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Three Observations about the Worst of the Worst, Virginia-Style

Corinna Barrett Lain*

Much could be said about Virginia's historic decision to repeal the death penalty, and Professor Klein's essay provides a wonderful starting point for any number of important discussions. We could talk about how the decision came to be. Or why the move is so momentous. Or what considerations were particularly important in the decision-making process. Or where we should go from here. But in this brief comment, I'll be focusing not on the how, or the why, or the what, or the where, but rather on the *who*. Who are condemned inmates, both generally and Virginia-style?

They are “the worst of the worst”—or at least that is what we are told. Time and again, the Supreme Court has stated that the death penalty is not for just any murderer; it is for the worst of the worst offenders.¹ The fact that the death penalty was not being imposed in any semblance of a targeted fashion is what led the Supreme Court to invalidate it in 1972.² And the fact

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1. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate.”); see also *infra* note 4 and accompanying text.

2. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (invalidating the death penalty as it was then administered as a violation of the Eighth Amendment’s “cruel and unusual punishments” clause); *id.* at 293–94

that states adopted “guided discretion” statutes that promised to remedy this deficiency is what led the Court to reinstate the death penalty four years later in 1976.³ As the Supreme Court reiterated in 2008, “capital punishment must ‘be limited to those offenders who commit a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”⁴ This is the core constitutional proviso that comes with the state’s power to put people to death: it is reserved for the worst, most culpable offenders and the worst, most culpable crimes.

Given that the death penalty doesn’t just exist in the abstract—it is fundamentally about the *who*, the worst of the worst—it only seems fitting to take this moment to set the record straight about who we execute generally, and what this has looked like in Virginia. I use the term “we” here intentionally, because when the government executes, it executes in our name. Your name, and mine. So we ought to know who gets the death penalty in this country. We ought to know who we as a society execute generally, and how this has played out Virginia-style.

In this regard, I offer three observations. First, we execute the severely mentally ill. Second, we execute offenders who have themselves been terrorized, offenders who are just as much a product of profound violence as they are its perpetrators. And third, we execute not for exceptionally bad crimes, but rather for the exceptionally bad luck of having poor representation, or being in a county where the prosecutor has a proclivity for capital charges, or committing Black-on-White crime.

Take these categories away, and the death penalty is an empty shell. There simply aren’t enough offenders to keep the system going. Virginia’s capital defenders figured this out. They showed time and again that capital defendants aren’t actually

(Brennan, J., concurring) (“When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.”).

3. See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (explaining that “the concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance”).

4. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

the worst of the worst, and after a decade of bleeding the death penalty dry (pardon the pun), other pieces of the puzzle came together to finally abolish this age-old punishment. But all that is the larger story.⁵ My focus (again) is the offenders themselves.

Before getting started, two clarifications are in order. First, this is a short essay. As in, *really* short. I will mainly just be waving at the points I'm making, but my hope here is to say enough to get a conversation started, and to raise a point that is easy to overlook. Second, nothing I say here is meant to suggest that the murders that these offenders committed aren't horrible crimes—every murder is a tragedy, and imposes unbearable pain on the victims and their families—nor is my intent to suggest that these offenders ought not be punished. My intent is to explore what makes death the appropriate option, as opposed to life without the possibility of parole (LWOP) or some other sentence. We're talking about the death penalty here, so we're supposed to be talking about the worst of the worst. And that brings me to my three observations.

First, we execute the severely mentally ill. That's not a term I throw around lightly. I'm talking about people who have been diagnosed with a severe mental illness as listed in the DSM-5—the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.⁶ The DSM-5 is the gold standard, and it defines severe mental illness as a clinically recognized, significant disturbance in cognition, regulating emotion, or behavior that reflects a severe impairment or dysfunction in mental functioning and is relatively persistent over time.⁷ These are people who suffer from schizophrenia,

5. I tell this story in a forthcoming article with a former capital defender. See Corinna Barrett Lain & Doug Ramseur, *Disrupting Death: Lessons Learned from Virginia's Abolition of the Death Penalty*, 56 U. RICH. L. REV. (forthcoming 2021) (on file with author).

6. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

7. See *id.* at 20 (defining mental illness as a “clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning”); AM. PSYCHOL. ASS'N, PROFICIENCY IN PSYCHOLOGY: ASSESSMENT AND TREATMENT OF SERIOUS MENTAL ILLNESS 5 (2009) (“[Serious mental illness] refers to mental disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that

psychosis, bipolar disorders⁸—people who are seriously sick. And we routinely sentence them to death, and then execute them, as the worst of the worst criminals.

The story of how this came to be is one that I tell elsewhere,⁹ but what matters here are the facts, and the facts are grim. One study of executions between 2000 and 2015 found that 43 percent of those executed had been diagnosed with some sort of serious mental illness.¹⁰ Another study, this one discussed in a 2016 ABA report, found that at least 20 percent of the condemned inmates currently on death row suffer from a severe mental illness.¹¹ We know that in 2017, six of the twenty-three inmates executed in this country were mentally ill.¹² In 2018, that figure was ten out of twenty-five.¹³ In 2019, it was eight out of twenty-two.¹⁴ And in 2020, it was eight out of seventeen.¹⁵ That's right, almost half of the inmates who were executed last year had some sort of serious mental health diagnosis. This is a huge chunk of who we execute.

It merits mention that in 2002, the Supreme Court held that it violates the Eighth Amendment's "cruel and unusual punishments" clause to execute the intellectually disabled (as opposed to the mentally ill).¹⁶ There the Court explained:

are relatively persistent (e.g., lasting at least a year); and that result in comparatively severe impairment in major areas of functioning . . .").

8. See *id.*; see also AM. BAR ASS'N, DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 9–14 (2016) (discussing the difference between mental illness and severe mental illness, as well as the major types of severe mental illness).

9. See Corinna Barrett Lain, *Madison and the Mentally Ill: The Death Penalty for the Weak, not the Worst*, 31 REGENT U. L. REV. 209 (2019).

10. See Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who are Mentally Ill? We Checked.*, WASH. POST (Apr. 3, 2017, 8:00 AM), <https://perma.cc/27ZG-XTVK>.

11. See AM. BAR ASS'N, *supra* note 8, at 16.

12. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2017: YEAR-END REPORT 8 (2017), <https://perma.cc/N28J-2JPK> (PDF).

13. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2018: YEAR-END REPORT 12 (2018), <https://perma.cc/8H4R-DV9P> (PDF).

14. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR-END REPORT 16 (2019), <https://perma.cc/7KG9-JY8S> (PDF).

15. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2020: YEAR-END REPORT 20 (2020), <https://perma.cc/75AM-U5ZS> (PDF).

16. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

[B]y definition, [intellectually disabled people] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.¹⁷

And we could say the same of the mentally ill. But we don't. Only one state (Ohio, as of 2021) prohibits the death penalty for the severely mentally ill.¹⁸ It's fair game for everyone else, and that brings us to Virginia.

Virginia has long embraced the death penalty for offenders with serious mental health issues. Indeed, in the 2002 case quoted above—*Atkins v. Virginia*¹⁹—we were the ones trying so hard to execute an intellectually disabled man that the Supreme Court had to step in. Moreover, even after the Supreme Court decided *Atkins*, Virginia was one of just two states in the country to impose a strict IQ cut-off score in order to benefit from the Court's decision (a rule that the Supreme Court also invalidated in due course).²⁰

That said, the best example of this point is Virginia's 2017 execution of William Morva, the last person to be executed in Virginia before it abolished the death penalty.²¹ Morva was sentenced to death for killing two people during a prison escape while waiting to be tried on an armed robbery charge. He overpowered the guard who had accompanied him on a trip to the hospital for stomach pain, took his gun, and shot a hospital

17. *Id.* at 318.

18. *Ohio Bars Death Penalty for People with Severe Mental Illness*, DEATH PENALTY INFO. CTR. (Jan. 11, 2021), <https://perma.cc/3683-RQHP> (“At least six other death-penalty states have considered severe mental illness exemptions in recent years, but Ohio is the first state to enact one. The Virginia Senate passed a similar bill earlier in 2020, but it stalled in the House.”).

19. 536 U.S. 304 (2002).

20. See *Hall v. Florida*, 572 U.S. 701, 718 (2014) (invalidating use of strict IQ cutoff to determine intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), and stating, “In summary, every state legislature to have considered the issue after *Atkins*—save Virginia’s—and whose law has been interpreted by its courts has taken a position contrary to that of Florida.”).

