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The Beginning of the End: Abolishing Capital Punishment in Virginia

Alexandra L. Klein*

From this day forward, I no longer shall tinker with the machinery of death. . . . I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.¹

When thinking about the history of capital punishment in the United States, I suspect that the average person is likely to identify Texas as the state that has played the most significant role in the death penalty.² The state of Texas has killed more than five hundred people in executions since the Supreme Court approved of states’ modified capital punishment schemes in 1976.³ By contrast, Virginia has executed 113 people since 1976.⁴

But Virginia has played a significant role in the history of capital punishment. After all, the first recorded execution in Colonial America took place in 1608 at Jamestown, when

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⁴ See Virginia, DEATH PENALTY INFO. CTR., https://perma.cc/TLL4-B3EY.
Captain George Kendall was shot to death by a firing squad. Virginia has officially executed 1,390 people, more than any other state. I write officially, because Virginia, like many other states also has a history of extrajudicial executions through lynching. The Equal Justice Initiative has calculated that between 1877 and 1950, eighty-four people were lynched in Virginia. Lynchings were arguably a form of “extrajudicial execution” because they frequently involved either the deliberate ignorance or enthusiastic cooperation of local officials and were tools of social control, just like legislatively enacted capital punishment.

Over four hundred years since Captain Kendall died at Jamestown, Virginia has decided to end its brutal regime of capital punishment. This is a truly historic moment. Virginia will be the first southern state, as well as the first state of the group of eleven states that seceded and formed the Confederate States of America during the Civil War to do so.

The repeal of capital punishment in Virginia has been a lengthy process. Attorneys, scholars, and activists have fought for years against the death penalty. A jury has not imposed a death sentence in nearly a decade. Prosecutors have tried to
secure death sentences. In 2018, a Prince William County jury convicted Ronald Hamilton of capital murder for killing his wife and a police officer. Yet the jury deadlocked on the death penalty. Executions have also dwindled. Since 2011, Virginia has executed five people. Only two men remain on Virginia’s death row: Anthony Juniper and Thomas Porter. Ending the death penalty is a crucial step for Virginia to create a better justice system, although significant work remains. Most other states only conduct infrequent executions—setting aside the COVID-19 pandemic and the federal government’s brutal execution spree, fewer people are sentenced to death each year and fewer people are executed. The punishment has lost any utility it has—if indeed it had any to begin with.

men.” Beccaria wrote this at a time when executions were public affairs, sometimes involving brutal torture. Virginia no longer conducts public executions, to be sure, and yet the death penalty remains a violent spectacle. I came across an article about the people in Virginia who volunteer to witness executions. Virginia, like many other states with capital punishment, requires civilian witnesses. Arkansas, which planned to execute eight inmates over a ten-day period in 2017, struggled to find the six citizens its laws require to witness executions, until it made its plight public. Arkansas suddenly had many volunteers, eager to watch another human die in the name of justice. Presumably requiring citizens to come watch executions serves the general deterrence function of capital punishment. I am uncertain that the requirement actually serves that function. Instead, it seems to encourage punitive attitudes and public vengeance. It is reminiscent of lynchings, in which community members came together to kill, observe, and pose for pictures with the victim’s dangling feet in the background, confident that some form of justice had been served.

Several of Virginia’s volunteers had watched multiple executions. One witness observed four executions “as a show of support for law enforcement.” Despite the aftereffects of watching executions, the volunteer witnesses remained “undeterred” and expressed willingness to observe more executions.

22. Va. Code Ann. § 53.1–234 (2020) (“At the execution, there shall be present . . . at least six citizens who shall not be employees of the Department.”).
25. Evans, supra note 21.
26. Id.
executions if they were needed. The volunteer requirement reflects just how much a society is willing to tolerate capital punishment. Without the absolute willingness of random people to watch another human die at the hands of the state, possibly in agonizing pain, the penalty cannot go forward. It is a burden we all share.

Pain also presents an important reason for Virginia to end capital punishment. While the Supreme Court has concluded that some pain is permissible in executions, it appears nearly impossible to execute people without a severe risk of agonizing pain and suffering. Botched hangings lead to strangulation or decapitation. Two states have held that electrocution, “with its specter of excruciating pain and its certainty of cooked brains and blistered bodies” is unconstitutional. Austin Sarat calculated that the average rate of botched electrocution executions from 1900 to 2010 is 1.9 percent—but from 1980 to 2010, 17.33 percent of electrocution executions were botched. And what about lethal injection? Sarat estimates that out of the 1,054 lethal injection executions states carried out until 2010, 75, or 7.12 percent, have been botched. That proportion is likely higher given the number of horrific botched executions carried out in the 2010s. A recent report suggested that 84 percent of prisoners who died by lethal injection suffered pulmonary edema during executions due to the way lethal

27. Id.
28. See Glossip v. Gross, 576 U.S. 863, 869 (2015) (“[B]ecause some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain.”).
29. See Alexandra L. Klein, Nondelegating Death, 81 OHIO ST. L.J. 931, 923 (2020).
32. Id.
injection drugs are administered. The firing squad might be less painful than any of these methods, but its protocols, as it is administered in Utah, require local police officers to volunteer to kill prisoners, potentially relying on impermissible justifications for punishment like vengeance and threatening to further diminish confidence in law enforcement. Although some may argue that the death penalty is necessary to show community condemnation and outrage, this is inconsistent with the role of the Eighth Amendment, which “limits the avenues through which vengeance can be channeled.”

