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## Voices for Justice

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## FOREWORD: Voices for Justice

THE HONORABLE ANITA S. EARLS\*

The articles and essays in this volume are precisely the kind of scholarship that is required to give voice to the experiences of Black and Brown people in North Carolina and more broadly around the country, experiences that otherwise remain largely invisible. Indeed, as Professor Njeri Rutledge eloquently explains here, sometimes the racialized aspect of those experiences become normalized and hence invisible even to the most directly affected individuals.<sup>1</sup> That invisibility has dire consequences for everyone. These articles also helpfully illuminate some of the issues that contribute to the criminal justice system's enduring disparate racial outcomes as well as what it will take to eliminate them.

Lest we underestimate the challenge ahead, it is important to remember that we are living in an era where the divisions between white and Black, rich and poor, those well-fed and housed, those hungry and homeless, and the healthy and the sick, have become ever-deepening chasms.<sup>2</sup> Kenya Glover's research on how implicit racial bias impacts the ability of Black women to access the health care they need dramatically and powerfully documents what creates the chasm and how the legal system fails to offer effective remedies. Jennifer Lechner and Leigh Wicclair's article makes

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\* Associate Justice, North Carolina Supreme Court. I would like to acknowledge the tremendous contributions of my research assistant, Jean-Paul Jacquet-Freese, whose talented and tireless work in connection with the Governor's Task Force on Racial Equity in Criminal Justice has been phenomenal.

1. *Accord* Njeri Rutledge, Opinion, *I Thought I Never Personally Experienced Racism. Then I Realized I Just Normalized It.*, USA TODAY (Sept. 15, 2020, 8:23 AM), <https://www.usatoday.com/story/opinion/voices/2020/09/15/racism-every-day-black-women-column/5793258002/> [<https://perma.cc/9WK7-V5NN>].

2. *Study Finds Significant Racial Disparities in Homelessness Rates*, NAT'L LOW INCOME HOUS. COAL. (Apr. 9, 2018), <https://nlihc.org/resource/study-finds-significant-racial-disparities-homelessness-rates> [<https://perma.cc/7C4L-BG98>]. See generally GENE R. NICHOL, *THE FACES OF POVERTY IN NORTH CAROLINA* (2018). Historian William Chafe recently noted that “[n]ot since the eve of the Civil War has America been this polarized.” William H. Chafe, Opinion, *Before Reconciliation, We Must Come to Grips With N.C.'s History on Race*, NEWS & OBSERVER (Jan. 28, 2021, 1:04 PM), <https://www.newsobserver.com/opinion/article248799880.html> [<https://perma.cc/65MV-59PK>]. He concludes that “a series of Truth, Justice and Reconciliation Commissions” are needed. *Id.*

real the burdens that disproportionately fall on Black and African-American drivers and their families, drivers who have had their licenses suspended due to traffic ticket debt that affluent drivers would hardly notice. In general, those social divisions have led to extremely different perceptions of reality that make productive public policy debates about race nearly impossible and middle ground seemingly non-existent.<sup>3</sup> To take an example from popular culture, on one side of the political spectrum, being a social justice warrior is anathema, the worst kind of insult, while on the other side, it is revered and the highest aspiration.<sup>4</sup>

These deep divisions are also present in judicial responses to the racially disparate outcomes in the justice system generally and disparities in the criminal justice system in particular. There is profound disagreement over whether the significant overrepresentation of African-Americans in the criminal justice system<sup>5</sup> is proof that the system is working correctly, or evidence of how racism permeates every aspect of the system.<sup>6</sup> Given that

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3. See, e.g., Meredith Conroy & Perry Bacon Jr., *There's A Huge Gap in How Republicans and Democrats See Discrimination*, FIVETHIRTYEIGHT (June 17, 2020, 7:00 AM), <https://fivethirtyeight.com/features/theres-still-a-huge-partisan-gap-in-how-american-s-see-discrimination/> [<https://perma.cc/4G8X-7W88>]; Theodore R. Johnson, *How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/> [<https://perma.cc/2KU7-AMVT>] (“More than 80 percent of black Americans believe that racial discrimination prevents them from getting ahead, and nearly 70 percent say being white provides advantages. Similarly, the majority of white Americans believe that discrimination against white people is a problem today, and nearly half of white Millennials think it’s as big of a problem as discrimination against black Americans. And more than three-quarters of Republicans believe that people see discrimination where it doesn’t exist, while the same number of Democrats think the real problem is a failure to recognize discrimination where it does exist. The result is widely divergent views on how to address racial discrimination.”).

4. This observation comes from my personal experience as a candidate for judicial office. See also Nathan J. Robinson, *In Defense of Social Justice*, CURRENT AFFS. (May 28, 2018), <https://www.currentaffairs.org/2018/05/in-defense-of-social-justice> [<https://perma.cc/VB5K-V2AK>].