21. See Whittney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, a 1st in the South*, NAT'L PUB. RADIO (Mar. 24, 2021, 2:50 PM), <https://perma.cc/H7GE-8QJ8>.

security guard on the way out, then shot a deputy sheriff who encountered him during the subsequent manhunt.²²

At trial, jurors heard evidence that Morva had a personality disorder. He was just an odd guy.²³ What they didn't hear was that Morva was actively psychotic, living in a world that only sometimes matched reality. Morva thought he suffered from an intestinal disease that required him to eat raw meat in large quantities, and pinecones.²⁴ He professed to be on a mission to save the world and thought he had been gifted with special powers to carry it out. He thought his real name was Nemo, and believed that he was meant to lead a secret tribe from South America, a lost indigenous people who would recognize him as their savior.²⁵ But not if the Feds got him first. Morva also believed that the Bush administration was working with the local police to target him and take him out.²⁶ "Someone wants me to die, and I don't know who it is," Morva told his mother in a call shortly before his escape.²⁷ He'd soon find out who was trying to kill him: the Commonwealth of Virginia.

As the extent of Morva's mental illness came to light, pressure grew for Virginia's governor—Terry McAuliffe at the time—to commute his sentence to life without parole.²⁸ Eighteen Virginia legislators—thirteen delegates and five senators—petitioned the governor to grant Morva clemency.²⁹ A massive letter-writing and phone campaign ensued (a certain law professor might have done her part) resulting in over thirty thousand supporters of the clemency effort, including the

22. See Sandy Hausman, *State to Execute Morva despite Serious Mental Illness*, WVTF (June 5, 2017), <https://perma.cc/ZM26-FLRG>.

23. See *id.*

24. See *id.*

25. See *id.*; Alanna Durkin Richer, *Killer to be Executed Suffers from Delusions, Lawyers Say*, ASSOCIATED PRESS (June 30, 2017), <https://perma.cc/9V54-L834>; Editorial, *Virginia's Governor Still Has Time to Save a Mentally Ill Man from Execution*, WASH. POST (June 29, 2017), <https://perma.cc/5NZD-L3R2>.

26. See Hausman, *supra* note 22.

27. See Richer, *supra* note 25.

28. See Alix Bryan, *Pressure Grows for Governor to Stop Execution of William Morva*, WTVR (July 5, 2017, 3:10 PM), <https://perma.cc/LTQ6-L5BH>.

29. See *id.*

daughter of one of the slain victims.³⁰ Even the United Nations called for a halt to the execution.³¹ It was all to no avail. McAuliffe denied the clemency petition and Morva was promptly executed. It would be a fitting final tribute to the death penalty in Virginia, an embarrassing execution that would mark the last gasp of an embarrassingly broken criminal justice practice.

Now, to my second observation: we execute offenders who have themselves been profoundly victimized. They victimize because this is what they know. Capital murderers, the saying goes, are not born so much as they are *made*. As renowned clinical psychiatrist Dorothy Otnow Lewis explains (and she should know, having interviewed over a hundred murderers and several of our country's most notorious serial killers, including Ted Bundy):

You realize that when you are talking with these people who have done some really extraordinarily violent acts, that there's an environment that created that. These people were not born dangerous. They were not born evil. . . . You get a combination of factors, environmental and intrinsic, that create a very violent person³²

Lewis and her longtime collaborator, neurologist Jonathan Pincus, have found three commonalities across a wide variety of the most violent offenders: a predisposition to mental illness, especially psychosis (we could have guessed that one); brain dysfunction, particularly in the frontal lobes, which regulate impulse control and emotion; and “almost invariably, horrific childhood abuse, often buried beyond the reaches of memory”³³ That last one—horrific childhood abuse—is the one I will focus on here.

30. See Ann E. Marimow & Gregory S. Schneider, *Daughter of Slain Sheriff's Deputy Asks Va. Governor to Stop Execution of Her Father's Killer*, WASH. POST (July 5, 2017), <https://perma.cc/76CP-XTTM>.

31. See David Hylton, *United Nations Urges McAuliffe to Halt Morva's Execution*, NBC-12 (Aug. 10, 2017, 12:20 PM), <https://perma.cc/2DSK-LTLH>.

