeguard of comparative proportionality review has, in practice, fallen well short of its statutory dictates, I question the ultimate merit or value of the tool itself. As a preliminary matter, it is unclear to me what a truly robust and comprehensive proportionality review would look like. While Emanuel's article focuses (as it promised to do) on what does not work with North Carolina's review process, it sheds little light, if any, on what a working and effective system of review would look like.

Moreover, given recent rumblings in the U.S. Supreme Court about the death penalty, it is not clear to me that comparative proportionality review, done poorly or otherwise, will be determinative for the future of capital punishment.

In *Glossip v. Gross*,¹⁷ a handful of justices engaged in a remarkable exchange about the constitutionality of capital punishment. Echoing former Justice Arthur Goldberg's famous dissent in *Rudolph v. Alabama*,¹⁸ Justice Breyer's dissent in *Glossip* catalogued constitutional arguments against the death penalty.¹⁹ Noteworthy and controversial for its significance,²⁰ Breyer's dissent made note

13. *State v. Burke*, 782 S.E.2d 737 (N.C. 2016), *cert. granted*.

14. *State v. Robinson*, 780 S.E.2d 151 (2015) (411A94-5); *see also State v. Augustine*, 780 S.E.2d 552 (2015).

15. *Robinson*, 780 S.E.2d at 151-52.

16. *Robinson*, 780 S.E.2d at 152; *Augustine*, 780 S.E.2d at 552.

17. *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

18. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting).

19. *Glossip*, 135 S.Ct. 2726 (2015) (Breyer, J., dissenting).

20. *See, e.g.*, Adam Liptak, *Death Penalty Foes Split Over Taking Issue to Supreme Court*, N.Y. TIMES (Nov. 3, 2015), <http://www.nytimes.com/2015/11/04/us/politics/death-penalty-opponents-split-over-taking-issue-to-supreme-court.html>; Lincoln Caplan, *Richard Glossip and the End of the Death*

of—and yet seemed to readily dismiss—the utility of comparative proportionality review.²¹

To be sure, it is well worth the time to read Emanuel’s analysis of the North Carolina Supreme Court’s abdication of its duty in performing a comparative proportionality review, as well as his recounting of the historical significance of Judge Weeks’ order in *Robinson*. But the remedy for the flaws in North Carolina’s death penalty system will almost certainly come from somewhere else.

Penalty, THE NEW YORKER (Sep. 30, 2015), <http://www.newyorker.com/news/news-desk/richard-glossip-and-the-end-of-the-death-penalty>.

21. *Glossip*, 135 S. Ct. at 2763 (2015) (Breyer, J., dissenting) (“Finally, since this Court held that comparative proportionality review is not constitutionally required...it seems unlikely that appeals can prevent the arbitrariness I have described”).