5. In a presentation to one of the Task Force’s working groups, Ben Finholt, Director of the Just Sentencing Project at North Carolina Prisoner Legal Services, provided data from the North Carolina Department of Public Safety indicating that African-Americans comprise 51.5% of our state’s prison population, and 21.5% of the general population statewide. The data indicated that African-Americans are also grossly over-represented among people receiving long terms of imprisonment. N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., REPORT 2020 (2020), [https://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal\\_12132020.pdf](https://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal_12132020.pdf) [<https://perma.cc/9UJK-TLBA>] [hereinafter REPORT 2020].

6. Compare Press Release, N.C. Jud. Branch, Chief Justice Beasley Addresses the Intersection of Justice and Protest Around the State (June 2, 2020), <https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and->

North Carolinians hold such fundamentally different views about race and its role in the legal system, and that there is precious little room for compromise between those who recognize and seek to remedy racial inequities and those who seek to preserve a power structure and institutions rooted in a history of overt and undeniable racist oppression, it is worth celebrating that the authors published in this volume and the editors supporting them are brave enough to step into the public debate at a time when it is fraught with peril. And in each of the pieces that follow, they do so respectfully, honestly, and openly; acknowledging the position from which they speak. They bring to bear the very best of their considerable intellect and experience to go beyond voicing grievance to articulating a constructive and creative vision for a better future. They give hope that even in the face of challenging discord, there is a road forward.

The North Carolina Governor's Task Force on Racial Equity in Criminal Justice is an effort to make that road by walking it.<sup>7</sup> Established by Executive Order 145 signed by Governor Cooper on June 9, 2020, the Task Force includes twenty-four leaders from diverse constituencies who have agreed to engage in the hard work of identifying evidence-based solutions to the problems that contribute to racial disparities in the criminal justice system in North Carolina. Operating on the assumptions that such disparities are both unacceptable and not inevitable, and further, that systemic change is possible, the Task Force met its initial mandate and provided to the Governor in December 2020 a report containing 125

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protests-around-the-state [<https://perma.cc/6EBL-FX4K>] (“These protests highlight the disparities and injustice that continue to plague black communities. Disparities that exist as the result of policies and institutions; racism and prejudice have remained stubbornly fixed and resistant to change . . . . As the mother of twin sons who are young black men, I know that the calls for change absolutely must be heeded. And while we rely on our political leaders to institute those necessary changes, we must also acknowledge the distinct role that our courts play. As Chief Justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better.”), with WILLIAM H. WESTERMEYER, *BACK TO AMERICA: IDENTITY, POLITICAL CULTURE, AND THE TEA PARTY MOVEMENT* 102–03 (2019) (“Now the problem is that you have this Racial Justice Act that was passed by not this legislature, but the prior legislature. It was very controversial then. It’s as if race were relevant to any of this. I have discussions with people who say that there are too many black people in prison. I don’t disagree with that, there are. But they are not there because they are black. They are there because they committed a crime . . . . I have not yet seen a situation where the dead person cared what color the person was that killed them. I mean, they are dead. That is the fallacy with this whole idea of hate crimes and all this kind of stuff. I mean, it’s either a crime or it’s not a crime. If you killed somebody, it’s wrong. It doesn’t matter what about them you didn’t like.” (quoting then-Justice Newby)).

7. See ANTONIO MACHADO, [*Traveler, your footprints*], in *THERE IS NO ROAD* 107, 107 (Mary G. Berg & Dennis Maloney trans., 2013).

recommendations for policy changes in policing and the courts, all with the goal of eliminating racially disparate outcomes for people of color, including when they are the victims of crime.<sup>8</sup>

I began my legal career in private practice with the civil rights firm in Charlotte, North Carolina that was founded by Julius Chambers in 1964.<sup>9</sup> When I arrived at the firm in 1988, I was quickly engaged in a wide variety of civil rights litigation, including voting rights, employment discrimination, school desegregation, and police misconduct cases in state and federal courts. Representing the families of men and women killed by police officers, I learned a lot about the state-of-the-art procedures in police use of force, and a lot about how the legal system, even at its best, was a poor avenue of redress for police use of excessive force. While an unscientific sample, during my ten-year tenure at the firm, of the roughly twelve cases I worked on involving individuals killed by police officers, all twelve cases involved a victim who was Black. Two involved Black women. All of the victims were unarmed. The victims died from chokeholds and from being hogtied and placed facedown, but mostly they were shot dead during traffic stops. Our clients and the communities we represented did not have an effective way to have their voices heard; their suffering by and large went unseen. Professor Rutledge's essay explains how the trauma of these events and the trauma of the criminal justice system more broadly affect Black people. This country's general inability to have a balanced and effective approach to police accountability existed over thirty years ago and has continued to the present day—it has contributed to the recent deaths of George Floyd and so many others.