32. Adrian Horton, *'They Were Not Born Evil': Inside a Troubling Film on Why People Kill*, GUARDIAN (Nov. 17, 2020, 1:20 PM), <https://perma.cc/P2VH-27AL>.

33. *Id.*

A prominent study of the life histories of thirty-seven men on death row tell the tale.³⁴ All but two of the thirty-seven death row inmates studied were physically abused in childhood, and twenty-two of them were sexually abused as well.³⁵ Thirty-one of the thirty-seven inmates—more than 80 percent—had experienced abuse so severe as to meet the criteria for terrorization (a qualitative marker for extreme levels of terror, including sadism, public humiliation, and other uniquely intense degradations).³⁶ Multiple risk factors for violence were not only co-occurring, the study found, but also sequential.³⁷ Inmates were emotionally neglected, and physically and sexually abused. This led them to seek coping mechanisms, which tended to model what they were witnessing in their environments: substance abuse and violence, primarily as a defense to their own powerlessness.³⁸ The combination creates a dangerous mix. Severe abuse is a risk factor for violence. Severe abuse is also a risk factor for PTSD and substance abuse, each of which is its own risk factor for violence.³⁹

Other work has corroborated this data in narrative form. Craig Haney, who has done the “boots on the ground” work of creating social histories for capital cases as well as scholarship based on that experience, paints a picture of chaos and instability, neglect and outright abandonment, and most of all, severe and sustained abuse.⁴⁰ Haney tells stories upon stories of victimization so damaging that these offenders-to-be disassociated from their trauma just to emotionally survive.⁴¹ They then turned to substance abuse to escape their reality, and

34. See generally David Lisak & Sara Beszterczey, *The Cycle of Violence: The Life Histories of 43 Death Row Inmates*, 8 *PSYCHOLOGY OF MEN & MASCULINITY* 118 (2007). Only thirty-seven of the forty-three life histories were detailed enough to include in the study, which, as the authors note, is its own comment on the differences in the care and attention inmates whose lives were at stake received. See *id.* at 120–21.

35. See *id.* at 121–122.

36. See *id.* at 123–125.

37. See *id.* at 126.

38. See *id.* at 125–26.

39. See *id.* at 119–120.

40. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 *SANTA CLARA L. REV.* 552, 559–74 (1995).

41. See *id.* at 561–83.

violence to endure it.⁴² Violence in gangs, and violence in school. Most were institutionalized as juvenile offenders, where they were further victimized.⁴³ These capital defendants “led lives that are the criminogenic equivalent of being born into hazardous waste dumps—Love Canals of crime,” Haney writes.⁴⁴ None of this excuses what they have done, he says, but the profoundness of their deprivation and the cruelty they suffered does help us understand them, and it should help us decide how to punish them too.⁴⁵ The vast majority of capital offenders were victims of terrorization long before they were ever its perpetrators.

Here again, Virginia has been a microcosm of the death penalty’s operation more generally, and the case that illustrates the point is Ricky Gray, who was executed just six months before William Morva in 2017.⁴⁶ Gray was the second-to-last person to be executed by Virginia, and his killing spree was so ghastly and gruesome that I find it hard to write about. Gray and his accomplice, Ray Dandridge, killed seven people over the course of six days in 2006.⁴⁷ One set of murders was a family of four—a mom, dad, and two girls, ages nine and four—killed on New Year’s Day.⁴⁸ Gray and Dandridge were looking for a home to rob and saw the front door open; the storm door wasn’t locked and they walked right in.⁴⁹ They bound and gagged the family and slit their throats, bludgeoning those who didn’t immediately die.⁵⁰ Days later, they went to the home of the woman who had been their lookout in the murders, and killed her and her parents as well—again, slitting their throats.⁵¹

42. *See id.* at 583–89.

43. *See id.* at 574–78.

44. *Id.* at 600–01.

45. *See id.* at 560, 609.

46. *See Virginia’s Execution History*, VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <https://perma.cc/3PLF-R43B>.