Jurisprudence surrounding capital punishment has attempted to limit who can be executed, reserving execution for the worst of the worst. But this is a truly difficult task. The initial capital punishment regime that the Supreme Court held unconstitutional in Furman v. Georgia was problematic because it offered no principled way for juries to discern who should receive death sentences. In Gregg v. Georgia, the Court approved a system of capital sentencing intended to provide jurors with better guidance in who should be executed.

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34. See Noah Caldwell et. al., Gasping For Air: Autopsies Reveal Troubling Effects of Lethal Injection, NPR (Sept. 21, 2020, 7:00 AM), https://perma.cc/2FEH-VE84.
35. See generally Alexandra L. Klein, Volunteering to Kill (unpublished manuscript) (on file with the author).
39. See id. at 309–10 (Stewart, J., concurring).
40. See id. at 206–07
41. See id. at 206–07

The new Georgia sentencing procedures...
Yet this has not solved the problem of limiting discretion in capital punishment. As Justice Breyer explained in his dissent in *Glossip v. Gross*, research demonstrated “that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.” Death sentences are based significantly on geography, even within individual states, and the discretion of that jurisdiction’s prosecutor.

Legislators identify the kinds of offenses eligible for capital punishment as a way to “genuinely narrow[] the field of killers to those upon whom death could be imposed.” These limits should narrow the group who is eligible for death while identifying the worst of the worst, defendants whose crimes really merit capital punishment. Yet there is ample evidence that they do not.

In Virginia, an intentional, deliberate, and premeditated killing is not, by itself, grounds for capital punishment.

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43.  Id. at 918 (Breyer, J., dissenting).
46.  Id.; see Zant v. Stephens, 462 U.S. 862, 878 (1983) (“[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”).
47.  VA. CODE ANN. § 18.2–32 (2020)
Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and
Virginia has fifteen statutory aggravating circumstances that make a homicide offense one that can be punished by death.\textsuperscript{48} Colorado had seventeen aggravating factors\textsuperscript{49} before it abolished capital punishment in 2020.\textsuperscript{50} A 2013 study of homicide offenses in Colorado revealed that “the death penalty was an option in approximately 90% of all first-degree murders,” but prosecutors sought the penalty “initially in only 3% of those killings, pursued all the way through sentencing in only 1% of those killings and obtained in only 0.6% of all cases.”\textsuperscript{51} Such a statute provided little-to-no guidance on who really deserved capital punishment.\textsuperscript{52} The real power to decide rested with prosecutors, rather than legislators.\textsuperscript{53} Attempts to constrain discretion in capital punishment at various stages and decide which offenders really deserve the penalty, have demonstrated that the only way to avoid these dilemmas of discretion, which create too many opportunities for discrimination and unfairness, is to stop using capital punishment.

One of the most compelling arguments for abolition of capital punishment is the endemic problem of racial discrimination in the death penalty, as well as the way in which capital punishment has been used to maintain inequitable and unjust racial hierarchies. The death penalty is so tied to a brutal history of racially motivated violence that it cannot ever purge itself of the taint.\textsuperscript{54} Virginia’s history of capital punishment (and the rest of the United States) reflects that the death penalty has been consistently administered in an unequal fashion as a tool of racial terror and subjugation. In the 1760s, enslaved Black

\textsuperscript{48}. Id. § 18.2–31(A).
\textsuperscript{49}. See Marceau, Kamin & Foglia, supra note 45, at 1088.
\textsuperscript{51}. Marceau, Kamin & Foglia, supra note 45, at 1071–72.
\textsuperscript{52}. Id. at 1072.
\textsuperscript{54}. See We Need to Talk about an Injustice, TED (Mar. 2012), https://perma.cc/WW4N-23CA.
people convicted of killing the white people who owned them were sentenced to be burned to death,\textsuperscript{55} hanged,\textsuperscript{56} and sometimes decapitated or dismembered so their bodies could be displayed in public places.\textsuperscript{57}

Gradual efforts at abolition in the South before the Civil War largely focused on limiting capital punishment for white offenders.\textsuperscript{58} The death penalty was a crucial tool for control, oppression, and terrorization of enslaved and free Black people in Virginia and the rest of the South.