The Task Force's work is the beginning of a process that must continue beyond the two and a half year time frame contemplated in the Governor's Executive Order. Some of the changes can be implemented immediately by state and local police departments, municipal governments, and the court system, but many of the changes will take longer to put in place and monitor. Data collection relevant to key indicators is crucial, as are enhanced opportunities for the meaningful involvement of directly impacted individuals and communities. There is a direct connection between broader efforts to reimagine public safety and promising practices that focus on restorative justice.

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8. REPORT 2020, *supra* note 5, at 4; N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., RECOMMENDATIONS (2020), [https://ncdoj.gov/wp-content/uploads/2020/12/TREC-Recommendations\\_12142020.pdf](https://ncdoj.gov/wp-content/uploads/2020/12/TREC-Recommendations_12142020.pdf) [<https://perma.cc/79VC-XRSV>] [hereinafter RECOMMENDATIONS].

9. See RICHARD A. ROSEN & JOSEPH MOSNIER, JULIUS CHAMBERS, A LIFE IN THE LEGAL STRUGGLE FOR CIVIL RIGHTS 63–82 (2016).

There may be principled reasons to oppose any one of the 125 recommendations made by the Task Force, and the debates and process of compromise that occurred during Task Force deliberations surfaced many of them. But a generalized opposition to the need to do anything at all about the racial disparities in the criminal justice system is rooted in notions of a color-blind ideal and the search for an identifiable racist bad actor as the only problem to be solved. Wilson, Fair and Morrison's article, describing "motivated awareness" and "inclusive integrity" provides a much-needed framework for explaining why asserting that in North Carolina "justice is blind" only exacerbates the problem and perpetuates the injustices.

To be sure, this is not an entirely new debate. When wrestling with how to judicially address the fact that students who had not yet started first grade when *Brown v. Board of Education* was decided in May of 1954 were graduating from high school in 1966, having attended completely racially segregated public schools in Alabama and Louisiana, Judge John Wisdom wrote:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.<sup>10</sup>

Or, put another way by the poet Langston Hughes:

That Justice is a blind goddess  
Is a thing to which we black are wise.  
Her bandage hides two festering sores  
That once perhaps were eyes.<sup>11</sup>

In addition to promoting an appropriate conceptual framework for future racial justice efforts, it is important to look back and acknowledge the role of racism in bringing us to this point. An example of this might be the North Carolina Bar Association's fifty-six-page report issued in

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10. *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966) *aff'd on reh'g*, 380 F.2d 385 (5th Cir. 1967).

11. LANGSTON HUGHES, *Justice*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 31, 31 (Arnold Rampersad & David Roessel eds., 1995).

November 2020 on the relationship between the Bar Association and systemic racism in North Carolina.<sup>12</sup> Professor Marcus Gadson's essay further highlights the importance of such reconciliation. Restorative justice programs, in particular, also flow from an appreciation of the power of reconciliation on an individual and community level. Numerous presenters urged the Task Force to recommend that North Carolina end its use of the death penalty. The Task Force reached consensus to recommend that a public truth and reconciliation commission regarding the history of race and criminal justice in North Carolina should be established. The Task Force's December 2020 report acknowledges:

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.<sup>13</sup>

From initial encounters with law enforcement officers, through every step of the criminal justice process, to the life-long collateral consequences of a criminal record, we know that significant racial disparities exist. The Task Force recommendations are an effort to begin to change that reality.

The articles and essays in this issue of the *Campbell Law Review* all contribute in different and important ways to understanding what needs to change and why, as well as to envisioning where we want to be and how we might get there. To quote the beautiful words of the remarkable poet Amanda Gorman, this issue helps illustrate that “there is always light if only we’re brave enough to see it. If only we’re brave enough to be it.”<sup>14</sup>

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12. N.C. BAR ASS'N, REPORT FROM THE EXECUTIVE DIRECTOR TO THE NORTH CAROLINA BAR ASSOCIATION (NCBA) BOARD OF GOVERNORS AND THE NORTH CAROLINA BAR FOUNDATION (NCBF) BOARD OF DIRECTORS REGARDING RELATIONSHIPS BETWEEN THE NCBA AND SYSTEMIC RACISM IN NORTH CAROLINA (2020), <https://www.ncbar.org/wp-content/uploads/2020/12/Report-Regarding-Relationships-Between-the-NCBA-and-Systemic-Racism-11-30-2020.pdf> [<https://perma.cc/9WRW-4BFB>].

13. REPORT 2020, *supra* note 5, at 124 (citations omitted).

14. AMANDA GORMAN, THE HILL WE CLIMB: AN INAUGURAL POEM FOR THE COUNTRY (2021).