



NEBRASKA RACIAL JUSTICE ACT: FACT SHEET

*We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals.*¹

(Sotomayor, J., dissenting)

Racial Bias in the Courtroom:

Racial bias can influence outcomes throughout a trial—from jury selection to charging decisions and sentencing.² Allowing racial bias to influence any case is an injustice; however, a defendant’s ability to demonstrate the effect of racial bias in the trial process is severely limited under current law. Unfortunately, today’s current constitutional framework provides little recourse. Unless the defendant can meet an incredibly high standard of proof, a court will not hold that the racial bias violated the Equal Protection Clause of the Fourteenth Amendment. However, just because bias does not satisfy the standard required to show an equal protection violation does not mean the bias should be tolerated by state legislatures.

Proposal Summary:

The Nebraska Racial Justice Act (“RJA”) would allow an individual convicted of a felony to challenge their sentencing or conviction, through the admission of statistical evidence and other material, on the basis that racial bias was a substantial factor in the outcome of their case. The RJA permits such an individual to show racial bias through admitting the following types of evidence:

1. Explicit racial bias by an attorney, judge, law enforcement officer, expert witness, or juror involved in the case.
2. Use of racially discriminatory language in court and during the criminal proceedings, whether or not intentional.

¹ *Schuetz v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*, 572 U.S. 291, 380-81 (2014).

² See Justice Marshall’s dissent in *Furman v. Georgia*, “...we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.” *Furman*, 408 U.S. at 253, 92 S.Ct. 2726 (Douglas, J., concurring).

3. Racial bias in jury selection³, such as removing all or nearly all people of color from the jury.⁴
4. Statistical disparities in charging and convictions – that is, evidence that people of one race are disproportionately charged or convicted of a specific crime or enhancement.⁵
5. Statistical disparities in sentencing – that is, evidence that people of one race receive longer or more severe sentences, including the death penalty or life without parole.⁶

Background Information on the RJA:

Under the landmark *McCleskey v. Kemp* case, the Supreme Court of the United States (“SCOTUS”) established a precedent that has left the courts unable to effectively address racial discrimination in criminal cases.⁷

- The defendant, Warren McCleskey, was accused of killing a white police officer during a robbery and faced the death penalty. McCleskey’s attorneys presented strong statistical evidence demonstrating that African American defendants were more likely to receive a death sentence than any other defendant. They argued that this racial disparity violated Mr. McCleskey’s 8th and 14th Amendment Rights.⁸

³The RJC is compiling data on the frequency of *Batson* challenges successes, “race-neutral” reasoning for a BIPOC potential juror’s removal, as well as general jury demographics in Nebraska.

⁴ Examples of racially motivated peremptory strikes that were survived *Batson* challenges under Nebraska appellate courts:

In *State v. Wofford*, the appellate court decision reflects that the sole Black juror out of 62 potential jurors in the venire was struck by the State. When defense counsel raised a *Batson* challenge, the Court found that the prosecutor’s reasoning, the sole Black juror’s beliefs would prevent him from participating in deliberations because of his reluctance to judge the defendants, who are also Black. After further questioning by the prosecutor, the Black potential juror clarified that he could render a fair decision, but the Court nevertheless held that the potential juror could be struck for the reasoning predicated on the initial statements by the prosecutor. *State v. Wofford*, 298 Neb. 412, 904 N.W.2d 649 (2017).

In *State v. Edwards*, a *Batson* challenge was raised to the State’s strike of two of three potential Black jurors. Both Black potential jurors were women that lived in North Omaha. The prosecutor’s justification for striking one juror was struck for she had had contact with the county attorney’s office in a sexual assault case and seemed reluctant to discuss the facts of the case. The second juror was struck for her “negative feelings” on the police’s ability to investigate a robbery she recently experienced. *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993).

⁵ Nebraska’s prison population is indicative of racial disparities in several areas of the criminal justice system - one being in the sentencing and conviction of BIPOC Nebraskans.

⁶ Currently, there is no data that demonstrates whether there is racial and ethnic disparity in the types of sentencing that non-white Nebraskans receive in comparison to white Nebraskans. The RJC is conducting a study on disparities on the type/kind of sentencing based on pre-sentencing investigation reports (PSIs), hopefully to be complete by Jan 2021.