47. *See* Gary A. Harki & Joanne Kimberlin, *A Man Set for Execution, and the Unforgotten Murders That Could Have Happened to Anyone*, VIRGINIAN-PILOT (Jan. 14, 2017, 1:47 PM), <https://perma.cc/RR9G-K4B8>.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

I remember those murders. I remember thinking, if anyone deserves the death penalty, it's these two.⁵² Prosecutors ended up allowing Dandridge to plead to a life sentence (in the midst of his trial, no less) and that sort of arbitrariness is a story of its own.⁵³ But the focus here is on the capital defendant who was left, the one who would get the death penalty for those murders: Ricky Gray.

Turns out, Gray, too, had a heartbreaking story.⁵⁴ He was born the son of a single mother and a father who pimped at least a half-dozen women into prostitution.⁵⁵ As a young boy, Gray was shuffled back and forth between households, fully immersed in the violence, drugs, and squalor that marked his mother and father's way of life.⁵⁶ When Gray was five, an older half-brother forced him to perform oral sodomy.⁵⁷ Thus began years of sexual abuse in which the half-brother (who was himself being sexually abused) anally raped Gray, sometimes on a nightly basis, and often with Gray's sister forced to watch.⁵⁸ Gray's sister, who was slightly older than him, would later recall

52. My views about the death penalty have evolved over time, a process that began when I started writing about the death penalty in 2007, the year after the murders described here. *See generally* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007); Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1 (2007).

53. *See* Caine O'Rear, *Dandridge Gets Three Life Sentences*, RICHMOND TIMES DISPATCH, <https://perma.cc/79J2-L2VJ> (last updated Sept. 20, 2006). For an extreme example of this sort of arbitrariness, see *DeGarmo v. Texas*, 474 U.S. 973, 974 (1985) (Brennan, J., dissenting from denial of writ of certiorari)

This case demonstrates just one way in which capital sentencing schemes have failed to eliminate arbitrariness in the choice of who is put to death. . . . While the state sought and may soon succeed in putting [the defendant] to death, it did not care to see his accomplice serve even a day in jail for participating in the same offense. This gross disparity in treatment is solely a product of the prosecutor's unfettered discretion to choose who will be put in jeopardy of life and who will not.

54. *See* Petition for a Writ of Habeas Corpus, *Gray v. Kelly*, No. 1:11-cv-630 (E.D. Va. Aug. 29, 2011) (on file with author).

55. *See id.* at 21, 23–24.

56. *See id.* at 21–27.

57. *See id.* at 28.

58. *See id.* at 28–29.

regularly trying to treat the wounds on Gray's anus.⁵⁹ At one point, the half-brother (who was also raping Gray's sister) tried to force Gray and his sister to have sex. She ran out of the room, and the half-brother caught her, raping her with a broomstick.⁶⁰ The psychologist who interviewed Gray on death row noted that he was so traumatized by the repeated sexual assaults that just the memory of certain smells—Vaseline and other products used to rape him—caused him to physically recoil in revulsion.⁶¹ The psychologist, who had been involved in some 150 capital cases, had never seen a case with such sustained and corroborated abuse.⁶² “The rapes,” he would conclude, “could only be described as sexual slavery.”⁶³

And that was just the sexual abuse. Gray's father subjected him to relentless beatings, using a belt (with Gray's name on it, no less), metal weather stripping, and a PVC pipe, among other things.⁶⁴ Family members recalled that as the youngest child, Gray was scapegoated and beaten mercilessly, sometimes three to four times a week and often leaving bruises, welts, and gashes all over his body.⁶⁵ At times, Gray was not allowed to go to school for fear that authorities would discover his injuries.⁶⁶ Gray developed a major psychiatric disorder that manifested in bed-wetting, lasting well into late childhood.⁶⁷ He began drinking somewhere between age eight and nine, and was using PCP by age eleven.⁶⁸ Gray was high on PCP when he committed the murders for which he was executed.⁶⁹

Was Gray the worst of the worst? His crimes surely were. But the Supreme Court has instructed that the death penalty is not just about the crime; it's about the offender as well.⁷⁰

59. *See id.* at 28.

60. *See id.*

61. *See* Harki and Kimberlin, *supra* note 47.

62. *See id.*

63. *See id.*

64. *See* Petition for a Writ of Habeas Corpus, *supra* note 54, at 30–31.

65. *See id.*

66. *See id.*

67. *See id.* at 33–34.