In Virginia slaves were liable to be executed for any offense for which free people would get a prison term of three years or more. Free blacks, but not whites, could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault if the victim was white. Attempted rape of a white woman was a capital crime for blacks in... [Virginia and Texas] as well as Florida, Louisiana, Mississippi, South Carolina, and Tennessee. In his 1856 treatise summarizing the slave laws of the southern states, George Stroud counted sixty-six capital crimes for slaves in Virginia against only one (murder) for whites.\textsuperscript{59}

Although states undertook substantial reform efforts following \textit{Furman v. Georgia}, they did not eliminate the bias with which the death penalty is administered.\textsuperscript{60} “The death

\textsuperscript{55} Banner, supra note 20, at 71 (identifying enslaved people who were burned to death).
\textsuperscript{56} Id. at 72 (“Slaves were often hung in chains for crimes like rape and arson, in a show of force to other slaves in their community.”).
\textsuperscript{57} Id. at 74

In 1763, a local court ordered that a slave named Tom from Augusta County, Virginia, who had been convicted of killing his owner, “be hanged by the neck until he be dead and... that then his head be Severed from his body and affixed on a pole on the Top of the Hill near the Road that lead from this Court House.”

\textsuperscript{58} Id. at 74–75 (discussing a similar dismemberment and display in Amelia County, Virginia).

\textsuperscript{59} Id. at 139.

\textsuperscript{60} See McCleskey v. Kemp, 481 U.S. 279, 327 (1987) (Brennan, J., dissenting) (“[P]rosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims.”); see also Alexis Hoag, \textit{Valuing Black Lives: A Case for Ending the Death Penalty}, 51 Columbia Hum. Rts. L. Rev. 985, 990 & n.15 (2020) (collecting studies reflecting racial disparities in capital punishment).
penalty is still disproportionately sought and imposed against defendants accused of murdering white victims.\footnote{61}{Hoag, supra note 60, at 990.} Of the 113 people executed in Virginia since 1976, fifty-two were Black.\footnote{62}{See Execution Database, supra note 14 (filtering executions based on race of the person).} Census estimates from 2019 estimate that Black people make up 19.9 percent of Virginia’s population.\footnote{63}{QuickFacts Virginia, U.S. CENSUS BUREAU, https://perma.cc/7EAD-DNE6.} Virginia has executed twenty-one people for killing Black victims; only seven of the executed were white.\footnote{64}{See id. (filtering executions based on the race of the victim and the executed person).} It executed ninety-three people for killing white victims; thirty-seven of the executed were Black.\footnote{65}{See id. (filtering executions based on the race of the victim).} Professor Alexis Hoag argues that the death penalty reflects the way in which the United States consistently undervalues Black lives.\footnote{66}{See Hoag, supra note 60, at 991.} Virginia’s post-1976 capital punishment scheme shows that some victims matter far more, and that some lives matter far less. Hoag argues that the only just remedy for undervaluing Black lives is to end capital punishment.\footnote{67}{See id.}

During his oral argument in \textit{Furman v. Georgia}, Professor Anthony Amsterdam explained that rare executions raise important questions about discrimination: “The very fact that capital punishment comes to be as rarely and as infrequently and as discriminatorily imposed as it is, takes the pressure off the legislature, quite simply, to do anything about it.”\footnote{68}{Transcript of Oral Argument at 15, Furman v. Georgia, 408 U.S. 238 (1972) (No. 69-5003), https://perma.cc/8QUW-KAK8 (PDF).} That is not the path the General Assembly chose. Instead, it chose the only just remedy for Virginia’s bloody legacy of capital punishment. The General Assembly wisely chose to commute Mr. Porter’s and Mr. Juniper’s sentences to life without parole, rather than set off new legal battles about whether the state should still execute them.\footnote{69}{When states abolish capital punishment, courts tend to hold that the imposition of death sentences afterward is not permissible. See generally State}
whether a death sentence should be imposed offers victims and their families respite from ongoing judicial proceedings that force them to relive the impossibly horrific trauma of losing a loved one.70

If Virginia, which has executed more people in its history than any other jurisdiction, can abolish capital punishment, any state can do it. Let this be the beginning of the end of the death penalty experiment, and the start of a search for true justice.

v. Santiago, 122 A.3d 1 (Conn. 2015) (concluding that the legislature's prospective abolition supported a determination that the death penalty violated the constitution of the state of Connecticut); Fry v. Lopez, 447 P.3d 1086 (N.M. 2019) (holding that the two prisoners left on death row after the state repealed the death penalty had disproportionate sentences to their offenses). See also Benjamin Mueller & James C. McKinley, Jr., Connecticut Death Penalty Law Is Unconstitutional, Court Rules, N.Y. TIMES (Aug. 13, 2015), https://perma.cc/G8B5-VXNT; Morgan Lee, New Mexico Sets Aside Final 2 Death Sentences, AP NEWS (June 28, 2019), https://perma.cc/SR7A-AATM.

70. See The Death Penalty Doesn’t Bring Closure So Much as It Extends Trauma, L.A. TIMES (Mar. 31, 2017), https://perma.cc/5FQX-8TZX.