⁷ *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

⁸ *McCleskey*, 481 U.S. at 286-292, 107 S.Ct. at 1764-1767.

- Nevertheless, the Court ruled that statistical evidence was insufficient to show a constitutional violation, requiring instead that a defendant show "exceptionally clear proof" of discrimination under the facts of his or her own case. The majority's insistence on proof of intentional or purposeful discrimination established a legal standard nearly impossible to meet.⁹

Currently, statistical evidence is not permitted to show racial bias. Nebraskans must rely on state or federal constitutional provisions to challenge discrimination in the criminal justice system.

- However, it is clear that these provisions have proven insufficient to address persistent racial discrimination in the criminal justice system because the courts have concluded that, due to the *McCleskey* case and others, proof of purposeful discrimination is required.
- Various studies, dating from several decades past to present, have found that the jury selection process, prosecutorial charging decisions, and jury sentencing are commonly identified as gateways for racial bias to infiltrate the court system.¹⁰

However, *McCleskey* did not render state legislatures powerless. According to the majority opinion, state legislatures may address racial bias in the criminal justice system¹¹—and a couple states have done so.

- Kentucky passed its own version of the RJA in 1998.¹²
- In 2009, North Carolina also pursued a similar effort until a gerrymandered State Legislative majority overturned the law in 2013.¹³ The four years that the RJA was in effect in North Carolina covered claims for more than 130 death row inmates.¹⁴
- Texas introduced two versions of the RJA in 2013. Notably, this legislation was supported by some District and County Attorneys.¹⁵ The RJC has secured bill authors for the RJA to be reintroduced in the 2021 Texas legislative session.

⁹ *McCleskey*, 481 U.S. at 313, 107 S.Ct. at 1778.

¹⁰ Equal Justice Initiative (EJI), *Illegal Racial Discrimination in Jury Selection*, August 2010. <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection/>; O'Brian, Barbara; Grosso, Catherine M., *Report on Jury Selection Study*. Michigan State University College of Law. Sept. 19, 2011. <https://digitalcommons.law.msu.edu/facpubs/331/>.

¹¹ *McCleskey*, 481 U.S. at 319, 107 S.Ct. at 1781 (quoting *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931)(holding that legislatures are best fit to address racial bias claims and can also "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.").

¹² Ky. Rev. Stat. § 532.300.

¹³ Carlisle, Madeleine. N.C. Supreme Court Rules Over 100 Death Row Inmates Have Chance to Prove Racism Affected Their Sentences. *Times*, June 5, 2020. <https://time.com/5849203/north-carolina-death-row-surpeme-court-racism/>.

¹⁴ *Id.*

¹⁵ Chammah, Maurice. "Lawmakers Discuss Race-Related Evidence in Death Penalty Cases." *Texas Tribune*. April 16, 2013. <https://www.texastribune.org/2013/04/16/lawmakers-discuss-race-testimony-death-penalty-cas/>.

- The California state legislature passed an RJA available to all felonies as of September 2020 and is awaiting a gubernatorial signature.¹⁶

The Nebraska Racial Justice Act (“RJA”) would mirror efforts to address inequities beyond those that exist in capital punishment cases. The RJA would apply to all felony charges and convictions.

- The State of Nebraska’s motto is “Equality Before the Law.”
- On June 11, 2020, Chief Justice Michael Heavican of the Nebraska Supreme Court issued a statement addressing the attention that recent events placed on equal access to the court and addressing deficiencies traditionally experienced by persons of color and other historically disadvantaged persons.¹⁷
- Chief Justice Heavican stated that, “All Nebraskans must have equal access to justice in our courts, and there is no place in our court system for historic racial discrimination or inequity.”¹⁸

The RJA can secure this urgent guarantee warranted by Nebraska’s state motto in Nebraska state courts.

¹⁶ California Assembly Bill (“AB”) 2542 (2020).

¹⁷ The Daily Record, “Nebraska Courts Seek “Equality Under the Law.” Michael G. Heavican. June 24, 2020. <https://www.omahadailyrecord.com/content/nebraska-courts-seek-%E2%80%98equality-law%E2%80%999>.

¹⁸ *Id.*