68. *See id.* at 34; Harki and Kimberlin, *supra* note 47.

69. *See* Harki and Kimberlin, *supra* note 47.

70. *See supra* notes 1, 4 and accompanying text.

(Should there be any doubt about that, one need only remember the horrendous facts of the case in which the Court held that executing juvenile offenders violated the Eighth Amendment).⁷¹ In light of the torturous conditions to which Gray was subjected—conditions over which he had no control whatsoever, but were dictated by the life into which he was born—it becomes difficult to look at even Gray as the worst of the worst. A perpetrator of unspeakable violence, yes. Absolutely. But a victim of it too. What does it say about us as a society that we are willing to throw someone away as irretrievably broken without having done a single thing to save them from being broken in the first place?

This brings me to my third and final observation: that we execute offenders not for committing exceptionally bad murders, but rather for the exceptionally bad luck of having poor representation, or being in a county where the prosecutor has a proclivity for capital charges, or committing Black-on-White crime. As Justice Breyer wrote in a 2016 dissent to a denial of certiorari, “[I]ndividuals who are executed are not the ‘worst of the worst,’ but, rather are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse, on the basis of race.”⁷² This is the essence of the claim. Those on the front lines of capital cases—judges, defenders, corrections personnel—have repeatedly surmised that if we were to put a pile of capital cases together, half of which resulted in a death sentence and half of which resulted in a life sentence, and then shuffled them in such a way that we didn’t know the outcome, it would be impossible to sort them based on what we know about the crime and the

71. See *Roper v. Simmons*, 543 U.S. 551, 556–57 (2005). In *Roper*, seventeen-year-old Simmons told a friend that he wanted to murder someone, and that he would “get away with it” because he was a minor. He and the friend then broke into the victim’s home in the middle of the night, duct-taping her mouth, covering her head with a towel, tying her hands and feet with electrical wire, and then throwing her off a bridge, drowning her in the waters below. *Id.*

72. *Sireci v. Florida*, 137 S. Ct. 470, 471 (2016) (Stevens, J., dissenting from denial of certiorari).

offender.⁷³ The factors that should explain the imposition of a death sentence don't, and the factors that shouldn't, do.⁷⁴

Each of these factors—lawyering, geography, race—is sufficiently important and complex to support a fulsome discussion of its own. The good news is that others have done this important work, allowing me to simply note it here. I start with a point captured by the title of Steven Bright's oft-cited article, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*.⁷⁵ Bright's piece is a classic—a must-read for anyone who wants to understand how the death penalty actually operates—but it's now twenty-five years old. For those wondering whether “slaughterhouse justice” is still a thing, Robert Smith's 2015 *Slate* piece titled *The Worst Lawyers* answers that question with an emphatic yes.⁷⁶ “[T]he death penalty is still a punishment reserved mostly for the people with the worst lawyers,” Smith writes, drawing a through-line between Bright's work and the death penalty today.⁷⁷

The geography point is aptly captured by a 2013 Death Penalty Information Center report showing that just *ten* counties in the United States—less than 1 percent of the counties nationwide—are responsible for over a quarter of all inmates on death row.⁷⁸ Moreover, just 2 percent of the counties in the United States are responsible for 56 percent of all inmates on death row and 52 percent of all executions in the modern era.⁷⁹ That's weird, you might say. And it is. But it's also readily

73. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1837, 1840 (1994).

74. See *Glossip v. Gross*, 576 U.S. 863, 918 (2015) (Breyer, J., dissenting) (“[T]he 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*.”).

75. See *supra* note 73 and accompanying text.

76. See Robert J. Smith, *The Worst Lawyers*, SLATE (Nov. 4, 2015, 5:00 AM), <https://perma.cc/HB3C-T4V6>.

77. *Id.*

78. See RICHARD C. DIETER, DEATH PENALTY INFO. CENTER, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (2013), <https://perma.cc/F9G9-V7WJ> (PDF).

79. See *id.* at iii.

explainable. The decision to seek the death penalty is made by the local prosecutor, and some prosecutors ask for death every chance they get. Hence the title of Smith's other 2015 *Slate* piece: *America's Deadliest Prosecutors*.⁸⁰

Then there's race. Any discussion of race in the death penalty must note the famous Baldus study, which found that even after taking account of 230 variables that could have explained its findings on nonracial grounds, defendants charged with killing a White victim were 4.3 times more likely to get the death penalty than defendants charged with killing a Black victim.⁸¹ The study also found that Blacks who kill White victims are nearly twenty-two times more likely to get the death penalty than Blacks who kill Black victims.⁸² The United States General Accounting Office followed the Baldus study with a metastudy of its own, examining twenty-eight studies and finding the effects of race in the imposition of death in 82 percent of them.⁸³ The report stated, "This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies."⁸⁴ Another study, reported in 2015, examined national statistics and found that "only 10 whites have been executed in the modern era [since 1976] for the crime of killing a Black male, with six additional cases where a Black male was one of multiple victims, including victims of other races or genders."⁸⁵ In the entire country, in the entire modern era of the death penalty, just *ten cases*. If we widen the data set to Whites executed in the modern era for killing a Black male *or female* (again, not including cases of

80. See Robert J. Smith, *America's Deadliest Prosecutors*, SLATE (May 14, 2015, 3:54 AM), <https://perma.cc/NRD2-F474>.

81. The Baldus study is discussed at length in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

82. See *id.* at 327 (Brennan, J., dissenting).

83. See U.S. GEN. ACCOUNTABILITY OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), <https://perma.cc/Y73H-Q3T7> (PDF).

84. *Id.*

85. Ian Millhiser, *Killing a White Person is Almost the Only Reason Murderers Ever Receive the Death Penalty*, THINK PROGRESS (Sept. 23, 2015, 2:49 PM), <https://perma.cc/YCP3-MN4Z>.

multiple victims), the number is twenty-one.⁸⁶ That's it. Just twenty-one executions for White-on-Black crime as of 2021. For a point of reference, the total number of executions at this time is 1,532.⁸⁷

That brings us to Virginia, and here the claims are too sweeping to support with individual cases alone, so I pull from other data to help illustrate my point. Working backwards—that is, starting with the impact of race—a 2000 study of Virginia's death penalty by a legislative commission found that as was true nationally, here in Virginia, those who killed White victims were more likely to be charged with capital murder than those who killed Black victims.⁸⁸ Equally telling is what two prominent prosecutors said in an op-ed about the death penalty in early 2021 while Virginia was considering rescinding it. “[T]he cheerleaders for state-sponsored death cannot show that the crimes for which the state kills people are consistently more heinous or vile than the crimes for which people are sentenced to serve life in prison rather than to die,” they wrote, stating:

In fact, the most striking characteristic of those who have been singled out to die is that they are damaged and broken people, are disproportionately African Americans, and their victims have been disproportionately white.

People have been sentenced to life in prison for equally vile crimes, and the system, regardless of the moral indefensibility of the death penalty, has done a poor job of ensuring that death comes for “the worst of the worst” alone.⁸⁹

86. See *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <https://perma.cc/QY7X-WLM2>.

87. See *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://perma.cc/BP7B-M5UU>.

88. See Frank Green, *Death Penalty Has Been Used to Enforce Racial Hierarchies since Colonial Times, Study Concludes*, RICHMOND TIMES DISPATCH (Sept. 15, 2020), <https://perma.cc/92DA-3LJ2> (“In 2000, a study of Virginia's death penalty by the Joint Legislative Audit and Review Commission found that defendants who murdered white victims were more likely to be indicted for capital murder and face prosecution than defendants who murdered Black victims.”).

89. James M. Hingeley & Gregory D. Underwood, *Two Virginia Prosecutors Renounce State's 'Death Machine'*, CRIME REP. (Jan. 25, 2021), <https://perma.cc/54PG-K5QJ>.

Here again, Virginia was no different than the rest of the country on this score: it was executing perpetrators of Black-on-White crime, rather than targeting the worst of the worst.

Even the two inmates who *won't* be getting executed in Virginia—the only two inmates left on death row—are a vivid illustration of my point. Whether by happenstance or the universe just aching for someone to notice, both inmates' death sentences were the result of capital cases that came out of Norfolk in 2004 and 2005, and both were pursued by the same prosecutor—a prosecutor known for his proclivity to seek the death penalty, in an office known for cutting constitutional corners to get the job done.⁹⁰ Indeed, one of these death row survivors, Anthony Juniper, won a (temporary) reversal from the Fourth Circuit in 2017 for the state's failure to disclose exculpatory evidence in his case.⁹¹ Citing prior cases involving the same office, the Fourth Circuit chided: “We have repeatedly rebuked the Commonwealth’s Attorney and his deputies and assistants for failing to adhere to their obligations under *Brady* We find it troubling that, notwithstanding these rebukes, officials in the Commonwealth’s Attorney’s office

90. See Jonathan Edwards, *Virginia Abolishes Death Penalty after Executing Almost 1400 Inmates*, VIRGINIAN-PILOT (Mar. 24, 2021, 2:46 PM), <https://perma.cc/LB77-EL8R> (noting that Phil Evans, a longtime Norfolk prosecutor who recently retired, helped prosecute both of the men who inhabit Virginia's death row); see also Bert, *VA: And Now for Some Good News: The Fourth Circuit Delivers an Immaculate Opinion on Brady Violations in Capital Case Juniper v. Zook*, PROSECUTORIAL ACCOUNTABILITY (Dec. 7, 2017), <https://perma.cc/8HUY-5P8H> (discussing record of prosecutorial misconduct in Norfolk and problems with investigators working on its murder cases). For instance, the lead investigator in the case of one of Virginia's death row inmates, Anthony Juniper, was also the lead investigator in the infamous “Norfolk Four” wrongful conviction case, and separate and apart from that, was convicted of taking bribes from criminals and sentenced to over a decade in prison. *Id.*

91. See *Juniper v. Zook*, 876 F.3d 551, 554 (2017) (holding that prosecutor withheld exculpatory evidence in violation of *Brady v. Maryland*, and that district court abused its discretion in dismissing the claim without an evidentiary hearing). On remand, the District Court once again denied Juniper's habeas petition, while noting: “The Commonwealth's conduct has understandably led Juniper to cry foul. . . . Something does smell fishy about the eleventh-hour emergence of this evidence, but the conflict is not so great as to require the Court to strike the evidence.” *Juniper v. Hamilton*, No. 3:11cv746, 2021 WL 1182819, at *18 (E.D. Va. Mar. 29, 2021).

continue to stake out positions plainly contrary to their obligations under the Constitution.”⁹² *Ouch*.

Having noted the impact of race and geography, that leaves just the importance of lawyering in Virginia’s capital cases, and here the best illustration of the point brings us full circle to the beginning of this essay: what Virginia’s dedicated capital defenders have done. They saw who was getting the death penalty in Virginia, and they figured out how to effectively show that these people weren’t the worst of the worst—sometimes to juries, but often to the prosecutors who were pushing death in the first place. Indeed, a large part of the reason why Virginia’s abolition of the death penalty was possible was the fact that capital defenders had rendered it largely elusive in any event. Virginia hasn’t seen a new death sentence in ten years, since 2011—and that was reversed on appeal.⁹³ With the advent of dedicated capital defenders, “the playing field was leveled,” explained David Johnson, Executive Director of the Virginia Indigent Defense Commission, adding, “and with a level playing field, the death penalty was going away.”⁹⁴ And so it did.

As we usher Virginia’s death penalty to the door, it is only fitting to set the record straight: we were never doing what the death penalty was supposed to do in the first place. We were never targeting the worst of the worst. We were executing the severely mentally ill. We were executing perpetrators who had been profoundly victimized themselves. And we were executing based on factors that we would never even try to defend as appropriate for consideration. We can and should celebrate that these are no longer Virginia’s problems. But here’s hoping we remember that outside of Virginia, each of these things is still generally true.

92. *Juniper*, 876 F.3d at 566 n.7.

93. See *Unanimous Federal Appeal Court Orders New Sentencing for Virginia Death Row Prisoner*, DEATH PENALTY INFO. CTR. (Dec. 3, 2018), <https://perma.cc/BM3J-NWVS>; see also Tom Jackman, *Va. Man Sentenced to Death in 2011 Gets New Hearing, and New Prosecutor Agrees to Life Sentence*, WASH. POST (Mar. 12, 2020, 7:28 PM), <https://perma.cc/VE7M-7B37>.

94. *How Capital Defenders Helped End Virginia’s Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 30, 2021), <https://perma.cc/6F6Q-8AHB>.